

STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

Belknap County

Laconia Family Division

In the Matter of Martin Kurowski and Brenda (Kurowski) Voydatch

No. 2006-M-669

Order on Motion for Reconsideration and
Narrative Order on Motion to Stay

Master recommends:

Respondent Brenda Voydatch has filed a Motion for Reconsideration and a Motion to Stay the Order of July 15, 2009 (Clerk's date) requiring that Amanda attend public school for the 2009-2010 academic year. Petitioner Martin Kurowski has objected, and Ms. Voydatch has responded to the Objection, and after review of the Motions, Objections, and Replies, the Court finds and rules as follows.

Procedural History

The parties were divorced in Massachusetts in 1999. Their stipulation for divorce awarded them joint legal custody. Mr. Kurowski registered the Decree in New Hampshire in 2002 and sought a schedule of residual custody, which was granted: he was awarded alternate weekends and other times with Amanda, and later the same year the parties filed a Partial Permanent Stipulation with additional provisions relating to the schedule.

In 2005, Mr. Kurowski filed a Petition for Contempt, alleging, in part, that Ms. Voydatch had failed to consult with him about her decision that Amanda would be home schooled. Ms. Voydatch disagreed, and alleged that the parties had consulted often about educational plans for Amanda. After a hearing in April 2006, and noting that neither party had requested that the Court determine where Amanda would be

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schooled, the Court acknowledged that at that time she was home schooled by Ms. Voydatch. The Court declined to hold Ms. Voydatch in contempt and ordered the parties to "continue to work together to meet the child's educational needs. They shall regularly consult regarding perceived deficiencies and research solutions to address these deficiencies." [Superior Court Index #51]

The issues for the current round of hearings were framed by pleadings filed by both parties in 2007, including motions for contempt related to parenting and financial issues and Mr. Kurowski's Motion for Modification of Parenting Time and Ms. Voydatch's Motion for Modification of Child Support.

In September 2008 the parties filed a stipulated Parenting Plan agreeing that Ms. Voydatch would have primary residential responsibility for Amanda, that the parties would have joint decision making responsibility for Amanda, and that they would consult with each other about all major decisions including education. The parties also specifically agreed as follows:

G 2. "Other. Irrespective of any other meetings the parents may hold, there shall be a meeting in January, 2010, when Amanda is completing fifth grade, to discuss Amanda's transition to public school, unless the parents agree she should continue home schooling at that time." (Family Division Index #77)

After a hearing in September 2008, the Court entered Orders on several of the financial issues and contempt issues, and approved the parties' agreed-upon Parenting Plan. The parties agreed that a hearing could be held after June 1, 2009 on whether Amanda would be home schooled for the 2009-2010 academic year or would attend public school for that year.

The hearing on school placement was held June 2, 2009 and the Order requiring Ms. Voydatch to enroll Amanda in public school was

entered July 15, 2009. Parties and counsel agreed to an extension of the usual time for filing post-Decree motions.

Remaining financial issues were not reached during the full day hearing on June 2. Counsel conducted a telephonic hearing on July 7; some of the financial issues have been resolved and some will be addressed at a hearing in late September.

Ms. Voydatch filed a Motion for Reconsideration and Motion to Stay. Mr. Kurowski filed separate Objections, as did the Guardian ad Litem. The Court denied the Motion to Stay without a narrative Order because public school was to start the next weekday after the Objection was filed.

Mr. Kurowski's Motion to Allow Late Filing

Mr. Kurowski's Objection to Ms. Voydatch's Motion for Reconsideration was due September 3, 2009. In the Motion to Allow Late Filing, Mr. Kurowski's counsel reports that the paralegal from that office was detained by traffic and unable to file the Objection by the time the Court closed that day; the Objection, together with the Motion to Allow Late Filing, was filed the next day, September 4:

Any Objection to the Motion was due September 15. Ms. Voydatch confirms in her Reply, dated September 16, 2009 and filed September 17, 2009, that she consents to the Motion for Late Filing, which is granted.

Motion for Reconsideration

1. Legal Standard

Ms. Voydatch argues that in deciding whether Amanda would attend public school for 2009-2010 the Court should have applied the standard for modification of residential responsibility contained in

RSA 461-A:11, I (c), requiring, in part, proof by clear and convincing evidence that Amanda's present environment is detrimental to her health.

Although the current Parenting Plan acknowledges that Amanda was home schooled for the 2008-2009 school year, it does not require that she be home schooled in future years. The Plan requires the parties to meet in January 2010 to discuss the "transition to public school" for Amanda, and, at paragraph B 4 b 2 (see the Attachment to the Parenting Plan), it provides for alternatives for the February and April school vacations depending whether Amanda is home schooled or is attending public school "in the future." Even assuming, therefore, that enrolling Amanda in public school for the 2009-2010 academic year modifies the recent practice, it does not modify the existing Orders.

However, assuming for the sake of the argument that public school enrollment is a modification of the status quo, if not of the existing Orders, the Court has reviewed the proposed modification by the "best interests of the child" standard of analysis, because a request for modification of decision-making responsibility is reviewed pursuant to that standard. Sanborn v. Sanborn, 123 N.H. 740 (1983); In the Matter of Hunt and Hunt, 146 N.H. 65 (2001). School enrollment is within the scope of decision-making responsibility and not within the scope of residential responsibility. See RSA 461-A:1, I and RSA 461-A:5.

The "best interests" standard also applies to the Court's analysis of cases in which the child's parents are unable to make major decisions even though they have joint decision-making responsibility. Anderson v. Anderson, 125 N.H. 686 (1984).

2. Issue preclusion

Ms. Voydatch argues that the 2006 Order precludes review of the home schooling vs. public schooling issue at this time, but neither

party argued before or during this hearing that the Court was precluded from entering this Order because of the 2006 Order.

In any event, the 2006 Order did not provide that Amanda be home schooled, but only denied Mr. Kurowski's request, at that time, that Ms. Voydatch be found in contempt for not consulting with him about home schooling. Neither party at that time requested that the Court determine where Amanda would be schooled, and the Court's acknowledgement that she was home schooled at that time does not represent a judicial determination on a contested issue that should be given preclusive effect.

Furthermore, the parties' stipulation in 2008 acknowledged that the schooling issue would continue to be a subject of discussion and that the Court might ultimately be required to make Orders if their discussions failed. Ms. Voydatch's argument that "the parents must be left alone to work out this issue" is not only made for the first time, but ignores the fact that the parents have made reasonable efforts to work out the issue and have been unable to do so. Denying the parents access to the Court on this issue would ignore Amanda's need for a decision.

3. Educational Standard

Ms. Voydatch argues correctly that the home schooling program she provides for Amanda complies with the Meredith School District's requirements and therefore with state standards for educational content. Mr. Kurowski does not disagree, and the Court specifically found that the program satisfies the Meredith School District's requirements and standards for educational curriculum.

It does not follow, however, that the Court is limited to comparison of the curriculum contents in order to determine whether it would be in Amanda's best interests to be home schooled for this year. Both parties submitted evidence about Amanda's participation in activities and interests that went beyond just the educational curriculum

of her home school program. Neither party argued that the experience of home schooling was identical to the public school experience, and the Court's language at page 7 of the Order was intended to illuminate the difference between the experience of home schooling and the experience of public schooling, based on the evidence, rather than to suggest or apply a different educational standard.

4. Prejudice against Religious Beliefs

Respondent argues that the Court has "adopted" the Guardian ad Litem's "bias against Mother's and Amanda religious beliefs."

The Court disagrees with the allegation that the Guardian ad Litem's investigation or recommendations reflected any bias or prejudice toward Ms. Voydatch's faith. See discussion below. Evidence of some of the specific tenets of Ms. Voydatch's faith were only admitted because of statements and behaviors of Amanda suggesting that Amanda's application of the logical consequences of those tenets was impacting her feelings toward her father and might impact her development in other areas. The Guardian ad Litem expressed no opinion about the validity or the reasonableness of Ms. Voydatch's beliefs.

Acknowledging that both parties and the Guardian ad Litem testified about Ms. Voydatch's religious beliefs and about Amanda's religious beliefs, that evidence did not require either the Court or the Guardian ad Litem to consider whether those beliefs were valid.

Absent evidence of harm to the child, the Court has no authority to restrict either parent's right to provide religious training for their child. Chandler v. Bishop, 142 N.H. 404 (1997) (holding that even a parent with sole legal custody could not prevent the other parent from exposing the child to a particular religious practice).

The Court has authority, however, to consider the parties' religions solely as they relate to "the concerns and temporal welfare" of

the child. Sanborn v. Sanborn, 123 N.H. 740, 748 (citing Provençal v. Provençal, 122 N.H. 793 (1982)).

The evidence about faith is only relevant because Amanda was unhappy that her father does not love her enough to want to spend eternity with her by adopting her faith. The specific tenets of Ms. Voydatch's faith are not the subject of the Court's inquiry. The only evidence submitted about Ms. Voydatch's faith centered on the difference between those who are "saved" and those who are not, because Amanda was upset that her father was not "saved." The evidence about particular tenets of Ms. Voydatch's faith was limited to those tenets which were reported in Amanda's statements to her parents, to the Guardian ad Litem, and to her counselor.

Furthermore, Ms. Voydatch's faith is not an integral part of the home schooling program, and the decision that Amanda should attend public school for this year will not affect Ms. Voydatch's ability to provide her with religious training and guidance. These conclusions were implicit in the Guardian ad Litem's report and recommendations, and the Guardian neither wrote about nor testified about any conclusion she might have drawn about the validity or the merits of Ms. Voydatch's religious beliefs. The claim that she was biased in favor of or prejudiced against Ms. Voydatch's religious beliefs is not supported by the evidence.

5. Constitutional Arguments.

The right of parents to raise and care for their own children is recognized and protected by both the New Hampshire and United States Constitutions.

Under certain circumstances, however, parents are unable to make joint decisions concerning the care, custody, and control of their children, and in those circumstances, the court is required to weigh the parents' constitutional rights to raise and care for their children against the children's best interests. In the Matter of Berg and Berg, 152 N.H.

658 (2005). In those circumstances, the parents' rights must "yield to the welfare of the child." (Berg, 152 N.H. at 661)

The issue in this case is whether Amanda should attend public school or be home schooled for the 2009-2010 academic year. The parties do not agree. If they agreed that Amanda be home schooled, the Court would have no authority to intrude on that decision. Home schooling is a legitimate educational option, recognized by the state and available for parents who agree to provide it.

To the extent that Ms. Voydatch argues that her sole decision to home school Amanda is subject to Constitutional protection, the argument ignores the Constitutional rights of Mr. Kurowski, who also has joint decision-making authority for Amanda.

To the extent that Ms. Voydatch argues that as the parent with primary residential responsibility she has sole decision-making authority with respect to Amanda's education, her argument is contradicted by the terms of the parties' agreed upon Parenting Plan, by the provisions of RSA 461-A:5 (establishing a presumption of joint decision-making responsibility), and by the decisions of the New Hampshire Supreme Court consistently distinguishing between awards of physical (custody) residential responsibility and legal (custody) decision-making responsibility.

Ms. Voydatch's argument that the Order undermines her free exercise of religion is inconsistent with the terms of the Order, which imposes no restrictions on Ms. Voydatch's ability to practice her faith or to provide Amanda with religious guidance, and also undermined by the evidence that the curriculum Ms. Voydatch used for home schooling was similar in content to the curriculum for the Meredith School District, the only difference being a bible class the contents of which were only briefly mentioned during the testimony. Having argued at the hearing that the home schooling curriculum was consistent with the curriculum offered by the public schools, it would be disingenuous of Ms. Voydatch now to

argue that enrolling Amanda in public school violates her freedom of religion because of a difference in the curriculum contents.

Ms. Voydatch submitted no other evidence that would establish a connection between her home schooling and her religion, and no evidence that the public school experience would adversely affect Amanda's religious training, and absent such evidence the Court cannot find that public school attendance would interfere with Ms. Voydatch's right to religious freedom or her right to provide religious guidance to Amanda.

Ms. Voydatch argues that the Court declined to consider other alternatives to public school education, but neither party proposed any such alternatives, and the proposals they did submit (home schooling versus public schooling) were fundamentally incompatible. Before the issue was presented to the Court, the parties made reasonable efforts to resolve the issue, and the Court presumes they considered all of the alternatives.

The parties have authority to agree to continue the hybrid approach they have been using (home school plus some public school classes), and authority to agree that Amanda attend a Christian school or other school with a religious educational program, and if they were to agree to either alternative, the Court would ratify their agreement. Absent an agreement, the Court is reluctant to engage in the kind of detailed planning for alternative education that is uniquely the province of parents, unless the parties themselves agree the Court should do so and provide evidence to support their preferences.

The Court does not rule that the "least intrusive alternative" analysis applies in any event to this case, because the Order does not impact Ms. Voydatch's right to practice her religion.

6. Guardian ad Litem's Bias

Ms. Voydatch's claim that the Guardian ad Litem was prejudiced against her religious beliefs is based on Ms. Voydatch's description of statements and behaviors she attributes to the Guardian ad Litem during their contact while the Guardian ad Litem was conducting her investigation. The Guardian ad Litem testified to a dramatically different recollection of some parts of that contact, and, as part of its obligation to consider what weight to give each witness's testimony, the Court found that the Guardian ad Litem's description of her conversations and interaction with Ms. Voydatch was more reliable than Ms. Voydatch's recollection of those conversations and interaction.

The Guardian ad Litem submitted a report with recommendations and testified at the hearing, subject to examination by both parties' counsel. She specifically addressed the claims that Ms. Voydatch restates in the present Motion, and, after taking all of the evidence into account, the Court's agreement with the Guardian ad Litem's assessment of Amanda's best interests reflects a finding that the Guardian ad Litem's testimony about her investigation and the process by which she drew her conclusions was more credible than Ms. Voydatch's testimony about that process.

7. Parenting Plan

The evidence does not support Ms. Voydatch's contention that the current environment (parenting schedule) is harmful to Amanda, and RSA 461-A:11, I does not permit significant modification of the existing Plan on any other ground. To the extent that Ms. Voydatch argues that the existing Plan (agreed to by the parties in September 2008) is not a permanent Parenting Plan, the terms of the Plan are otherwise.

The Court took each party's arguments into account in considering whether to adopt minor modifications to the Plan based on

Amanda's best interests, and has adopted portions of each party's proposal, or, as in the case of school summer vacations, neither party's proposal.

8. Absence of Accompanying Affidavit

Mr. Kurowski complains that Ms. Voydatch did not attach an Affidavit to the Motion for Reconsideration pursuant to the Rule requiring such an Affidavit be attached to any Motion.

The Court has assumed, because no Affidavit was attached, that Ms. Voydatch's request for reconsideration is based only on the evidence already submitted and the legal arguments made in the Motion, and has also assumed that Ms. Voydatch has not recited any new facts supporting the Motion. In this context, the Court rules that the requirement of an Affidavit does not apply, Ms. Voydatch is not seeking to introduce any new evidence, and the Court has considered only the evidence already submitted.

After considering the Motion for Reconsideration and the Objection, and reviewing the pleadings and Orders to the extent required to address the pending Motion, the Court is not persuaded that it has overlooked any fact compelling a different result or misunderstood or misapplied any law requiring a different result and therefore the Motion for Reconsideration is denied.

Respondent's Motion to Stay

The Court previously denied the Motion to Stay, by an Order entered the last weekday before Amanda was due to be enrolled in public school.

In considering whether to stay the Order, the Court considered several factors.

First, this Order governs only the 2009-2010 academic year. The parties have agreed to meet in January 2010 to discuss Amanda's "transition to public school." This language appears to reflect an agreement in principle that Amanda will attend public school beginning in the sixth grade, and such an agreement reduces the possibility that in the event of an appeal there will be discontinuity of her educational experience.

Second, Amanda is at an age when it can be expected that she would benefit from the social interaction and problem solving she will find in public school, and granting a stay would result in a lost opportunity for her.

Third, and in part because Ms. Voydatch has proven experience and diligence with the home schooling program, the transition for Amanda back to home schooling after a reversal of the Order, even in the middle of the school year, would be less disruptive for Amanda than a transition into public school in the middle of the school year.

Finally, the Court has taken into account the arguments Ms. Voydatch has advanced in support of her stated intent to appeal the Order, and the Court is not persuaded that the appeal is likely to succeed.

For the foregoing reasons, the Motion to Stay is denied.

9/17/09
Date

Michael H. Garner
Michael H. Garner, Master

Master's recommendations approved and so ordered.

9/17/09
Date

Lucinda V. Sadler
Presiding Justice
Lucinda V. Sadler