Research on
Domestic and Custody Cases
Involving
Home Schooling

Updated: March 2011

The following packet is designed for background on custody cases where homeschooling has become an issue due to disagreements between the parents as to the education of their children. Part 1, an excerpt of the Amicus brief HSLDA filed jointly in the Rachel L. case in California, 2008, gives an overview of some of the research on the successes of homeschooling. Part 2 includes cases addressing homeschooling in custody battles, where homeschooling was not automatically ruled out by the courts just because the parents disagreed, and in several cases was continued after the divorce proceedings were completed. Part 3 address the same questions as part 2, except that the cases involve private schools (sometimes religious), rather than homeschools. Taken as a whole, these cases demonstrate that public schooling should not be the default position of the courts, even when parents disagree. The best interest of the child is paramount in such situations, and can be served by continuing religious private schooling or homeschooling.

This Packet Includes the Following:

1. Excerpt from Brief of Amicus Curiae filed in *In re: Rachel L.* (2008)

   Overview of some of the research indicating that homeschooling is an effective means of educating children. *See also* Tanya K. Dumas, Sean Gates, & Deborah Schwarzer, "Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research," Widener Law Review (forthcoming), draft available at http://ssrn.com/abstract=1317439.

2. Homeschool Cases involving custody and/or child support

- *Staub v. Staub*, 960 A.2d 848 (Pa.Super. 2008)

  "On appeal, Father asks us, *inter alia*, to adopt a clear but narrow rule that requires children to attend public schools when parents who share legal custody cannot agree on home schooling versus public schooling. We decline to adopt such a rule or presumption. To the contrary, we hold that the well-established best interests standard, applied on a case by case basis, governs a court's decision regarding public schooling versus home schooling. Utilizing this standard, we affirm the trial court's order [to leave children in homeschool]." At 849

- *Taylor v. Taylor*, 758 N.W.2d 243 (Mich. 2008)

  Mother wanted to begin homeschooling after the divorce. Court of Appeals sided with father in enrolling the child in public school; the Supreme Court denied appeal. Justice Young, joined by three other justices, concurred: "While regrettable, I do not view the stray remarks of the trial court, which appear to reflect a view of homeschooling as less beneficial than a public school, as altering the legitimacy or primacy

of the trial court's best interests determination." Justice Markman dissented: "I believe that the trial court erred by *appearing* to substitute its own generally unfavorable attitudes concerning homeschooling for the public policies of this state, which accord no preference for either public schooling or homeschooling. While the trial court is entitled to its own views concerning the respective merits of these educational approaches, it is not entitled to replace the policies of Michigan with such personal views." MARKMAN, J., *dissenting* at 243

- *Yordy v. Osterman*, 37 Kan.App.2d 132, 149 P.3d 874)

  "In the all-too-common event of a dispute on such a fundamental issue between parents who are subject to the court's ongoing jurisdiction during the minority of their child, it is the job of the courts to resolve the dispute in a manner that is in the best interests of the child. . . . When a court resolves such issues by disregarding the conflicting religious preferences of the parties and focusing on the other important factors in choosing a school for a child, the court does not engage in any State endorsement of, or hostility towards, religious practices that would offend the Establishment Clause of the First Amendment to the United States Constitution."

- *Donna G.R. v. James B.R.*, 877 So.2d 1164 (La.App. 2 Cir. 2004)

  "Under the particular facts of this case, we find that the evidence rebuts the presumption that Donna's decision for home schooling is in the best interest of the children and that the trial court's ruling to the contrary was an abuse of its discretion." Homeschooling wasn't automatically ruled out, but deemed not in children's best interests because of

mother's lack of compliance with homeschool law, her lack of educational structure, her lack of education, and the children's poor test scores.

- *Brown v. Brown,* 30 Va. App. 532, 518 S.E.2d 336 (1999)

  "Unable to find that father's home-schooling efforts were inferior to the public school alternative, the trial court determined that the children's best interests would be advanced by continuing with the home-schooling." At 539. The Virginia Court of Appeals held that there was no reason to change the children's education. The court stated, "the children were performing well academically and socially in a home-schooling program approved by Loudoun County." At. 538.

- *Stephen v. Stephen*, 937 P.2d 92 (Okl.1997)

  "We hold that when the trial court found this home schooling was not in the best interest of the children, and ordered a change of custody unless the children were returned to public school, such change was against the clear weight of the evidence, and was an abuse of discretion. Accordingly, we reverse the order."

- *In re Marriage of Riess*, 632 N.E.2d 635 (Ill.App. 2 Dist.1994)

  "On appeal, the mother argues, *inter alia*, that the trial judge improperly shifted to her the burden of proving that home schooling was in the child's best interests [as opposed to father proving that it is not]. A review of the record supports this assertion. Consequently, reversal is required." At 640

3. Private School Cases involving custody and/or child support

- *Jordan v. Rea***,** --- P.3d ----, 2009 WL 1491343 (Ariz.App. Div. 1 2009)

  "As set forth below, we hold: (1) The superior court is to apply a best interests standard when parents obligated to work together are unable to reach agreement as to school placement; (2) A private religious school may not be precluded from consideration as the child's school placement merely because it is a private religious school; and (3) The superior court has authority to order an objecting parent to pay child support for the school placement that is determined to be in the best interests of the child even if it is a private religious school."

- *Prystay v. Avildsen*, 673 N.Y.S.2d 679 (N.Y.App.Div.1 1998)

  "…it would be in the best interests of the subject child to remain at the private military boarding school he has attended for the past five years and at which he has only one year to go before graduation, and, accordingly, that an award of educational expenses for that purpose … is appropriate" At 679 (internal citations omitted)

- *In re Marriage of Debenam*, 896 P.2d 1098 (Kan.Ct.App. 1995)

  "The trial court's finding that the stability of continuing Cortney at [private school] Cair Paravel, at the time, was in the child's best interest was supported by the evidence and was not an abuse of discretion."At 1101

- *In re Marriage of Manning*, 871 S.W.2d 108 (Mo.Ct.App. 1994)

"Dissolution is difficult for a child. Not allowing the child to continue at the school she has been attending would make it more so. Allowing children to continue at a private school can be 'a condition essential to the welfare of the [child]'" At 111 (internal citations omitted)

- *Von Tersch v. Von Tersch*, 455 N.W.2d 130 (Neb. 1990)

  "the trial court abused its discretion by intruding upon the right of a custodial parent to determine the nature and extent of educating a child for whom the parent has been granted custody. Accordingly, we reverse the district court's judgment that the Von Tersch twins must be educated in a public school." At 136

- Valente v. Valente, 495 N.Y.S.2d 215 (N.Y.App.Div.2 1985)

  "the court properly found that religious values and education were an integral part of the family life-style and value structure. Furthermore, the children, who are already in their mid-teens, have been in parochial school since kindergarten. Therefore, it is in the best interests of the children that their school and social lives not be disrupted at this juncture." At 215

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

In re RACHEL L., et al., Persons Coming Under the Juvenile Court Law.	
JONATHAN L. and MARY GRACE L., Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent;	Appeal No. B192878 (Los Angeles County Super. Ct. No. JD00773)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Real Party in Interest.	

BRIEF OF AMICI CURIAE HOME SCHOOL LEGAL DEFENSE ASSOCIATION, FOCUS ON THE FAMILY, AND PRIVATE AND HOME EDUCATORS OF CALIFORNIA

Superior Court of California, County of Los Angeles, Juvenile Division
The Honorable Stephen Marpet, Commissioner Presiding

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A. Home-schooling Is An Incredibly Effective Means of Cultivating Knowledge and Intelligence

1. The results of formal studies demonstrate that home-schooling is highly successful.

Home-schooling has grown rapidly in the United States since the early 1980s. "In the spring of 2003, an estimated 1,096,000 students were being homeschooled in the U.S. This represents a 29 percent increase from the estimated 850,000 students who were being homeschooled in the spring of 1999. In addition, the estimated homeschooling rate—the percentage of the school-aged population being homeschooled—rose from 1.7 percent in 1999 to 2.2 percent in 2003."[1] Georgia's home school student population nearly doubled in five years from about 19,000 in the 2000-01 school year to about 37,000 in 2006, according to the state Department of Education.[2] Florida's home-school population is now more than 51,000 students, up from fewer than 40,000 in 2000.[3]

This rapid growth is spurred by the growing recognition of the significant academic achievement that is the normal and predictable outcome of home-schooling. Since 1988, there have been a number of studies done comparing the success of

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[1] U.S. Department of Education, S*tatistics About Non-Public Education in the United States, available at* http://www.ed.gov/about/offices/list/oii/nonpublic/ statistics.html#homeschl (n.d.).

[2] D. Aileen Dodd, *Home-schooled Pupils Find Plenty of Lessons*, The Atlanta Journal-Constitution, September 18, 2006, *available at* http://www.mafa.net/general-public/news/hear-ye-hear-ye-182-1.html.

[3] Andrew Dunn, *Parents Are Taking Education Back Home*, The Lakeland Ledger, July 31, 2006, *available at* http://www.theledger.com/apps/pbcs.dll/article?AID=/20060731/NEWS/607310357/1004\.

home-schooled students with those in the public education system. These include official studies by the Tennessee Department of Education in 1988[4] and the Oregon Department of Education in 1999.[5] Additionally, there have been at least five national studies of the success of home-schooling by professional researchers[6], including one by the Director of the ERIC Clearinghouse on Testing and Measurement.[7]

All of these studies demonstrate that home-schooling produces higher scores on educational achievement tests than public school students. Home-schoolers achieve, on average, between 15 and 30 percentile points above public school averages. These studies reveal that this is true for all grade levels. It is true for all subject matters.

It is vitally important to note that there is no consistent relationship between teacher certification and educational success in home-schooling. Home-school

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[4] Tennessee Department of Education. *Tennessee statewide averages, home school student test results, Stanford Achievement Test, grades 2, 5, 7 and 9* (Nashville, TN, 1988).

[5] Oregon Department of Education, Office of Student Services, *Annual report of home school statistics 1998-99 (*Salem, OR. May 20, 1999).

[6] Brian D. Ray, *A nationwide study of home education: Family characteristics, legal matters, and student achievement* (Salem, OR: National Home Education Research Institute, 1990)*; Research Project*. Home School Researcher, 6(4), 1-7; (1990); Deani Van Pelt. *The choices families make: Home schooling in Canada comes of age*, Frasier Forum, March 2004, *at* http://www.fraserinstitute.org/Commerce.Web/product_files/The%20Choices%20Families%20Make~~%20Home%20Schooling%20in%20Canada%20Comes%20of%20Age-Mar04ffpelt.pdf.

[7] Lawrence M. Rudner, *Scholastic achievement and demographic characteristics of home school students in 1998*, Educational Policy Analysis Archives, 7(8). (1999). *available at* http://epaa.asu.edu/epaa/v7n8/.

students achieve high results whether or not their parents possess a state teaching credential.[8]

When the achievement of home-schooled students is analyzed according to the educational level of their parents (high school diploma, some college, college degree, etc.), some studies find that there is a small correlation between parental education and student success while other studies find no correlation at all.[9] However, all studies have found that even those students whose parents have the lowest level of educational background still score higher than public school averages.

However, in public schools there is a strong correlation between the parents' educational level and student success.[10] Public schools have proven themselves to be unable to attain the remarkable results attained by home-schools. In public schools, the children of highly educated families are the achievers; students from families with

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[8] Jennie F. Rakestraw, *Home schooling in Alabama*, Home School Researcher, 4(4), 1, 5 (1988); Brian D. Ray 1990, 13, 38 *supra*; Brian D. Ray, *Home schooling: The ameliorator of negative influences on learning?* Peabody Journal of Education 75(1 & 2), 71, 83, 90 (2000); Howard B. Richman, William Girten, & Jay Snyder, *Academic achievement and its relationship to selected variables among Pennsylvania homeschooler*s, Home School Researcher, 6(4), 9, 13, (1990); Rudner 1999, Table 3.11.

[9] Joan Ellen Havens, *A study of parent education levels as they relate to academic achievement among home schooled children*. Doctoral (Ed.D.) dissertation, Southwestern Baptist Theological Seminary, Fort Worth TX (1991), 92-97; Brian D. Ray, *Home education in Oklahoma: Family character istics, student achievement, and policy matters*, National Home Education Research Institute (Salem, OR, 1992), 25; Rudner 1999, Table 3.12: "It is worthy to note that, at every grade level, the mean performance of home school students whose parents do not have a college degree is much higher than the mean performance of students in public schools. Their [homeschooled] percentiles are mostly in the 65th to 69th percentile range."

[10] Gary Neil Marks, *Are father's or mother's socioeconomic characteristics more important influences on student performance? Recent international evidence.* Social Indicators Research, 85(2), (January 2008) 293-309.

lower-level educational backgrounds score significantly lower on achievement tests. But in home-schooling, there is virtually no educational disparity between children of the most highly educated compared to those with a more minimal background. Every segment of the home-schooling community scores materially higher than public school averages.

This same phenomenon can be found when educational results are segmented according to family income. It is a national shame, perhaps even a national crisis, to note that in public schools, students who come from low-income families have significantly lower results than students from high-income families.[11]

Home-schooled children from every income level achieve results that are significantly above public school averages. Moreover, in some studies of home-schoolers there is no material difference in the achievement of the children from the poorest families compared to the children from the richest families.[12] In other studies, there is a marginal difference in home-school student success based on family

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[11] James S. Coleman & Thomas Hoffer, *Public and private high schools: The impact of communities* Chapter 5 (New York, NY: Basic Books, Inc, 1987); Gordon Dahl & Lance Lochner, *The impact of family income on child achievement*. Discussion Paper No. 1305-05, Institute for Research on Poverty, 2005 *available at* http://www.eric.ed.gov/; Catherine E. Snow, Wendy S. Barnes, Jean Chandler, Irene F. Goodman, & Lowry Hemphill, *Unfulfilled expectations: Home and school influences on literacy* 2-3 (Cambridge, MA: Harvard University Press, 1991).

[12] Ray 2000, 83-90 *supra*; Terry Russell, *Cross-validation of a multivariate path analysis of predictors of home school student academic achievement,* Home School Researcher, 10(1), 9 (1994).

income.[13] But even in these cases, students from the lowest income levels achieve well above public school averages.

Public schools cannot seem to break the cycle of low achievement for students from low income families. Of all the many successes which can be demonstrated for home-schooling, it is this that deserves the most attention. Children from low income families succeed in home-schooling. Children from families where parents have lower educational levels succeed in home-schooling. Rather than banning home-schooling, California public schools ought to pay attention to these profound results to see what lessons can possibly be incorporated for the benefit of students who come from disadvantaged backgrounds.

These profoundly successful results are not limited to academic achievement—although this is the extent of the mandate contained in the California Constitution. Nonetheless, it has been demonstrated that home-schooled students' social, emotional, and psychological development is as strong or better, on average, than students in public and private schools. [14]

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[13] Rudner 1999, Table 3.10 *supra*; Jon Wartes, *The relationship of selected input variables to academic achievement among Washington's homeschoolers*. (Woodinville, WA, September 1990), 79, 122.

[14] Steven W. Kelley, *Socialization of home schooled children: A self-concept study* Home School Researcher, 7(4), 1-12 (1991), 8-9; Richard G. Medlin, *Predictors of academic achievement in home educated children: Aptitude, self-concept, and pedagogical practices* Home School Researcher, 10(3), 1-7 (1994), 2-3; Richard G. Medlin, *Home schooling and the question of socialization*, Peabody Journal of Education, 75(1 & 2), 107-123.

Home-schooled graduates are doing as well or better, on average, than the general public in terms of all measures of adult success for which studies have been completed. These measures include the rates of matriculation in college, completion of college, civic engagement, and community service.[15]

This record of achievement is truly profound. Home-schooling is the most important educational innovation in the last 100 years. It has found a way to achieve success for all students from all walks of life and from every segment of society. The egalitarianism that was hoped for from public education has finally been achieved in home-schooling. Educational success is truly available for *all* in home-schooling.

The writers of the Constitution of California would be astonished to learn that a form of education that is this successful might be outlawed by a judicial decision. The mandate is to promote *all suitable means* of achieving educational success. Home-schooling is safe when this is the standard.

2. Popular reports demonstrate that home-schooling is highly successful.

Home-school success has been demonstrated by a number of other popular indicators of success. California's youngest college student, 10-year-old genius Moshe

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[15] Clive R Belfield, *Home-schoolers: How well do they perform on the SAT for college admission?* in Bruce S. Cooper (Ed.), *Home schooling in full view: A reader* (Greenwich, CT: Information Age Publishing; Galloway, 2005), 167-177; A. Rhonda & Joe P. Sutton, *Home schooled and conventionally schooled high school graduates: A comparison of aptitude for and achievement in college English,* Home School Researcher, 11(1), 1-9 (1995); Paul Jones & Gene Gloeckner, *A study of home school graduates and traditional school graduate,* The Journal of College Admission, No. 183, (2004, Spring) 17-20; Brian D. Ray *Home educated and now adults: Their community and civic involvement, views about homeschooling, and other traits* (Salem, OR: National Home Education Research Institute, 2004).

Kai Cavalin, was home-schooled from age 6 through 8, after which his parents decided college was the best place for him.[16]

Another indication of the success of home-schooling comes from the national spelling and geography bees. Just last year, the winner of the Scripps Howard National Spelling Bee was Evan O'Dorney, a home-schooled student *from California.*[17] Of the competitors who made it to the national level, 12.5 percent of them were home-schooled, and home-schoolers took three of the top six slots.[18]

Since 1997 and 1999, when home-schoolers first won the spelling and geography bees respectively, home-schoolers have consistently performed well at such competitions. The winner of the 2007 National Geographic Bee, Caitlin Snaring, was home-schooled,[19] and in both 2005[20] and 2003,[21] home-schoolers took second place

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[16] John Rogers, *10-year-old scholar takes Calif. college by storm*, AP News, May 14, 2008, *available at* http://apnews.myway.com/article/20080514/ D90LCS4G0.html.

[17] *California Boy Wins National Spelling Bee*," CBS News, May 31, 2007, *available at* http://www.cbsnews.com/stories/2007/05/31/national/main2873184.shtml.

[18] Richard Sousa , *On Education: Home-schooling is a viable alternative to public schools*, San Francisco Chronicle, June 11, 2007, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/11/EDGKOP3DE31.DTL&hw=subject%3Dedu+subject%3Deducation&sn=150&sc=153.

[19] Scott Norris, *Girl Wins Geographic Bee – First in 17 Years*, National Geographic News, May 23, 2007, *available at* http://news.nationalgeographic.com/news/2007/05/070523-geo-bee.html.

[20] *Californian wins National Spelling Bee with 'appoggiatura'*, USA Today, June 1, 2005, *available at* http://www.usatoday.com/news/nation/2005-06-01-spelling-bee_x.htm; *Ten Students Win Places in National Geographic Bee Final,* National Geographic News, May 24, 2005, *available at* http://news.nationalgeographic.com/news/2005/05/0524_050524_beefinals.html; National Geographic, *Past National Geographic Bee Winners, at* http://www.nationalgeographic.com/geographybee/ past_winners.html (n.d.).

in the spelling bee and won the geography bee. Four out of the top six finalists in the 2002 geography bee—including the winner[22]—and at least one of the finalists in the 2002 spelling bee,[23] were also home-schooled. 2001 saw a home-schooled student win the spelling bee again,[24] and another take third place in the geography bee.[25] The most successful year, however, was 2000, where home-schooled students swept the top three slots in spelling,[26] and four of the top ten in geography.[27] 1999 tells the same story, with a home-schooled student taking third in spelling[28] and first in geography.[29] In all, home-schoolers can claim five of the past eleven spelling bee winners and five of the past nine geography bee winners, as well as at least thirty finalists between the two competitions.

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[21] *Eighth-grader from Dallas wins spelling bee*, CNN.com, May 30, 2003, *at* http://edition.cnn.com/2003/EDUCATION/05/29/spelling.bee.ap/index.html; National Geographic, *2003 Winner: James Williams*, *at* http://www.nationalgeographic.com/geographybee/2003.html (n.d.).

[22] Mary Pride, *What We Can Learn from the Home-schooled 2002 National Geography Bee Winners*, Practical Home-schooling # 48, 2002, *available at* http://www.home-school.com/Articles/phs48-geobee.html.

[23] *Colo. student wins spelling bee with 'prospicience'*, USA Today, May 31, 2002, *available at* http://www.usatoday.com/news/nation/2002/05/30/ spelling-bee.htm.

[24] *Minnesota Boy Is Spelling Champ*, CBS News, May 31, 2001, *available at* http://www.cbsnews.com/stories/2001/05/31/national/main294239.shtml?source=search_story.

[25] Rich Jefferson, *Home schooler wins third place in National Geography Bee*, NCHE, May 23, 2001, http://www.hslda.org/docs/news/hslda/ 200105231.asp.

[26] *Home Schoolers Making Headlines*, NCHE, June 22, 2000, http://www.hslda.org/docs/nche/000002/00000254.asp.

[27] National Geographic, "2000 Finalists," http://www.nationalgeographic.com/geographybee/2000_semi.html.

[28] Jefferson 2001, *supra*.

[29] NCHE 2000, *supra*.

In 2002, three home schooled teams from California were nationally recognized for their projects in the national Space Day program, Design Challenges. Over 400 team projects were submitted to Space Day Foundation from students around the world. Eighteen team winners were chosen, five of which were home school teams. Former astronaut and United States Senator John Glenn recognized the teams in Washington, D.C. at the May 2 Space Day Opening Ceremony.[30]

It is not merely academic champions who are home-schooled, though. 2007 Heisman Trophy winner Tim Tebow was home-schooled, [31] and according to USA Today, "The ranks of action sports champions are thick with home-school graduates such as 17-year-old X Games snowboard gold medalist Shaun White, 19-year-old motocross champion James "Bubba" Stewart and 17-year-old mountain bike champion Kyle Strait."[32]

Home schoolers scored higher on the ACT than the national average for 10 years – from 1996 until 2006, when the ACT stopped differentiating home-school students. In 2006, the average ACT composite score for home-schooled students was 22.4, compared to the national average composite of 21.1.[33] The 2005 average ACT

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[30] *California Home Schoolers Recognized in Space Day Competition,* HSLDA News, July 8, 2002, *at* http://www.hslda.org/docs/news/hslda/ 200207080.asp.

[31] *One-of-a-kind Tebow becomes first sophomore to win Heisman,* AP article, December 10, 2007 *available at* http://sports.espn.go.com/espn/wire?section=ncf&id=3148445.

[32] Sal Ruibal, *Elite take home-school route,* USA TODAY, June 7, 2005, *available at* http://www.usatoday.com/sports/preps/2005-06-07-home-school-cover_x.htm.

[33] *Once Again Home-schoolers Score High on the ACT Exam,* HSLDA, July 31, 2007, *at* http://www.hslda.org/docs/news/hslda/200707310.asp.

composite score for home-schooled students was 22.5, compared to the national average of 20.9. Part of this academic achievement may be related to the fact that home-school kids spend their time in radically different ways than their public- or private-schooled counterparts. In a study of fourth graders, 0.1percent of home-schooled children watched six hours or more of television per day, compared to 19 percent of schooled kids who watched television at this staggering rate.[34]

Colleges are receptive to and even recruiting home school graduates. "'After years of skepticism, even mistrust, many college officials now realize it's in their best interest to seek out home-schoolers,' said Barmak Nassirian, associate executive director of the American Association of Collegiate Registrars and Admissions Officers."[35] California colleges, especially UC Riverside, are taking a leadership role in this regard. "UC Riverside [is] the first UC campus and one of the first public research universities in the nation to recruit students who were home-schooled at the kitchen table or on the road instead of inside a classroom. 'These students are very prepared for college-level work and doing very well here,' said Merlyn Campos, interim admissions director."[36] Regina Morin, director of admissions at Columbia College in St. Louis, Missouri, says the school is seeing more home-schoolers apply each year.

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[34] Rudner 1999, Table 2.10 *supra*.

[35] Alan Scher Zagier, *Colleges Coveting Home-Schooled Student*s, AP, September 30, 2006, *available at* http://www.boston.com/news/nation/articles/2006/09/30/colleges_coveting_home_schooled_students/.

[36] Elaine Regus, *UC Riverside a leader in courting home-schooled students*, The Press-Enterprise, November 23, 2007, *available at* http://www.pe.com/localnews/highereducation/stories/PE_News_Local_D_home-school24.3085ff7.html.

"They tend to be better than their public school counterparts," she said. "They score above average on tests, they're more independent, they're often a grade ahead."[37] As one example, home-school graduate Matthew Lifson was accepted into 9 of the 10 colleges he applied to, including USC and Pepperdine, UC Davis, the UC Irvine honors program, and UC Berkeley. In addition, he received financial awards at the University of Dallas, Santa Clara University, Loyola, and the University of Arizona. He currently attends UC Berkeley.[38]

Home-school students are also civically involved. For example, home-schooler Rachael Lambin had a 3-page article featured in "Teen Vogue" about her project HOPE (Helping Obese People through Education). For HOPE and other community service, she received a Nevada Governor's Point of Light Award in 2006.[39] She was also the winner of the Do Something BRICK Award, where only nine winners are selected each year out of thousands of applicants.[40]

The home-school community is culturally stable. An overwhelming 97 percent of home-school parents are married couple families, compared to 72

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[37] Georgina Gustin, *Home-school numbers growing*, St. Louis Post-Dispatch, October 3, 2007, *available at* http://forum.gon.com/ showthread.php?t=141756.

[38] *Home-school Success Stories*, Homeschool.com, *available at* http://www.home-school.com/articles/successstories/default.asp (n.d.).

[39] Press Release, Nevada Commission for National and Community Service, Inc., *Governor's Points of Light Award Recipients Announced*, November 8, 2006, *available at* http://gov.state.nv.us/PR_Archive/pr/2006/2006-11-08PointLightAward.htm.

[40] *Helping Obese People through Education (H.O.P.E.)*, Dosomething.org, *available at* http://www.dosomething.org/node/3190 (n.d.).

percent of families with at least one child enrolled in schools nationwide.[41] They have more children, 62 percent having three children or more, compared to 89 percent of public/private schooling families nationwide having two or fewer children.[42] And home-school parents also bring into the family a strong education background. Home-school parents have more formal education than the general population. While slightly less than half the general population attended or graduated from college, almost 88% of home-schooling parents continued their education after high school.[43]

Home-schooling is also growing in the black community. According to Brian Ray, Ph.D., president of the National Home Education Research Institute in Salem, Oregon, "There was a time when the conferences were all white. In the '90s, you saw a little more color, and by 2000, a substantial number of black families started showing up. In some cities, the majority of those attending conferences are African American."[44] Muslims also are turning to home-schooling if they find that "a public school education clashes with their religious or cultural traditions."[45]

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[41] Rudner 1999, Table 2.5 *supra*.

[42] Rudner 1999, Table 2.6 *supra*.

[43] Rudner 1999, Table 2.8 *supra*.

[44] Leslie Fulbright, *Blacks take education into their own hands*, San Francisco Chronicle, September 25, 2006, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/09/25/MNGLCLC58S1.DTL.

[45] Neil MacFarquhar, *Many Muslims Turn to Home Schooling*, New York Times, March 26, 2008, *available at* http://www.nytimes.com/2008/03/26/us/26muslim.html?partner=rssnyt&emc=rss.

Even the legal profession is beginning to see the effectiveness of home-schooled students. Patrick Henry College, whose 2007 freshman class was comprised of 84% home-schooled graduates,[46] has won more trophies at the national championship of the American Collegiate Moot Court Association than any other college in America for the last six years combined. In 2008, 12 of the top 16 collegiate moot court competitors were from this college where more than four-fifths of its students are home-schooled.[47]

[46] *2007 CIRP Freshman Survey Report*, PHC Office of Institutional Assessment, accessed on May 15, 2008.

[47] ACMA *2008 National Tournament Winners, at* http://falcon.fsc.edu/ mootcourt/ (n.d.).

Superior Court of Pennsylvania.
Toni J. STAUB, Appellee
v.
Brian L. STAUB, Appellant.
Argued April 29, 2008.
Filed Oct. 21, 2008.

Background: Husband appealed from decision of the Court of Common Pleas, York County, Domestic Relations Division, No. 2006-CU-2123-Y03,Renn, J., denying his petition for special relief, wherein he requested that the trial court prevent continued home schooling of the parties' minor children by wife.

Holdings: The Superior Court, No. 1636 MDA 2007,Shogan, J., held that:
(1) as matter of apparent first impression, appellate court would decline to adopt a bright line rule or presumption in favor of public schooling over home schooling; and
(2) applying the best interests standard, trial court did not err in denying husband's petition for special relief.

Affirmed.

***849** Arthur J. Becker, Jr., Hanover, for appellant.

Kathleen J. Prendergast, York, for appellee.

BEFORE: LALLY-GREEN, SHOGAN and COLVILLE [FN*], JJ.

FN* Retired Senior Judge assigned to the Superior Court.

OPINION BY SHOGAN, J.:

¶ 1 Appellant ("Father"), Brian L. Staub, appeals from the order denying his petition for special relief brought pursuant to Pa.R.C.P.1915.13.[FN1] Therein, Father requested that the trial court prevent continued home schooling of the parties' minor children by Appellee ("Mother"), Toni J. Staub. On appeal, Father asks us, *inter alia,* to adopt a clear but narrow rule that requires children to attend public schools when parents who share legal custody cannot agree on home schooling versus public schooling. We decline to adopt such a rule or presumption. To the contrary, we hold that the well-established best interests standard, applied on a case by case basis, governs a court's decision regarding public schooling versus home schooling. Utilizing this standard, we affirm the trial court's order.

FN1. Pa.R.C.P.1915.13 states, in pertinent part, that "[a]t any time after commencement of [a custody, partial custody or visitation of minor children] action, the court may on application or its own motion grant appropriate special relief."

***850** ¶ 2 The trial court summarized the facts of this case as follows:

> The parties separated residences in June of 2007. Mother lives in the Southwestern York School District.

> Father also resides in that school district. The children are aged 10 and 13. They have been home schooled since September of 2001. The oldest child attended a private school for pre-school, kindergarten and first grade. The youngest child has always been home schooled ...
>
> Mother, who has only a high school education, has always and continues to be the person responsible for the home school program. The decision to home school the children was made by both parents. Father, as the "breadwinner" of the family, has been relatively uninvolved in the home school program by his choice, according to his testimony. He discussed with Mother the possibility of public schooling for the children little, if at all, but instead suggested alternatives such as private or charter schools.
>
> By all accounts, the children are doing well academically. The home school program is supervised by a representative of the Southwestern School District. The children are involved in activities outside of academics, though not necessarily through the school district. Extracurricular activities are available to the children through the school district. There is no evidence that Father is excluded from participation in the schooling process by Mother.

Trial Court Opinion, 8/28/07, at 2.

¶ 3 We note that a Stipulated Order for Custody had been entered by the trial court shortly after Mother vacated the marital residence. Pursuant to that order, Mother and Father were granted shared legal custody and Mother was granted primary physical custody. See Stipulated Order for Custody, 7/9/07, at 1-2. The shared legal custody was defined as "the right of both parents to control and to share in making decisions of importance in the life of their children, including educational, medical, and religious decisions." *Id.* at 2. As noted in the July 9, 2007 order, Mother and Father had reached agreement as to all custody issues, except whether the children should attend public school in the fall or be home schooled. *Id.* at 1.

¶ 4 Mother and Father were apparently unable to come to an agreement on the education issue and, on July 30, 2007, Father filed the instant petition for special relief pursuant to Pa.R.C.P.1915.13. On August 21, 2007, the trial court held a hearing on Father's petition for special relief. On August 24, 2007, the trial court issued the instant order denying Father's petition for special relief. This appeal followed.

¶ 5 Father raises the following issues on appeal:

1. Whether the Trial Court erred in adopting a "case by case" approach to determining [sic] whether children should attend public school or home

school?

2. If the Trial Court was correct in adopting a "case by case" approach to determining [sic] whether children should attend public school or home school, whether the Trial Court erred in finding that this case presents "extraordinary circumstances" which require a deviation from the well-established policy of public school education?

Father's Brief at 5.

¶ 6 Father presents a custody issue of first impression for this Court. In his interrelated issues, Father asks us to adopt a bright line rule in favor of public schooling over home schooling, instead of ***851** utilizing the best interests standard to decide this educational issue on a case by case basis.

¶ 7 This Court's scope and standard of review is well settled in reviewing a custody order:

> [T]he appellate court is not bound by the deductions or inferences made by the trial court from its findings of fact, nor must the reviewing court accept a finding that has no competent evidence to support it. However, this broad scope of review does not vest in the reviewing court the duty or the privilege of making its own independent determination. Thus, an appellate court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion.

A.J.B. v. M.P.B., 945 A.2d 744, 746 (Pa.Super.2008) (citing *Helsel v. Puricelli*, 927 A.2d 252, 254-255 (Pa.Super.2007)).

¶ 8 In his first issue, Father contends that the trial court "erred in adopting a 'case by case' approach to determining [sic] whether children should attend public school or home school." Father's Brief at 5. When resolving disputes concerning home schooling, Father specifically urges this Court to "establish a clear but narrow rule that requires children to attend public school...."*Id.* at 7. Father advances several arguments in favor of the adoption of a clear but narrow rule. First, he argues that allowing one parent to home school the children over the objection of the other parent excludes the objecting parent from the children's education. *Id.* at 7, 11. Second, he argues that parents who cannot communicate with each other must continually resort to judicial intervention in order to resolve disputes over the children's education. *Id.* at 7, 11-12. Finally, he argues that a clear but narrow rule does not prevent a court from withdrawing shared custody if one parent is acting in bad faith. *Id.* at 7-8, 12-13.

¶ 9 In addressing Father's first argument, we note that, according to Father's own testimony, he has been relatively uninvolved in the home school program by choice. N.T., 8/21/07, at 107. Moreover, there is no evidence that Mother excluded Father from participating in the schooling process. Thus, Father's first argument lacks merit.

¶ 10 Father's second argument in favor of a bright line rule is that if the parties cannot agree, "the objecting parent must resort to continuous judicial intervention to resolve disputes involving the home schooling of the children." Father's Brief at 11-12. However, in shared custody cases, we have previously stated that we are "neither unaware of nor unconcerned with the fact that granting shared custody involves an inherent risk that couples may reappear on the courthouse steps for further resolution of their conflicts." *Hill v. Hill,* 422 Pa.Super. 533, 619 A.2d 1086, 1088 (1993). Despite that concern, this Court has determined that the benefits of shared decision-making authority outweigh the concern for judicial expediency. *See In re Wesley, J.K,* 299 Pa.Super. 504, 445 A.2d 1243 (1982). Consistent with this authority, the benefits afforded parents in shared decision-making over education choices outweigh any such concerns. Thus, Father's second argument lacks merit.

¶ 11 We likewise fail to find merit in Father's third argument in favor of a bright line rule since, regardless of whether a bright line rule is adopted, a court may revisit its custody determinations in cases of bad faith.

***852** ¶ 12 Finally, we note that Father has neither provided us with any evidence that a public education is in the best interests of the child in every case, nor has he pointed to any precedent or legislative enactment that supports such an argument. Moreover, Father's arguments do not focus on the best interests of his children or children generally. Instead, they focus on the best interests of the parent objecting to home schooling, who in this case is the father.

¶ 13 Despite Father's failure to provide any precedent or legislative support for his request that we adopt a bright line rule, we will nonetheless respond more specifically to the merits of his request in order to provide guidance to the trial courts and bar in general. Historically, we note that in 1682, the "Great Law" passed by the First General Assembly of Pennsylvania "included a provision for the creation of schools across Pennsylvania." *Combs v. Homer Center School District,* 468 F.Supp.2d 738, 742 (W.D.Pa.2006), *affirmed in part, vacated in part, remanded by, Combs v. Homer-Center School District,* 540 F.3d 231 (3d. Cir.2008). In addition, Article III § 14 of the Pennsylvania Constitution requires the General Assembly to provide a system of public education to

serve the needs of the Commonwealth. "The Constitution of Pennsylvania ... not only recognizes that the cause of education is one of the distinct obligations of the state, but makes of it an indispensable governmental function." *Zager v. Chester Community Charter School,* 594 Pa. 166, 173, 934 A.2d 1227, 1231 (2007) (quoting *Malone v. Hayden,* 329 Pa. 213, 223, 197 A. 344, 352 (1938)).

¶ 14 The original school education system of this Commonwealth has evolved since enactment of the Great Law in 1682. Pursuant to the Public School Code of 1949 ("the Code"),[FN2] the Pennsylvania General Assembly currently permits parents to choose among four general categories of education to satisfy the compulsory attendance requirement of the Code: (1) a public school with certain trade, or business school, options; (2) an accredited private academic school, or private tutoring; (3) a day school operated by a "bona fide church or other religious body;" or (4) a "home education program." 24 P.S. §§ 13-1327, 13-1327.1. *See also Combs,* 540 F.3d at 235.

FN2. Act of March 10, 1949, P.L. 30, *as amended,*24 P.S. §§ 1-101 to 27-2702.

¶ 15 In 1988, the Pennsylvania legislature approved a comprehensive program of home schooling which conformed with the requirements of the Code. In Pennsylvania, "[a] home education program must satisfy the same minimum hours of instruction requirements and almost all of the same subject matter requirements as a school operated by a bona fide church or religious body." *Combs,* 540 F.3d at 237 (citing 24 P.S. §§ 13-1327(b), 13-1327.1(c)).

¶ 16 While changing to allow for a more flexible education system, the provisions of the Code suggest neutrality on the issue of whether public, home, or other permitted schooling, is preferable. Section 13-1327, "Compulsory School Attendance," states that:

(a) Except as hereinafter provided, every child of compulsory school age having a legal residence in this Commonwealth, as provided in this article, and every migratory child of compulsory school age, is required to attend a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language ...

***853** * * *

(d) Instruction to children of compulsory school age provided in a home education program, as provided for in section 1327.1 of this act, shall be considered as complying with the provisions of this section ...

24 P.S. § 13-1327(a), (d) (footnote omitted). Section 13-1327.1 of the Code, "Home education program,"

sets forth the procedures for ensuring that an appropriate education is taking place in the home schooling program. If, for some reason, it is determined that a child is not receiving an appropriate education, "the home education program for the child shall be out of compliance with the requirements of [sections 1327.1 and] 1327, and the [child] shall be promptly enrolled in the public school district of residence or a nonpublic school or a licensed private academic school." 24 P.S. § 13-1327.1(j), (*l*). Thus, the plain language of these provisions suggests that if a home education program is in compliance with section 13-1327.1, it is on equal footing with that of a public education. 24 P.S. § 13-1327(d). Certainly, nothing in the provisions of the Code indicates a preference for one system over the other. If anything, there is a strong argument that the Code defers to the parents on this issue. The Code, in 24 P.S. § 13-1327(b)(2), specifically states that "[i]t is the policy of the Commonwealth to preserve the primary right and the obligation of the parent or parents, or person or persons in loco parentis to a child, to choose the education and training for [a child enrolled in a day school which is operated by a bona fide church or other religious body]."

[1] ¶ 17 In light of the above, we decline to adopt a bright line rule or presumption in favor of public schooling over home schooling. Thus, we conclude that the trial court did not err in utilizing a "case by case" approach to this educational issue.

¶ 18 In his second issue, Father alternatively contends that the trial court erred "in finding that this case presents 'extraordinary circumstances' which require a deviation from the well-established policy of public school education [.]" Father's Brief at 5. Here, the trial court concluded that "absent extraordinary circumstances, when two parents sharing legal custody of a child cannot agree whether the child should be home schooled or attend public school, it is usually in the child's best interests to attend public school." Trial Court Opinion, 8/27/07, at 7-8. The trial court then proceeded to find "extraordinary circumstances" and denied Father's petition. *Id.* Based on the foregoing, we disagree with the trial court's conclusion regarding a presumption in favor of public schooling and the need to find extraordinary circumstances to overcome the presumption. However, notwithstanding the trial court's stated grounds, if its result is correct, this Court can affirm the trial court on any basis. *Oxford Presbyterian Church v. Weil-McLain Co., Inc.*, 815 A.2d 1094, 1102 n. 3 (Pa.Super.2003).

[2] ¶ 19 It is well-established that "the paramount concern in a child custody case is the best interests of the child, based on a consideration of all factors that legitimately affect the child's physical, intellectual, moral and spiritual

well-being and is to be made on a case-by-case basis." *A.J.B.,* 945 A.2d at 747 (citing *Wheeler v. Mazur,* 793 A.2d 929, 933 (Pa.Super.2002)). *See also Ketterer v. Seifert,* 902 A.2d 533, 539 (Pa.Super.2006) ("custody disputes are delicate issues that must be handled on a case by case basis.")

¶ 20 In *Dolan v. Dolan,* 378 Pa.Super. 321, 548 A.2d 632 (1988), the best interests standard was applied on facts similar to those of the instant case. In *Dolan,* the ***854** father filed a petition to modify the custody and visitation order to require his child's enrollment at a parochial school instead of a nearby public school. *Id.* at 633-634. On appeal, we stated that:

> Shared legal custody works only when the parents agree. Should there be a disagreement, obviously one or the other's, and perhaps neither, view will prevail. In such instances, the court, while looking to the interests and desires of the parties, must ultimately rule in the best interest of the child.

Id. at 635. Concluding that the trial court did not abuse its discretion, we affirmed the trial court's decision on the grounds that it was in the best interests of the child to do so. *Id.*

[3] ¶ 21 Like in *Dolan,* here, the parties to a shared legal custody arrangement simply disagree over where their children should be educated. We find no reason to believe that a disagreement between public and parochial schooling is any different than a disagreement between public and home schooling. Therefore, we apply the well-established best interests standard to resolve this educational issue.

[4] ¶ 22 Regarding the best interests of the children, Father argues that "[a]lthough the parties did agree that home schooling was best for their children for the first several years of their grade school education, ... their advanced education should be taught by qualified professionals rather than Appellee." *Id.* at 14.

¶ 23 The trial court held a lengthy hearing on the issue of whether the children's best interests would be better served by attending public school or home school. Both Mother and Father testified and were cross-examined, and multiple witnesses testified on behalf of each parent. Additionally, during the hearing, the parties provided a joint stipulation of facts to the trial court. N.T., 8/21/07, at 5-6. Therein, it was established that: the children have been home schooled by Mother since September 2001; the older child attended a private school for pre-school, kindergarten and first grade; the younger child has always been home schooled; and, neither child has ever attended public school. *See* Joint Stipulation of Facts.

¶ 24 Father stated that he felt that the social development of the children would be better served if they were

"exposed to all of the different personalities, all the different character traits, all the different behavior patterns of a lot of children" and they would have the opportunity to do so by attending public school. N.T., 8/21/07, at 33. Additionally, Father testified that Mother only had a high school education, and that the resources and the certified teachers that the public school offers cannot be duplicated in a home school environment. *Id.* at 32, 42. On cross-examination, Father testified that he does not get to see his children interact with other children or adults. *Id.* at 96. Additionally, when asked what the extent of his involvement was in the children's education, Father responded that "I told my wife from the start that I was the breadwinner of the family and I would not have the time to be helping out with the home-schooling, and I was very clear on that." *Id.* at 107.

¶ 25 Mother testified that she chose to enroll her children in a science class outside the household because she felt that the children would benefit more from being instructed by a teacher who is much more passionate about the subject. N.T., 8/21/07, at 121. Additionally, she testified she felt that it was in her children's best interests to continue with her home education program in light of the findings of her home schooling expert, Dr. Brian Ray.*Id.* at 119.

***855** ¶ 26 Dr. Ray, who, among other things, has reviewed thousands and thousands of home schooled children's standardized test scores and portfolios over a 23-year period, testified that the children are "very high in the terms of their academic achievement." N.T., 8/21/07, at 55. Specifically, regarding the children's test scores, Dr. Ray testified that "[the children] are not only above average, but above average of the home-school average, which is above the public school average." *Id.* Regarding their portfolios, Dr. Ray testified that "all [of] the basic subject areas are being addressed carefully and in detail, and in addition, they're engaged in all kinds of activities beyond the, quote, basics of a public school or even a private school environment. They're doing very, very well." *Id.* at 58-59. With respect to the children's social abilities, Dr. Ray testified that they had absolutely no trouble interacting with other children or adults. *Id.* at 68-70. Further, Dr. Ray testified that nothing indicated that the children would be better off by taking them out of their home education program and enrolling them in public school. *Id.* at 72-73. Finally, Dr. Ray testified that, in the home school context, "[c]hildren of parents who have higher education attainment score a little higher, but the correlation is ... quite weak." N.T., 8/21/07, at 62.

¶ 27 South Western School District superintendent, Barbara Kehr, also testified in the hearing. N.T., 8/21/07, at 82. Kehr is in charge of ensuring that the home education programs in the district are in compliance with

requirements of the Code.[FN3] *Id.* at 85-86. Specifically, Kehr approves parents' requests to home school their children and, if approved, she reviews the children's portfolios at the end of the school year. *Id.* In her testimony, Kehr reinforced Dr. Ray's statements regarding the children's academic achievements. Specifically, Kehr stated that:

> FN3. The superintendent of the public school district of the child's residence is charged with ensuring that each child is receiving "appropriate education," which is defined by the Code as "a program consisting of instruction in the required subjects for the time required in this act and in which the student demonstrates sustained progress in the overall program." 24 P.S. § 13-1327.1(a). In order to demonstrate to the superintendent that such "appropriate education" is taking place, at the end of each public school year the supervisor of the home education program must submit a file with two types of documentation, a portfolio of records and an annual written evaluation of the child's work. *Id.* § 13-1327.1(e)(2). The supervisor may choose any person qualified under the Code to make the evaluation.

> [the children are] above average in most categories and highly above average in a lot of them compared to other students across the country who take that achievement test.
>
> As far as the portfolios themselves go, whenever I look at one, I always try to see, if this child were to enter South Western tomorrow, would the child be about where he or she needs to be in order to be successful.
>
> In judging the portfolios of the Staub children, both of them appear to be at a place where they would be on par with their public-schooled counterparts.

Id. at 87. Additionally, when asked whether South Western's middle school would be able to provide the children with anything additional to that which they are receiving in their home education, Kehr stated that it would just be "a different form of delivery." Id. at 88.

¶ 28 It is apparent that the trial court was aware of Father's argument that Mother's high school education is insufficient and did not find it to be a significant ***856** factor. Instead, the trial court found the following factors to be significant in denying Father's request for the trial court to order his children to attend public school: "1) The children have a significant history of home education; 2) The children are doing extremely well being home educated; 3) Despite only a high school education, Mother has sought outside

resources to supplement the home education; and 4) Father has been relatively uninvolved in the children's education to date." Trial Court Opinion, 8/27/07, at 8. After a careful review of the record, we determine that the trial court's "incontrovertible factual findings support its factual conclusions[.]" *A.J.B.*, 945 A.2d at 746 (quoting *Helsel v. Puricelli*, 927 A.2d at 254-255). Applying the best interests standard, we thus conclude that the trial court did not err in denying Father's petition for special relief.

¶ 29 Order affirmed.

Pa.Super.,2008.
Staub v. Staub
960 A.2d 848, 239 Ed. Law Rep. 194, 2008 PA Super 251

Supreme Court of Michigan.
Laura E. TAYLOR, Plaintiff-Appellant,
v.
David E. TAYLOR, Defendant-Appellee.
Docket No. 137258.
COA No. 281555.

Nov. 21, 2008.

Prior report: 2008 WL 2917650.

Order

On order of the Court, the application for leave to appeal the July 29, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.
YOUNG, J., (*concurring.*)
I concur in the order denying leave to appeal. According to the record, the "lynch pin" of the trial court's decision to send the minor child to a public school was MCL 722.23(j), which considers the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent...."

The record amply supports the trial court's conclusion that the two parents simply "do not communicate," and that the mother's desire to **homeschool** the child would result in the father being precluded from having any "say or involvement in his child's education." While regrettable, I do not view the stray remarks of the trial court, which appear to reflect a view of homeschooling as less beneficial than a public school, as altering the legitimacy or primacy of the trial court's best interests determination.

TAYLOR, C.J., WEAVER and CORRIGAN, JJ., join the statement of YOUNG, J.
MARKMAN, J., (*dissenting.*)
I respectfully dissent. Instead of denying leave to appeal, I would remand to the trial court for reconsideration of its order resolving the parties' dispute concerning their child's education. The trial court resolved this dispute in favor of the public schooling preferred by the father and in opposition to the homeschooling preferred by the mother. Although I take no position on the merits of the trial court's ultimate decision, I believe that the court erred by at least *appearing* to take improper factors into account in reaching this decision.

In particular, I believe that the trial court erred by *appearing* to substitute its own generally unfavorable attitudes concerning homeschooling for the public policies of this state, which accord no preference for either public schooling or homeschooling. While the trial court is entitled to its own views concerning the respective merits of these educational approaches, it is not entitled to replace the policies of Michigan with such personal views.

Here, the court concluded with regard to the parties' six-year-old daughter's educational prospects that "she doesn't seem to have a problem, I don't believe, in being able to succeed anywhere," but then terminated the daughter's homeschooling, asserting that her interests would be best served by public schooling, in which both parents could be involved. In the course of rendering this decision, the trial court made the following observations:

- Public schools would offer the child a "wider exposure" than she would receive with homeschooling.

***244** • Public schools would offer "much more diversity, many more opportunities with respect to the things that she would be able to do."

- Although the court "appreciate[d] and respect[ed] [the mother's] desire to have a religious-based schooling, we live in a very diverse society and it is not beneficial for children to be raised in a bubble where they do not have exposure to other people's cultures and other people's religion."

- Public schooling would make the child "a more well-rounded person."

Each of these observations may or may not be true, or relevant. However, taken as a whole, they evince an attitude toward homeschooling (and public schooling) that is simply not reflected in the laws and policies of this state. Taken as a whole, these observations suggest a predisposition by the trial court that, everything else being equal, public schooling is invariably preferable to homeschooling, a predisposition that would presumably also counsel in favor of public schooling in future disputes in which parents disagreed on approaches to their children's education.

Upon remand, I would direct the trial court to resolve the instant dispute in a manner that is not grounded on a predisposition toward either public schooling or homeschooling. I would require the trial court, as it has done with regard to the other statutory factors set forth in MCL 722.23(h), to assess the best interest of this child in terms of her *particular* educational needs. While there conceivably may be circumstances-pertaining either to the child, her parents, her parents' relationship, or the available schools-that would counsel in favor of public schooling or homeschooling in the instant case, these need to be set out with specificity and without reference to any predisposition toward either public schooling or home schooling.[FN1]

FN1. Although it may be true, as the Court of Appeals suggests, that the trial court's decision on the child's education was "not based on a bias against home schooling," such conclusion entails speculation and conjecture in light of what was actually stated. Similarly, it is

> conjecture and speculation that these statements constituted mere "stray remarks," as the concurring statement asserts. If the Court of Appeals, and the concurring statement, are correct in these assessments, the trial court, on remand, could make this clear. I am comfortable that this matter can be remanded to the same judge for further consideration.

Mich.,2008.
Taylor v. Taylor
482 Mich. 1060, 758 N.W.2d 243

Court of Appeals of Kansas.
David A. YORDY, Appellant,
v.
Lisa M. OSTERMAN, Appellee.

No. 95,203.
Jan. 19, 2007.

Background: Father of child born out-of-wedlock filed motion seeking judicial permission for child to attend religious school. Mother objected. The District Court, Sedgwick County, James R. Fleetwood, J., denied motion. Father appealed.

Holding: The Court of Appeals, McAnany, P.J., held that trial court was required to base its decision on whether child was to attend religious school or secular public school on best interests of child.

Reversed and remanded.

West Headnotes

[1] Children Out-Of-Wedlock 76H ⚿20.9

76H Children Out-Of-Wedlock
76HII Custody
76Hk20.9 k. Visitation and Joint Custody. Most Cited Cases

Trial court was required to base its decision on whether child born out-of-wedlock was to attend religious school, which father desired, or secular public school, which mother desired, on best interest of child, where parents with joint custody could not agree on choice of school. K.S.A. 60-1610(a)(4)(A).

[2] Child Custody 76D ⚿152

76D Child Custody
76DIV Joint Custody
76Dk151 Control by and Authority of Parties
76Dk152 k. In General. Most Cited Cases

Child Custody 76D ⚿153

76D Child Custody
76DIV Joint Custody
76Dk151 Control by and Authority of Parties
76Dk153 k. Education. Most Cited Cases

When the district court orders that parents of a child have joint custody of their child, the parents have equal rights to make decisions in the best interests of their child; this includes the decision about which school their child should attend. K.S.A. 60-1610(a)(4)(A).

[3] Child Custody 76D ⚿153

76D Child Custody
76DIV Joint Custody
76Dk151 Control by and Authority of Parties
76Dk153 k. Education. Most Cited Cases

In context of a joint custody situation, when parents subject to the court's ongoing jurisdiction during the

minority of their child cannot agree on the school their child should attend, it is the task of the court to resolve the dispute in a manner that is in the best interests of the child; the fact that the dispute centers on the child's attendance at either a religious or secular school does not absolve the court from deciding the matter. K.S.A. 60-1610(a)(4)(A).

[4] Child Custody 76D 153

76D Child Custody
76DIV Joint Custody
76Dk151 Control by and Authority of Parties
76Dk153 k. Education. Most Cited Cases

Constitutional Law 92 1409

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1404 Family Law
92k1409 k. Child Custody, Visitation, and Support. Most Cited Cases
(Formerly 92k84.5(1))

When a court resolves a dispute between parents who have joint custody of a child relating to the school attendance of the child by disregarding the conflicting religious preferences of the parties and focusing on other important factors in choosing a school for the child, the court does not engage in any state endorsement of, or hostility towards, religious practices that would offend the Establishment Clause of the First Amendment. U.S.C.A. Const.Amend. 1; K.S.A. 60-1610(a)(4)(A).

[5] Child Custody 76D 462

76D Child Custody
76DVIII Proceedings
76DVIII(B) Evidence
76Dk453 Presumptions
76Dk462 k. Joint Custody. Most Cited Cases

When courts are called upon to resolve disputes between parents who have joint custody of a child as to whether their child should attend a secular or a religious-based school, there is no presumption in favor of a child's secular education. K.S.A. 60-1610(a)(4)(A).

*****874 *132*** *Syllabus by the Court*

1. When the district court orders that parents have joint custody of their child, the parents have equal rights to make decisions in the best interests of their child. This includes the decision about which school their child should attend.

2. When parents subject to the court's ongoing jurisdiction during the minority of their child cannot agree on the school their child should attend, it is the task of the court to resolve the dispute in a manner that is in the best interests of the child. The fact that the

dispute centers on the child's attendance at either a religious or secular school does not absolve the court from deciding the matter.

3. When a court resolves a dispute between parents relating to the school attendance of their child by disregarding the conflicting**875 religious preferences of the parties and focusing on other important factors in choosing a school for the child, the court does not engage in any State endorsement of, or hostility towards, religious practices that would offend the Establishment Clause of the First Amendment to the United States Constitution.

4. When courts are called upon to resolve disputes between parents as to whether their child should attend a secular or a religious-based school, there is no presumption in favor of a child's secular education.

Gary L. Ayers and Michael J. Mayans, of Foulston Siefkin LLP, of Wichita, and Robb W. Rumsey, of Rumsey & Cleary, of Wichita, for appellant.

Cheryl J. Roberts, of Cheryl J. Roberts, Attorney Chartered, of Wichita, for appellee.

Before McANANY, P.J., PIERRON, J., and BUKATY, S.J.

McANANY, P.J.

In 2002 Lisa Osterman (Mother) and David Yordy *133 (Father), who were never married to each other, were awarded the joint custody of their 3-year-old son. They shared residential placement on a schedule of Mondays and Tuesdays with Father, Wednesdays and Thursdays with Mother, and alternating weekends. In September 2004, Father moved the court for an order allowing his son to attend Sunrise Christian Academy for preschool. Mother objected. The court ordered that each parent shall have exclusive control over the child while the child was with him or her and, therefore, the boy could attend Sunrise preschool during the alternating days he resided with his father.

In August 2005, as the boy prepared to enter elementary school, Mother moved to allow him to be enrolled in kindergarten in a public school. Father wanted his son to continue at Sunrise where the boy had made friends who would attend kindergarten there with him. Father argued his proposal was in his son's best interests because Father worked at Sunrise as a teacher and coach and could check on his son during the day. Further, the school would waive tuition because of Father's employment there. Finally, the boy would be taught by a well-qualified teacher in a class of only seven students. Mother, on the other hand, objected to Father having that much contact with his son. She wanted the child to attend school in a "neutral environment." Following oral argument on the motion the district court sustained Mother's motion. The court stated it would not "order a religious-

based schooling in a situation where both parents are not in equal agreement as to that education.... Unless both parties are in agreement I'm not going to order the child in Sunrise School."

Father immediately moved the court to reconsider its decision. The district court held a nonevidentiary hearing on this motion a week later and denied the motion. In doing so, the district court concluded that there is a presumption in favor of public schooling and when one parent objects to a religious school the proponent for attendance at a religious school must overcome the presumption in favor of public schools. Though no evidence had been presented, the court found that Father failed to overcome the presumption.

***134** Father now appeals. He argues that the district court erred by not giving equal consideration to each parent's choice of a school but rather imposing a presumption against religious-based schooling which Father had to overcome. He also claims the district court erred by not determining which school was in his son's best interests.

[1][2][3][4][5] When the district court orders that parents have joint custody of their child, they have equal rights to make decisions in the best interests of their child. K.S.A. 60-1610(a)(4)(A). This includes the decision about which school their child should attend. Thus, Mother and Father had equal rights to make decisions about which school their son should attend. See *In re Marriage of Debenham,* 21 Kan.App.2d 121, 896 P.2d 1098 (1995). In the all-too-common event of a dispute on such a fundamental issue between parents who are subject to the court's ongoing jurisdiction during the minority of their child, it is the job of the courts to resolve the dispute in a manner that is in the best interests of the child. The fact that the dispute centers on the child's attendance at either a religious or secular school does not absolve ****876** the court from deciding the matter. When a court resolves such issues by disregarding the conflicting religious preferences of the parties and focusing on the other important factors in choosing a school for a child, the court does not engage in any State endorsement of, or hostility towards, religious practices that would offend the Establishment Clause of the First Amendment to the United States Constitution. *Debenham,* 21 Kan.App.2d at 123, 896 P.2d 1098. The court cannot refuse to undertake such an analysis simply because the parties cannot agree.

Further, Mother fails to point to, and we cannot find, any precedent or legislative enactment that creates a presumption in favor of a child's secular education. Such a presumption would seem to be at odds with the government's posture of neutrality on decisions regarding the religious upbringing of children.

In *Debenham,* the district court found

that attending a religious school was in the child's best interests, even though one parent objected. On appeal, this court affirmed the district court and found that the district court did not err by basing its decision on what was in the best interests of the child. 21 Kan.App.2d at 123, 896 P.2d 1098. ***135** The court further found that the district court did not violate the objecting parent's First Amendment rights because it did not view the matter as one of religious or educational preference but solely as an issue of stability and the continued best interests of the minor child. 21 Kan.App.2d at 123, 896 P.2d 1098.

We agree with the reasoning in *Debenham*. Accordingly, we reverse and remand for an evidentiary hearing on Mother's motion in which the district court determines which school is in the child's best interests.

Reversed and remanded.

Kan.App.,2007.
Yordy v. Osterman
37 Kan.App.2d 132, 149 P.3d 874

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Court of Appeal of Louisiana,
Second Circuit.
DONNA G.R., Plaintiff-Appellee
v.
JAMES B.R., Defendant-Appellant.
No. 39,005-CA.

July 2, 2004.

Background: Dissolution proceeding was brought. The First Judicial District Court, Parish of Caddo, No. 469,357,Andrew B. Gallagher, J., awarded former wife permanent spousal support and ruled for the continuance of home schooling for parties' children. Former husband appealed.

Holdings: The Court of Appeal, Caraway, J., held that:
(1) evidence did not support finding that home schooling was in best interests of children, and
(2) evidence did not support finding that former wife was at fault on ground of abandonment for breakup of marriage.

Affirmed in part, reversed in part, and remanded.

Ronald J. Miciotto, Shreveport, for Appellee.

Before STEWART, CARAWAY and LOLLEY, JJ.

CARAWAY, J.

This case involves two interrelated rulings by the trial court which present a *res nova* issue. After a challenge by the non-domiciliary parent regarding the domiciliary parent's decision to continue home schooling the three minor children, the trial court ruled in favor of the continuance of home schooling. Additionally, the trial court awarded the domiciliary parent permanent spousal support without imputing any employment income to that parent because of her home schooling duties. Finding that the domiciliary parent's decision for home schooling is not in the best interest of the children, we reverse the trial court's ruling and order that the children be enrolled in the public school system. Additionally, we remand for the trial court's reconsideration of the award for permanent spousal support.

Facts

James B.R. ("James") and Donna G.R. ("Donna") separated on July 13, 2002, after 16 years of marriage. Three children were born of the marriage. The oldest (DOB: 5/10/88) was 15 years old at the time of the hearing and in the eighth grade. The second child (DOB: 1/27/91) was 12 and in the seventh grade. The youngest (DOB: 7/3/92) was 11 and in the fifth grade.

The testimony indicates that after James stopped paying the house note for five or six months in 2002, the family was evicted upon the sheriff's sale of the home. After the eviction, Donna refused to live at James' parents'

home in Greenwood, and instead took the three children to Grand Cane, where her parents lived. James' towing and wrecker business is also located in Greenwood.

Within a few weeks, James leased a house for the family to live in and began making improvements to it. Donna testified that James never asked her and the children to move back in with him. James testified that when Donna objected to the condition of the rent house, he redecorated and remodeled it to her specifications. Nevertheless, Donna and the children never moved back in with James but eventually acquired a mobile home with her parents'***1166** help and placed it on their land, where she and the children now live.

Donna filed for divorce on September 3, 2002. The interim judgment dated November 18, 2002, awarded the parties joint custody and designated Donna the domiciliary parent. The child support worksheet estimated James' income at $5,000 per month and imputed income of $1,126.67 per month to Donna based on her potential to earn $6.50/hour. Her past work experience included clerical employment at a bank, payroll clerk for a construction company and bookkeeping/inventory control clerk for a department store. During tax season in 2003, she obtained a part-time tax-related job paying $7.50 per hour. From this income data for both parents, James was ordered to pay $1,265 per month child support and $700 per month interim spousal support.

The joint custody implementation plan incorporated into the judgment provided for the children's education as follows:

> Each parent will consult with the other and attempt to select the type of education and education process best suited to the children, taking into consideration each parent's economic circumstances and the benefits to be derived from such by the children. Every effort shall be made to continue educating the children as has historically been done. In case of dispute, LSA R.S. 9:335, *et seq.* shall apply.

James moved for a final divorce in March 2003, and requested termination of the interim spousal support payments. He also alleged that Donna was home schooling the three children, and requested that they be tested prior to their being allowed to return to home schooling in the fall of 2003, "to determine if they are currently at the standard level of education for each of them." The hearing on James' rule was scheduled for April 2, 2003.

On April 1, 2003, Donna filed a rule alleging that she "never worked during the marriage," and because she home schooled the children for 6 years, she "[was] not able to work." She also alleged that the children "are well

above their levels in their school work ..., are tested at the end of each year and are well above in their CAT [FN1] tests."

> FN1. "CAT" refers to the California Achievement Test.

The trial court rendered the judgment of divorce between the parties on April 2, 2003. The pending rules on the issues of permanent spousal support, home schooling and incidental custody issues were continued until the following month. After a hearing on May 7, 2003, the trial court rendered judgment in Donna's favor, continuing the payment of interim spousal support for an additional six months, ordering James to maintain health insurance coverage on the children, and allowing Donna to continue to home school them. However, the trial court ordered that Charlotte Hansen test the children "no later than July of each year, with a copy of the results to be immediately furnished" to James. The judgment further provided that "the parties each reserv[ed] their right to relitigate this issue."

The record shows that Donna's rule nisi for permanent spousal support was ultimately set for hearing in November 2003. In mid-October, James filed a motion for contempt, for Donna's failure to have the children tested by Ms. Hansen for the 2003 school year. The motion also reiterated James' "desire that the minor children ... be placed in public school." He also alleged that Donna was not free from fault in the dissolution of the marriage.

At the November hearing, the trial court found that Donna was free from fault in ***1167** the dissolution of the marriage. She was awarded permanent spousal support in the amount of $750 per month.

On the issue of the education of the children, the court heard the testimony of the two older children, the parents and the housekeeper, who had observed the children's study habits. Additionally, the court received test scores from the CAT administered by a local school teacher in June 2003.[FN2] In reaching its decision allowing the home schooling to continue, the trial court made the following comments in its oral ruling:

> FN2. The teacher was not Charlotte Hansen as ordered by the court. She was Donna's friend, and she did not testify at the hearing.

> Now, with respect to the school, I agree these children are certainly doing substandard work, however, they have been home schooled for seven years.... I'm not willing to discount the testing that Ms. Rials did from the previous years. However, it is my view that in the future there should be testing annually by an independent tester.

They have been in ... home school for

seven years. At this point in the semester, ... I would be reluctant to pull them out and put them in public school. Part of that is the reason-is the adjustment-in some of the concerns that I have about home school program.

This program, well, I've got a couple of concerns about it, and I stated earlier I'm going to let them stay in home school. But Number 1, I don't think they're putting time in from the testimony of the housekeeper. Now, she hasn't been there in the last year, so, but I'm just wondering if the time's really being put in.

Nevertheless, I'm going to let them at least continue until the end of the school year in home school situation.

Finally, the trial court ordered that the children's "future performance be evaluated on an at-least-a-semester basis by a qualified educator, and not by the home school teacher."

The judgment was signed by the trial court on December 16, 2003. James appeals the trial court's award of permanent spousal support and the continuation of the children's home schooling.

Discussion

I.

[1] Since we find that the home school decision has implications regarding the award of permanent spousal support, we will initially address that important ruling. From our research and the parties' argument, this issue has not been previously addressed in this state.

The statutory authority regarding decisions concerning the child's education in a joint custody arrangement is addressed in general in La. R.S. 9:335(B)(3) which provides as follows:

The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. All major decisions made by the domiciliary parent concerning the child shall be subject to review by the court upon motion of the other parent. It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child.

Additionally, the legislature has provided for the economic decisions regarding private schooling in La. R.S. 9:315.6(1), as follows:

By agreement of the parties or order of the court, the following expenses incurred on behalf of the child may be added to the basic child support obligation:

***1168** (1) Expenses of tuition, registration, books, and supply fees required for attending a special or private elementary or secondary school to meet the needs of the child.

In addition to these statutes, it must not be overlooked that Donna retains the alimentary obligation under Civil Code Article 227 for "supporting, maintaining, and educating" the children. This is further reflected in the child support guidelines which provide as basic principles under La. R.S. 9:315(A) and (B)(2), in pertinent part, as follows:

> (A) Basic principles. The premises of these guidelines as well as the provisions of the Civil Code is that child support is a continuous obligation of both parents, children are entitled to share in the current income of both parents, and children should not be the economic victims of divorce or out-of-wedlock birth....
>
> * * *
>
> (B)....
>
> (2) In intact families, the income of both parents is pooled and spent for the benefit of all household members, including the children. Each parent's contribution to the combined income of the family represents his relative sharing of household expenses. This same income sharing principle is used to determine how the parents will share a child support award.

The child support guidelines also address the voluntary unemployment of a parent and assess such parent her "potential income" for the computation of the basic child support obligation. La. R.S. 9:315(C)(6)(b). That potential income attributable to Donna was measured and applied in this case by the trial court raising the amount of the basic child support obligation, yet lowering the amount of support paid by James.[FN3] The children, however, do not receive any economic contribution for support and maintenance from Donna because of her decision as domiciliary parent to home school the children and not seek employment.

> FN3. The basic support obligation from the parties' combined income, including the income imputed to Donna, was $1559, of which James' share was $1265. If only James' $5000 in monthly income had been used, the basic support obligation is listed in La. R.S. 9:315.19 at $1349, which would be entirely paid by James.

A review of all of the above laws, along with the law for permanent spousal support discussed below, demonstrates the considerable statutory tension underlying this dispute. May Donna utilize her authority as domiciliary parent for making the major decision for the children's education (which is presumed in the best interest of the children) to lessen or avoid her economic support obligation to the children and to increase the permanent spousal support in her favor? Under the particular facts of this case, we find

that the evidence rebuts the presumption that Donna's decision for home schooling is in the best interest of the children and that the trial court's ruling to the contrary was an abuse of its discretion.

The most important fact regarding the home schooling is Donna's lack of education. Donna quit school at the age of fifteen and obtained only a GED. She later received vocational technical training in accounting and office skills.

The method of teaching the children centered around computer programs studied by each child on separate computers, with Donna answering questions raised by each child. As noted in the trial court's ruling, the time invested by each child in this process, as revealed in the testimony of the housekeeper, was undisciplined and insufficient.

***1169** These weaknesses in the children's home school education program are further amplified by the lack of any evidence of Donna's formal compliance with La. R.S. 17:236.1, which requires the annual review and approval of a home school study program by the Board of Elementary and Secondary Education. That statute requires the annual submission to the board of "satisfactory evidence that the program has in fact offered a sustained curriculum of quality at least equal to that offered by public schools at the same grade level." La. R.S. 17:236.1(C)(1). In lieu of such submission, Section D of the statute requires verification to the board's satisfaction that the child has met the LEAP testing requirements provided in La. R.S. 17:24.4 or has scored at or above his grade level on the CAT. La. R.S. 17:236.1(D)(1) and (2).

The CAT test score for each child was poor. The oldest child performed slightly above average in the reading segment, but well below average in mathematics and language. The middle child also performed near average in reading, but again well below average in mathematics and language. The youngest child's performance was particularly poor in reading and mathematics, and her language skills were especially low. Moreover, there was no testimony that these apparently deficient CAT scores demonstrate nevertheless that each "child has scored at or above his grade level," in compliance with La. R.S. 17:236.1(D)(2).

When we review the trial court's November 2003 ruling to allow the children to continue with home schooling at that time, the court does not appear to have made a permanent decision, but only a decision through the end of the school year. The decision was also made subject to the continued testing of the children. Such conditional open-ended rulings in child custody disputes invite further litigation. In this case, the decision also indicates to us the court's concern at the time of ruling for moving the

children to public schools during the school year. That concern is no longer present.

Finally, Donna's decision as domiciliary parent is outweighed by the economic obligation for the maintenance and support of her children and the increased obligation of spousal support from James which her decision implicates. The parties' use of the public school system, which is the subject of much public policy of this state, will obviously provide economic benefit to the children by freeing Donna to find employment. Accordingly, we find that the trial court's ruling allowing for home schooling was not in the best interest of the children.

II.

[2][3] Fault is a threshold issue in a claim for spousal support. In a proceeding for divorce or thereafter, the court may award interim periodic support to a party or may award final periodic support to a party free from fault prior to the filing of a proceeding to terminate the marriage, based on the needs of that party and the ability of the other party to pay. La. C.C. art. 111. *Jones v. Jones,* 38,790 (La.App.2d Cir.6/25/04), 877 So.2d 1061, 2004 WL 1418186; *Roan v. Roan,* 38,383 (La.App.2d Cir.4/14/04), 870 So.2d 626.

[4][5][6][7] Fault continues to mean misconduct that rises to the level of one of the previously existing fault grounds for legal separation or divorce. Revision Comment (c) of 1997, La. C.C. art. 111; *Jones, supra; Roan, supra.* Fault that precludes an award of spousal support must have occurred prior to the filing of the action for divorce. To constitute legal fault, misconduct must not only be of a serious nature, but must also be an independent contributory or proximate cause of the separation. *Jones, supra.;* ***1170***Mayes v. Mayes,* 98-2228 (La.App. 1st Cir.11/5/99), 743 So.2d 1257. They include adultery, conviction of a felony, habitual intemperance or excesses, cruel treatment or outrages, public defamation, abandonment, an attempt on the other's life, status as a fugitive, and intentional non-support. *Mayes, supra.* Abandonment by a spouse occurs when that spouse withdraws from the common dwelling without lawful cause and constantly refuses to return. *Id.* One of the elements necessary to prove abandonment is that the abandoned spouse desired the other spouse's return. *Id.*

[8] Once freedom from fault is established, the basic tests for the amount of spousal support are the needs of that spouse and the ability of the other spouse to pay. La. C.C. arts. 111 and 112; *Roan, supra.* The award for final periodic spousal support is governed by La. C.C. art. 112, which requires the court to consider all relevant factors. *Roan, supra.* Permanent alimony is awarded to a former spouse in need and is limited to an amount

sufficient for maintenance as opposed to a continuation of an accustomed style of living. *Mizell v. Mizell,* 37,004 (La.App.2d Cir.3/7/03), 839 So.2d 1222.

[9][10] Domestic relations issues such as the determination of entitlement to spousal support largely turn on evaluations of witness credibility. *Jones, supra.* The trial court has vast discretion in matters regarding determination of fault for purposes of precluding final periodic support. The trial judge's finding of fact on the issue of fault will not be disturbed unless it is manifestly erroneous or clearly wrong. *Id.*

Although James does not precisely articulate the legal basis for Donna's alleged fault nor cite any prior ruling of a Louisiana court, he states that she would not return to live with him in the house he rented a few weeks after the eviction. We consider this argument for fault as resting upon abandonment, and we reject it.

The real separation of the parties occurred prior to James' lease of alternative housing, when his reckless financial actions led to the eviction of his family from their home. Donna and the children were forced into a smaller dwelling, which was not her parents' home but was located on their property. James did not seek to join them there. Concerning the small two-bedroom house that James later rented and renovated, Donna testified that she never indicated any reconciliation with James and any agreement to reside in the rented residence. Under these facts, we do not find James' assertions of abandonment free from his own fault. The family breakup occurred because of the eviction which he, with an admitted income of $5,000 per month, failed to prevent. The ruling of the trial court finding no fault on Donna for the breakup of the marriage is affirmed.

Despite this affirmance of the trial court's ruling on Donna's lack of fault, the trial court's award of $750 per month for permanent spousal support must be revisited by the trial court in view of our ruling ending home schooling. Accordingly, we remand this matter to the trial court. Any adjustment or termination of permanent spousal support shall be made prospective only at the time of the hearing.

Conclusion

In accordance with this opinion, the trial court's rulings allowing home schooling of the children is reversed. It is hereby ordered, adjudged and decreed that within seven days of the finality of this judgment, the children should be enrolled in the appropriate public schools in accordance with La. R.S. 17:236.2 and the rules and regulations of the local school board. Any costs associated with the children's enrollment in the public schools shall be borne by ***1171** appellant. The case is remanded to the trial court for immediate docketing with a priority

setting to assure compliance with this court's order and to reconsider the award of $750 per month permanent spousal support, to determine if such award should be prospectively modified.

Costs of appeal are assessed to appellant.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

La.App. 2 Cir.,2004.
Donna G.R. v. James B.R.
877 So.2d 1164, 39,005 (La.App. 2 Cir. 7/2/04)

Brown v. Brown, 30 Va. App. 532, 518 S.E.2d 336 (1999)

In the Court of Appeals of Virginia
Argued at Alexandria, Virginia

COLLEEN N. BROWN
v.
MARK R. BROWN

Record No. 1830-98-4
Decided: August 31, 1999

Present: Judges Coleman, Elder and Bumgardner

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY, James H. Chamblin, Judge

Affirmed. [Page 534]

COUNSEL

Donald S. Caruthers, Jr. (Donald S. Caruthers, Jr., P.C., on briefs), for appellant.

Mark A. Barondess (Milissa R. Spring; Sandground, Barondess, West & New, P.C., on brief), for appellee. [Page 535]

OPINION

COLEMAN, J. — Colleen N. Brown (mother) appeals from a ruling of the trial court denying her request for a change in custody of the two children born of her marriage to Mark R. Brown (father). On appeal, she contends the court erroneously failed (1) to award her sole legal custody or joint legal custody with father; and (2) to order father to discontinue home-schooling the children. For the reasons that follow, we disagree and affirm the ruling of the trial court.

BACKGROUND

In accordance with familiar principles, we summarize the evidence in the light most favorable to the prevailing party below. *See Bottoms v. Bottoms,* 249 Va. 410, 414, 457 S.E.2d 102, 105 (1995). The parties have two children, a daughter Danielle born in 1987 and a son Christopher born in 1991. When they divorced in 1995, they agreed upon joint legal and physical custody of the children. Soon thereafter, a dispute arose about Danielle's enrollment in Faith Christian School and mother's shared custody when she planned to live with her paramour. Following a hearing, the trial court awarded sole legal custody to father but ruled that the parties would jointly decide where to enroll the children in school.

When mother chose not to have the children attend Faith Christian School, father decided to home-school the children, to which mother objected. Following a hearing on August 21, 1996, the trial court modified its earlier ruling to provide that father had the authority to decide "where and in what manner the parties' minor children are to be schooled." Father's home-school

curriculum was approved by the Director of Pupil Services for the county.

On August 13, 1997, following one year of father's home-schooling, mother moved for sole or joint legal custody of the children, or alternatively, for an order directing that the children attend a specific public elementary school. Mother complained that father excluded her from participating in her children's lives. Mother contended that the home-schooling, [Page 536] the assigned homework, and the children's extra-curricular activities detracted from her scheduled time with the children. She conceded, however, that she supported the children's participation in some of the extra-curricular activities. Father explained that although some of the extra-curricular activities occurred during mother's scheduled time with the children, typically the schedules were not established until after enrollment in the activities. Further, father told the children that he could only guarantee their attendance at these activities during his scheduled time with them.

Although father initially denied mother's request to assist in the home-schooling, he invited her to visit the classroom in early 1997. On that occasion, the tension between the parents detracted from the learning environment, and father determined that in the future it would be best if mother were not present during classroom time. According to his testimony, father encouraged mother's participation in other home-schooling events and suggested that her presence would benefit the children. Mother conducted a field trip and held a monthly art class for several children, including Danielle and Christopher. Father testified that he encouraged mother to be involved with these groups and explained that he initially had not included her name on their home-schooling group's phone lists because mother previously had aired their personal problems to other parents.

Father denied allegations that he forbade the children from attending mother's church. Father testified that he merely wanted custody of them on Sundays to ensure that they attended church on a regular basis and in a consistent program.

Mother testified that she ended her relationship with her paramour following the court's April 1996 ruling and had no contact with him since he moved out. She also testified that no other man to whom she was not related had been "under my roof while the children were in my custody."

Each party accused the other of inappropriate parenting. As an example of alleged inappropriate discipline, mother [Page 537] testified that father made Danielle stand in the corner on one occasion for an hour and forty minutes until she apologized for being disrespectful. Father offered testimony

that mother inappropriately involved the children in the parties' disputes.

Although the children expressed a desire to attend public school, they also praised home-schooling and performed very well in that environment.

Mother offered the expert testimony of Dr. Zuckerman, a licensed clinical psychologist. Dr. Zuckerman supported mother's complaints regarding the children's school environment and its detrimental impact on her relationship with the children. He opined that the children would be better off in a school where both parents felt welcome and over which the parental conflict was not an issue. However, Dr. Zuckerman testified that he was not in a position to make a recommendation regarding child custody.

Father offered the testimony of Dr. Brian Ray, who qualified as an expert in the field of education. He opined that the children's "home-schooling is working very well." He agreed that it was important for mother to be as involved as possible in their schooling. He stated that home-schooling would provide both parents more time to be with their children, which is especially important in divorce situations, and that home-schooling permitted father to integrate his personal "religious philosophical view" into their education, both of which were likely to help the children avoid the negative aspects of peer pressure. Finally, he opined that the children engaged in sufficient activities outside the home classroom to develop necessary social skills.

ANALYSIS

A party seeking to modify an existing custody order bears the burden of proving that a change in circumstances has occurred since the last custody determination and that the circumstances warrant a change of custody to promote the children's best interests. *See Keel v. Keel,* 225 Va. 606, 611 -12, 303 S.E.2d 917, 921 (1983); *see also* Code § 20-124.2(B). [Page 538] In deciding whether to modify a custody order, the trial court's paramount concern must be the children's best interests. *See Farley v. Farley,* 9 Va. App. 326, 327 -28, 387 S.E.2d 794, 795-96 (1990). However, the trial court has broad discretion in determining what promotes the children's best interests. *See Eichelberger v. Eichelberger,* 2 Va. App. 409, 412, 345 S.E.2d 10, 12 (1986).

Code § 20-124.3 specifies the factors a court "shall consider" in determining the "best interests of a child for . . . custody or visitation." Although the trial court must examine all factors set out in Code § 20-124.3, "it is not 'required to quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors.'" *Sargent v. Sargent,* 20 Va. App. 694, 702, 460 S.E.2d 596, 599 (1995) (quoting *Woolley v. Woolley,* 3 Va. App. 337, 345, 349 S.E.2d 422, 426 (1986)).

As long as evidence in the record supports the trial court's ruling and the trial court has not abused its discretion, its ruling must be affirmed on appeal. *See Alphin v. Alphin,* 15 Va. App. 395, 405, 424 S.E.2d 572, 578 (1992).

Here, the trial court expressly considered the "best interests" of the children. Contrary to mother's contention, the court did not elevate the alleged right of father, the children's legal custodian, to home-school the children over the children's best interests. We cannot say on this record that the evidence fails to support the trial court's decision to maintain the *status quo,* by denying mother's request for sole or joint legal custody or by refusing to prohibit father from home-schooling the children. Although the parties exercised joint physical custody, father had sole legal custody of the children, and mother bore the burden of proving a material change in circumstances requiring a change in legal custody to safeguard the best interests of the children.

The evidence, viewed in the light most favorable to father, supports the trial court's finding that mother failed to meet that burden. The children were performing well academically and socially in a home-schooling program approved by Loudoun County. Although initially resistant to mother's involvement [Page 539] in the children's education, father made some effort to keep her apprised of their progress and agreed that it would be "beneficial for [mother] to come [to their class] on occasion." The trial court found that the parties had made the children "the battlefield," they could not communicate, and they could not share any decision-making authority over the children. Unable to find that father's home-schooling efforts were inferior to the public school alternative, the trial court determined that the children's best interests would be advanced by continuing with the home-schooling.

We also find that the trial court's decision was not an abuse of discretion, plainly wrong, or unsupported by the evidence. In light of our clearly defined standard of review, it is immaterial that the record, if viewed in the light most favorable to the mother, may support the relief she seeks. The trial court rather than the appellate court "ascertains a witness' credibility, determines the weight to be given to [the witness'] testimony, and has the discretion to accept or reject any of the witness' testimony." *Street v. Street,* 25 Va. App. 380, 388, 488 S.E.2d 665, 668 (1997) *(en banc).* The trial court was entitled to reject the testimony of Dr. Zuckerman, who opined that home-schooling was having a negative effect on the children's education, in favor of the testimony of Dr. Ray, who opined that "home-schooling is working very well" for the parties' children. *See id.* at 387-89, 488 S.E.2d at 668-69.

Further, the court was not required to award mother sole or joint legal

custody or to prohibit home-schooling simply because the children expressed a preference to attend public school. "Although a child's preference 'should be considered and given appropriate weight,' it does not control the custody determination and is just one factor to be considered." *Sargent,* 20 Va. App. at 702, 460 S.E.2d at 599 (quoting *Bailes v. Sours,* 231 Va. 96, 99, 340 S.E.2d 824, 826 (1986)).

Finally, contrary to mother's contention, the record, viewed in the light most favorable to father, does not support her contention that the trial court erroneously elevated "stability and continuity" over the children's best interest. The [Page 540] record establishes that the trial court considered other statutory factors, including the needs and preferences of the children, the relationship between the children and their parents, and the parents' inability to communicate and cooperate. Nevertheless, the evidence supports the trial court's finding that the children would benefit from a ruling preserving stability and continuity and that such was in their best interest. The issue in dispute here was the children's education. The record established that Christopher's only experience was in home-schooling, that both children had been home-schooled for almost two years at the time of the hearing, and that home-schooling permitted each parent to spend a greater amount of time with the children. Accordingly, we find that the trial court did not place undue emphasis on the children having stability and continuity in their lives.

For the foregoing reasons, we affirm the trial court's ruling. We deny father's request for an award of attorney's fees and costs on appeal.

Affirmed.

Elder, J., concurring, in part, and dissenting, in part.

I concur in the majority's affirmance of the trial court's ruling declining to grant wife sole legal custody of the parties' children. I also concur in its decision to deny father's request for an award of attorney's fees and costs on appeal. However, I respectfully dissent from the majority's affirmance of the trial court's ruling on mother's request for joint legal custody. Because I believe the trial court applied an incorrect legal standard in denying mother's request for joint legal custody, I would remand to the trial court for further proceedings on that issue.

In resolving disputes between parents over the custody and visitation of minor children, "the court shall give primary consideration to the best interests of the child," Code § 20-124.2, considering the various factors outlined in Code § 20-124.3. In fashioning a custody arrangement that meets this "best interests" standard, a court may award joint custody or [Page 541] sole custody. *See id.* Sole custody "means that one person retains responsibility

for the care and control of [the children] and has primary authority to make decisions concerning the [children]." Code § 20-124.1. Joint custody has several meanings. The court may award

> (i) *joint legal custody* where both parents retain joint responsibility for the care and control of the [children] and joint authority to make decisions concerning the [children] even though the [children's] primary residence may be with only one parent, (ii) *joint physical custody* where both parents share physical and custodial care of the [children] or (iii) *any combination of joint legal and joint physical custody* which the court deems to be in the best interest of the [children].

Id. (emphasis added). The plain meaning of this statute permits a court to apportion between the parents the ability to make certain decisions regarding the children's upbringing in order to effectuate the children's best interests. *See Vasquez v. Vasquez,* 443 So. 2d 313, 314 (Fla. Ct. App. 1983) (upholding court's order permitting father to choose children's school based on state's "Shared Parental Responsibility Act," which expressed preference for shared decision-making for divorced parents in upbringing of children but provided that court "may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those aspects between the parties based on the best interests of the child").

This best interests standard applies both to an initial determination regarding custody and to any subsequent requests for modification of custody. *See Keel v. Keel,* 225 Va. 606, 611, 303 S.E.2d 917, 920-21 (1983).

> Once a court has ruled on matters relating to the custody and care of minor children . . . , the court retains jurisdiction throughout the minority status of the child involved. The court, in the exercise of its sound discretion, may alter or change custody . . . when subsequent events render such action appropriate for the child's welfare. [Page 542]

Eichelberger v. Eichelberger, 2 Va. App. 409, 412, 345 S.E.2d 10, 12 (1986) (citation omitted). Although the best interests of the children remains the court's primary consideration, once a custody order is in effect, a party seeking a change in custody must prove both that a change in circumstances has occurred since the last custody award and that a change in custody is in the best interests of the children. *See Keel,* 225 Va. at 611, 303 S.E.2d at 920-21. Virginia has specifically rejected the "narrow view that once custody is decided it should stay decided absent 'gross changes that threaten harm' to the children." *Id. Compare Williams v. Williams,* 256 Va. 19, 20 20-22, 501 S.E.2d 417, 417-18 (1998) (plurality

opinion) (in dispute between parents in "intact" family and alleged "person with a legitimate interest" (grandparents) seeking visitation with child under Code § 20-124.2, holding that parents' fundamental constitutional right to raise child is acknowledged in statute's requirement that a court "give due regard to the primacy of the parent-child relationship" and that law requires court to make threshold finding of "'actual harm to the child's health or welfare without such visitation'" before reaching "best interests" standard), *and id.* at 28-29, 30-33, 501 S.E.2d at 421-22, 423-24 (Hassell and Kinser, J.J., dissenting in part and concurring in judgment) (agreeing that parents' constitutional right to raise child requires finding of harm before state may interfere with that right but asserting that Code § 20-124.2 is unconstitutional because it contains no such requirement), *with Dotson v. Hylton,* 29 Va. App. 635, 638 - 40, 513 S.E.2d 901, 903 (1999) (holding that, in dispute between divorced parents over visitation for child's paternal grandmother, *Williams* standard of harm to child does not govern and court applies statutory standard for visitation by "person with a legitimate interest," which requires only clear and convincing proof that visitation serves best interests of child).

Here, in ruling on the issue of education, the trial court made conflicting observations. It observed that it had to consider whether a particular type of education was in the children's "best interest." However, it also relied heavily on language in *Martin v. Stephen,* 937 P.2d 92 (Okla. 1997), to [Page 543] hold that, absent "'most unusual conditions'" or "'compelling circumstances,'" it "ha[d] no business . . . interfering" with the legal custodian's "right to decide where the children are educated."

As discussed above, Virginia's child custody statutes specifically provide that the court must consider the best interests of the children. *See* Code §§ 20-124.2, 20-124.3. The mere fact that Code § 22.1-254.1 provides generally that home-schooling of children by their parents, under certain circumstances, "is an acceptable alternative form of education" does not alter the court's more specific statutory duty under Code § 20-124.2 to make child custody decisions based on the best interests of the children. Parents have a fundamental constitutional right to make decisions regarding child-rearing, and the state may not interfere with this right absent the compelling state interest of protecting the child's health or welfare. *See, e.g., Williams,* 256 Va. at 21, 501 S.E.2d at 418 (plurality opinion); *id.* at 28-29, 501 S.E.2d at 421-22 (Hassell and Kinser, J.J., dissenting in part and concurring in result). However, where the dispute over child-rearing is between two parents involved in a custody dispute, it may be inherently impossible to preserve that fundamental right with respect to each parent simultaneously. Under those circumstances, therefore,

the statute provides that the best interests standard controls. *See Dotson,* 29 Va. App. at 638-40, 513 S.E.2d at 903; *see also Clark v. Reiss,* 831 S.W.2d 622, 624-25 (Ark. Ct. App. 1992) (upholding application of best interests test to prevent custodian from home-schooling children in light of deficiencies in specific program and impact of home-schooling on non-custodial parent's visitation time and ability to participate in their schooling); *Bowman v. Bowman,* 686 N.E.2d 921, 926-27 (Ind. Ct. App. 1997) (upholding application of best interests test to the "particular circumstances" of that case as ground for removing children from custody of parent who wished to home-school them); *King v. King,* 638 N.Y.S.2d 980, 981 (N.Y. App. Div. 1996) (upholding application of best interests test to award custody to children's father where "manner in which [mother] structured and conducted the home instruction [Page 544] . . . was not ideal"); *Elrod v. Elrod,* 481 S.E.2d 108, 111 (N.C. Ct. App. 1997) (acknowledging best interests standard but noting that father earlier had agreed to entry of order permitting home-schooling and had shown no change of circumstances permitting court to revisit home-schooling issue); *In re Reiss,* 632 N.E.2d 635, 640-42 (Ill. App. Ct. 1994) (citing statutory "negative" best interests test permitting custodian to make certain decisions unless they would "clearly be contrary to the best interests of the child" and remanding for additional evidence). *But see Martin v. Stephen,* 937 P.2d 92, 98-100 (Okla. 1997) (Simms, J., concurring) (noting that custodial parent's "rights and obligations of custody are extensive and operate against third parties, including the noncustodial parent" such that custodial parent's decision to home-school children is not grounds for change of custody unless it "directly and adversely affected [children] in [a] material way or posed a serious threat to their health, safety or welfare"); *Rust v. Rust,* 864 S.W.2d 52, 56-57 (Tenn. Ct. App. 1993) (reciting best interests standard for custody decisions but holding that once initial custody decision has been made, custodial parent retains same fundamental autonomy over childrearing decisions that married parents would have absent evidence that parent is no longer fit and, therefore, that custodial parent may home-school child unless home-schooling "poses a substantial danger to the child's health or safety or places a substantial social burden on him"). *See generally* J. Bart McMahon, *An Examination of the Non-Custodial Parent's Right to Influence and Direct the Child's Education: What Happens When the Custodial Parent Wants to Home Educate the Child,* 33 U. Louisville J. Fam. L. 723 (1995).

Because Code §§ 20-124.1 and 20-124.2 permit the court to fashion any combination of joint legal custody which is in the best interests of the children, the trial court had authority under Virginia's statutory scheme to bifurcate the issues over which mother

and father have decision-making authority in this case, giving mother the authority to make decisions regarding the children's education while reserving to father [Page 545] the ability to make all other decisions associated with legal custody.

Therefore, I would hold that the trial court erred in concluding it could not revisit the child custody issue absent unusual or compelling circumstances and would remand to the trial court for further proceedings in keeping with the best interests standard, including the option of joint legal custody tailored to allow mother to choose where to educate the children while reserving to father all other decisions associated with legal custody.

Supreme Court of Oklahoma.

Lynn STEPHEN, now Martin,
Appellant,
v.
Mark STEPHEN, Appellee.

No. 86560.

April 22, 1997.

Former husband filed motion to modify custody. The District Court, Oklahoma County, Sidney J. Gorelick, Special Judge, ordered change in custody from former wife to husband unless children were placed in public school. Wife appealed. The Supreme Court, Alma Wilson, J., held that: (1) wife's home schooling of children did not directly and adversely affect their best interests; (2) reduction in husband's child support obligation was not warranted after wife stopped working to educate children at home; and (3) husband was not entitled to award of attorney fees.

Reversed and remanded.

Simms, J., concurred and filed opinion in which Kauger, C.J., and Opala and Watt, JJ., joined and which Alma Wilson, J., approved.

Summers, V.C.J., concurred in part and dissented in part and filed opinion in which Lavender, J., joined.

***93** Appeal from the District Court of Oklahoma County; Sidney J. Gorelick, Special Judge.

Mark Stephen, appellee, applied to modify child custody based on the fact that the mother, Lynn Martin, appellant, had begun to educate the two minor boys at home. Both parties sought modification of child support and the mother requested supervised visitation. The trial court found that the mother's home schooling was a substantial change of circumstances adversely affecting the best interests of the children. The court ordered that if the mother did not re-enroll the two minor boys in public school, custody would be changed to the father and ordered standard visitation. In reducing child support, the court imputed an income to the mother equivalent to what she had made before she quit her employment to educate the minors at home. The trial court subsequently awarded attorney's fees and some costs to the father.

REVERSED AND REMANDED.William D. (Bill) Graves, Oklahoma City, for Appellant.

Frank W. Davis, Guthrie, Michael P. Farris and David E. Gordon, Home School Legal Defense Association, Paeonian Springs, Virginia, for Amici Curiae, Home School Legal Defense Association, Oklahoma Central ***94** Home Educators Consociation, Christian Home Educators Fellowship of Oklahoma.

Marcie James, Oklahoma City, for Appellee.

ALMA WILSON, Justice:

Lynn Stephen, now Martin, appellant, was granted an uncontested divorce from Mark Stephen, appellee, on March 29, 1989. Martin was granted custody of their two boys, born in August 1982, and June 1987. During the 1994-1995 school year Martin quit her job to educate the boys at home. In response, Stephen filed a motion to modify custody alleging that Martin was not qualified to serve as their teacher, and that a home-school education was not in their best interests. After a five-day hearing, the court concluded that the children were probably better off with Martin, but that she was not qualified to educate her children at home. The court ordered a change in custody from Martin to Stephen unless the children were placed in public school. Martin appealed, and her motion to retain was granted.

The dispositive issue is whether the evidence supports the trial court's determination that home schooling had a direct and adverse effect on the children. We find the evidence does not establish that Lynn Martin's home schooling of her two boys adversely affected their best interests. We hold that when the trial court found this home schooling was not in the best interest of the children, and ordered a change of custody unless the children were returned to public school, such change was against the clear weight of the evidence, and was an abuse of discretion. Accordingly, we reverse the order.

I. Procedural Issues

[1][2][3][4] Before reaching the evidentiary issue, we address two preliminary issues: 1) whether the change of custody is an appealable order; and 2) whether the appellant has accepted the benefits of the order. The modification order appears to be conditional, rather than a final order. However, the conditional aspect of the judgment was removed after October 10, 1995, the time limitation for Martin to enroll the two boys in public school.[FN1] When an order embodies a conditional judgment and the conditional nature of the judgment has been removed by the passing of the time limits set by the trial court, the order is final and appealable.[FN2] Generally, a court of equity may render such judgment as will meet all the exigencies of the litigation and equitably settle all conflicting rights. In granting the necessary and proper relief the court may attach to such grant any reasonable conditions that to it seem proper.[FN3] In this case, whether the boys would continue to live in the familiar and suitable home provided by the mother was conditioned upon the mother's behavior, and the condition was intended to coerce the mother's behavior.[FN4] Early in the custody dispute, the mother heeded the trial court's warnings and re-enrolled her older son in public school. Having already placed the older child in public school, when the trial court pronounced its custody order, Martin

advised the trial judge that she would comply by enrolling her younger son in public school. Coerced compliance with the conditions in the custody order is not tantamount to acceptance of the benefit of a judgment that ***95** waives the right of appeal. [FN5]

FN1. The order was not conditional at the time it was filed with the district court clerk on October 24, 1995, two weeks after October 10, 1995, nor when the petition in error was filed with the clerk of this Court on November 22, 1995.

FN2. *Sneed v. State ex rel. Dept. of Transp.*, 683 P.2d 525, 527-528 (Okla.1983). *See also Casker v. Dennis,* 208 Okla. 34, 252 P.2d 1027 (Okla.1952).

FN3. *Polk v. Unknown Trustees,* 298 P.2d 432, 436 (Okla.1956).

FN4. In pronouncing its decision, the trial court said: "The ties of the children are such that excluding the home education, mother is probably the better place to leave the children. I don't know that I have the authority to order mother not to home-educate these children because of the current law, but I do have the authority to tell her that if they are not placed in public school or private school or be educated by some other educator, other than herself, in addition to whatever she wants to give them herself, then I am going to move the children and it's just that simple. It's what I told you at the very beginning of this trial and my thoughts haven't changed since."

FN5. *Robert L. Wheeler, Inc. v. Scott,* 818 P.2d 475, 477 (Okla.1991). In *Stokes v. Stokes,* 738 P.2d 1346, 1347 (Okla.1987), we held that an appellant who cashed one of her alimony checks subsequent to the trial court's order awarding alimony did not waive her right to appeal that judgment. We reasoned that where the judgment accepted was necessary for the support and maintenance of the receiving spouse and minor children, it would be grossly unfair and against enlightened public policy to force the litigant to choose between food and the right to appeal. Likewise, Martin should not have to choose between the continued custody of her children and appeal.

II. Changed Circumstances and Child's Best Interests

[5][6][7] Title 43 O.S.Supp.1994, § 112(A)(3) authorizes a trial court to modify a child custody order "whenever circumstances render such change proper...." [FN6] This language has

remained unchanged since *Gibbons v. Gibbons*.[FN7] *Gibbons* held that parents requesting modification must establish (1) a permanent, substantial and material change in circumstances; (2) the change in circumstances must adversely affect the best interests of the child; and, (3) the temporal, moral and mental welfare of the child would be better off if custody is changed.[FN8] In a hearing upon a motion to modify, the burden is upon the applicant to show a substantial change in conditions since the entry of the last order or decree which bears directly upon the welfare and best interest of the child.[FN9] On appeal, a trial court order modifying child custody will be affirmed if the evidence supports a finding that the child is directly and adversely affected by the substantial change of circumstances.[FN10] Before the trial court, Mark Stephens took the position that Lynn Martin was not qualified to home school the boys because she had no formal education beyond high school, and therefore, the home schooling adversely affected the boys. The testimony and exhibits, however, do not support a finding that Lynn Martin's home schooling directly and adversely affected the best interests of her children.

FN6. Section 112 has been amended by 1996 Okla. Sess. Laws, ch. 131, § 10, eff. Jan. 1, 1997. The wording quoted above remains the same in the amended statute.

FN7. 442 P.2d 482, 484 (Okla.1968).

FN8. *Gibbons v. Gibbons,* 442 P.2d 482, 485 (Okla.1968).

FN9. *David v. David,* 460 P.2d 116, 117 (Okla.1969).

FN10. *Fox v. Fox,* 904 P.2d 66, 69 (Okla.1995), citing *Gorham v. Gorham,* 692 P.2d 1375, 1378 (Okla.1984); and *Rice v. Rice,* 603 P.2d 1125, 1128 (Okla.1979).

The five days of hearings were spread from July 11, 1995, to October 6, 1995. The evidence shows that before Martin decided to start educating the boys at home, Stephen did not follow any pattern of regular visitation. Although he attempted to explain this, the proof was that until Stephen filed his motion to modify custody, visitation with his older son was sporadic, and visitation with his younger son was almost nonexistent. Stephen admitted on cross-examination that Martin was "a great mother," and that he filed his motion because he "didn't feel she was giving them a quality education in teaching them herself at home."

The trial court appointed its own expert for psychoeducational-psychological evaluation. Her tests revealed that the older boy was "bright to superior" in intelligence, and the younger boy "high average to bright." At the beginning of the 1994-1995 school year, both boys were behind a

grade level for their ages. The older boy would have started the sixth grade and the younger boy would have started the first grade in the public school system. After one year of home schooling, the Iowa Tests of Basic Skills given in June of 1995, revealed that the older boy had earned a composite grade equivalent of 8.5, meaning that his test performance was approximately the same as that made by a typical student in the eighth grade at the end of the fifth month. As a comparison, at the end of his fifth grade year in public school, the Iowa Test of Basic Skills stated that his overall achievement was about average for his grade. The younger boy's composite score grade equivalent was 2.4, that is, second grade, fourth month. The report of the court's expert indicated that the ***96** older boy was capable of achieving at the tenth grade level. The court's expert reported that the younger boy is achieving between second and third grade in all basic academic areas, which findings are consistent with the Iowa Test scores. The expert observed that the younger boy had made good academic progress even though his achievement is not at expectancy for his age and ability. The court's expert concluded that both boys could handle whatever decision the court made.

Dr. Raymond Moore, a witness for Martin, and whose doctorate was in teacher education and developmental psychology, was offered as an expert witness in home education, developmental psychology and teacher education. The court accepted him as an expert without an objection from Stephen's counsel. Dr. Moore described Martin as a very attentive, devoted and pensive mother. He concluded that she was doing an excellent job of teaching her boys. Although Dr. Moore preferred his home school program to the one being used by Martin because his program involved "study, work, and service," he observed that both boys were doing above the national norm based on the 1995 Iowa Test scores. Those tests were taken after the 1994-1995 year of home schooling. Dr. Moore observed that only in one or two areas were they below the national norm. He testified that on several of the skill levels, both boys had scored 100 percent correct. Although there were areas in which she could improve, Dr. Moore testified that the test results indicated that great credit must be given to Martin as a home schoolteacher. He observed that with proper coaching she could do very, very well. When asked if the mother would be disqualified as a home schoolteacher because she overlooked some misspelled words on spelling tests, Dr. Moore replied that the main concern of the mother was building character and ability to deal with life, so, putting first things first, the boys were really very well educated. They had manners, were industrious, and helped around the house. He concluded that she did an outstanding job that would not be done in any classroom.

Another of Martin's witnesses was Glenn Kastner, Director of Special Services for Putnam City Public Schools. He had not met either of the boys, nor the parties until the day of the hearing. He evaluated the older boy's Iowa Tests. Kastner testified that the older boy had shown a dramatic growth in his reading ability and that he was ready for the seventh grade. At the time of the hearing, as noted above, the older boy was back in public school for the 1995-1996 school year, in the seventh grade. Kastner had checked with the boy's counselor and found that he had an A in science, a B in social studies, a B in English, and was enrolled in Honors Mathematics where he was maintaining a B. For the younger boy, Kastner did not have the benefit of being able to compare Iowa Tests taken before and after one year of home schooling, like Kastner did with the older boy. But Kastner testified that the younger boy's scores were all in the average to above-average range and that placing him in the second grade at Putnam City would not be a problem.

Lynn Martin testified that the course material she orders to teach her boys includes teacher's editions, children's manuals, tests and quizzes. She visits the library every two weeks to get additional reading material for both boys. She orders biographies of sports heroes who are her older son's favorites, and even a biography of Colin Powell that he enjoyed. The boys took art classes on Mondays and engaged in physical education classes on Tuesdays that included football, soccer, and baseball at Metropolitan Baptist. When asked what she would do if her older son asked her a question she could not answer, she replied that she would figure it out with him, but if they could not figure it out, and she was not able to teach a course, she would put him in a school where he could learn.

While the trial court finds in its order that Martin is not capable of educating her children properly because of her limited formal education, and cannot educate the children to a normal level, the standardized tests, tests of the court's expert, and testimony of the witnesses are all to the contrary. The only limitations the record supports is that the mother has a high school degree and overlooked some misspelled words and a grammatical***97** error on some exhibits Stephen's attorney found in a stack of graded papers. But the Iowa Tests and the testimony of the experts reveal that both boys made substantial improvement in one year. So the trial court's conclusions are not supported by the record.

[8] Even if the trial court were correct in finding that Martin's education of the boys at home was not in their best interests, the court does not find that one deficiency outweighs all of the other circumstances and therefore requires that custody be moved to Stephen. There was substantial evidence presented that Stephen may

be a problem drinker, occasionally drinks and drives, that he had to be taken to court once to collect past due child support, that he did not regularly visit the boys until after he filed his motion to change custody, that he did not keep his appointments when he did promise to visit them, that when he had them at his home in Tulsa for visitation he left them alone during the day and checked on them by phone. In contrast, Martin gave up a $50,000 a year job to stay home to give the boys a better education and more behavioral supervision than she believed that they were receiving in the public school system. She has had custody of the boys for eight years now. The trial court makes the formal education of the mother, and the overlooking of a few misspelled words outweigh the substantial negative evidence against custody being changed to the father. A change in custody, given these facts, is simply not supported. The trial court cannot presume that a parent possessing only a high school degree is unqualified to educate her children at home and make that the sole basis for a change in custody.[FN11] The trial court's personal beliefs should not be forced on a custodial parent who has made a legitimate decision for the benefit of the minor children. Finding that Martin, whose formal education is limited to a high school degree, is incapable of educating her children at home without evidence supporting such a finding is an abuse of discretion in light of the academic advances made by these boys as revealed by the court's expert, the Iowa tests, and the testimony of other witnesses. The trial court abused its discretion in finding that because of the mother's home schooling, a change in custody would be in the best interests of the children. The decision is against the clear weight of the evidence.

> FN11. We note that the legislature has recently amended 43 O.S. § 112(4) to provide regarding care and custody of children that "there shall be neither a legal preference or a presumption for or against private or public school or home-schooling in awarding the custody of a child, or in appointing a general guardian for the child." 1996 Okla. Sess. Laws, ch. 131, § 10, eff. Jan. 1, 1997.

III. Child Support

[9] Concerning Martin's motion to increase child support, the only evidence presented failed to prove that Stephen's income had increased. Martin's had actually decreased from $50,000 per year to no income. The evidence presented does not meet the burden of proof needed to modify a support decree. The child support computation filed with the divorce decree on March 31, 1989, reveals that Stephen's child support would have been $413.60 per month, and his part of the child care expense would have been $203.51 per month, for a total of

$617.11 per month. By agreement, the child support was set at $500.00 per month. On February 7, 1990, the parties entered a second agreed order setting the child support at $350.00 per month to be paid to Martin by Stephen. Although the statutes provide child support may be based upon imputed income, [FN12] the loss of Martin's income resulting from her choice to educate her children at home makes decreasing child support unjust. We find that imputing an income of $50,000 per year to Martin is inequitable and an abuse of discretion. The court's decision reducing child support is reversed. The cause is remanded for the trial court to set a fair and equitable amount of child support. On remand the trial court should assess the financial impact of home schooling and apportion it equitably between parents.

FN12. 1995 Okla. Sess. Laws, ch. 1, § 13(B)(4), codified at 43 O.S. § 118(B)(4).

***98** IV. Attorney's Fees and Costs

[10] Martin amended her petition in error appealing the award of attorney's fees in favor of Stephen. Title 43 O.S. § 110(C) & (D) provide that the court may require either party to pay reasonable expenses of the other as may be just and proper under the circumstances.[FN13] As this Court explained in *Thielenhaus v. Thielenhaus,*[FN14] the award of attorney's fees does not depend on which party prevails, but upon a judicial balancing of the equities. Regardless of the fact that Martin was imputed an income of $50,000 per year based upon past years, she gave up that income to educate her sons at home. The trial court awarded attorney's fees in the amount of $10,000 to Stephen, and additional sums of $63.50 for his costs and $650.00, which represents one-half of the fees of the court-appointed expert witness. The same reasoning that applied to our rejection of a decrease in child support applies here. We find that equity requires each party to pay their own attorney's fees and expenses for both trial and appellate expenses and one-half of the expense of the court-appointed expert. We so order.

FN13. 1992 Okla. Sess. Laws, ch. 252, § 1(C) & (D).

FN14. 890 P.2d 925, 934-935 (Okla.1995).

JUDGMENT OF THE TRIAL COURT IS REVERSED AND REMANDED.

KAUGER, C.J., and SIMMS, HARGRAVE, OPALA and WATT, JJ., concur.
SUMMERS, V.C.J., and LAVENDER, J., concur in part, dissent in part.SIMMS, Justice, concurring:
I agree with the majority that these facts do not support the trial court's determination that Ms. Martin is incapable of educating her children and that the trial court's decision requiring

her to enroll her boys in public school under threat of losing of their custody, must be reversed. I would go further, however, and hold that the threshold for judicial interference in Ms. Martin's custody of her children was not reached by the noncustodial father's challenge to her choice of one lawful educational alternative over another, and that the entire scope of the inquiry into the adequacy of her teaching was inappropriate for the trial court's consideration of change of custody.

It is not the business of the courts to become involved in everyday decisions of child rearing which are properly the prerogative of the parents or, in the case of divorced parents, the custodial parent. The right of the custodial parent to determine and control the education of the child is well-settled. In the absence of specific provisions in the divorce decree or an agreement between the parents, the sole decision making power over significant decisions affecting the child's welfare, including education, resides in the custodial parent. See *Annot., Noncustodial Parent's Rights As Respects Education of Child,* 36 A.L.R.3d 1093*; Bennett v. Bennett,* 73 So.2d 274 (Fla.1954)*; Von Tersch v. Von Tersch,* 235 Neb. 263, 455 N.W.2d 130 (1990)*; Jenks v. Jenks,* 385 S.W.2d 370 (Ct.App.Mo.1964)*; Rust v. Rust,* 864 S.W.2d 52 (Tenn.Ct.App.1993)*; Griffin v. Griffin,* 699 P.2d 407 (Colo.1985)*; Parrinelli v. Parrinelli*, 138 Misc.2d 49, 524 N.Y.S.2d 159 (Sup.Ct.Suffolk Co.1986).

The essence of the custody which the court awarded to Ms. Martin at the time of her divorce is the right to companionship of her children and the right to make fundamental decisions regarding their care, control, education, health and religious training. 10 O.S.1991, § 4; 43 O.S.1991, § 112; *Matter of Adoption of Darren Todd H.,* 615 P.2d 287 (Okl.1980). It is a matter of unquestioned constitutional principle that in the absence of jeopardy to the health and safety of children, the government may not interfere with fundamental parental rights and interests in directing education and the religious upbringing of their children. *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). The rights and obligations of custody are extensive and operate against third parties, including the noncustodial parent, as well as against the state. In ***99** the absence of exceptional facts, decisions made by the custodian regarding a child's education cannot be grounds for the modification of custody.

The legislature is the proper body to provide standards for the education of children. In its wisdom, our legislature has enacted statutory protection of the right to home educate children, [70 O.S.1991 § 10-105(B); 70 O.S.1991, § 10-109(A)], but has not seen fit to enact minimum standards for teachers

or curriculum. We cannot do so in its stead. Home schooling is a lawful educational alternative available to Ms. Martin and in the absence of the most unusual conditions, which were not shown to be present here, it was not within the power of the trial court to pass on the quality of education they were receiving or dictate the type of education it felt best suited to her children. These educational decisions are placed by law with her and with her alone.

The trial court erred in considering and determining custodial imperatives under the guise of ordinary schooling complaints. The evidence fell far short of showing that Ms. Martin's instruction of her boys was a substantial change of circumstances which directly and adversely affected them in any material way or posed a serious threat to their health, safety or welfare. *Gibbons v. Gibbons*, 442 P.2d 482 (Okl.1968).

In *Jenks v. Jenks*, 385 S.W.2d 370, 376 (Mo.App.1964), the court stressed that courts should not specify in a divorce decree nor afterwards by modification prescribe the manner of the performance of duties of the parent awarded custody so as to abridge that custodial discretion, and in fact, once custody has been awarded no further decision should be required of the court except to prevent abuse of the child or neglect of his essential interests. The court refused to direct a specific school which the child of divorced parents should attend although the agreement between the parents was unenforceable and, on that point, the court stated:

"... Courts are not so constituted as to be able to regulate the details of a child's upbringing. It exhausts the imagination to speculate on the difficulties to which they would subject themselves were they to enter the home or the school or the playground and undertake to exercise on all occasions the authority which one party or the other would be bound to ascribe to them. Considerations of the most practical kind, therefore, dictate that in these cases the duty of attending to the details of the child's rearing be delegated to a custodian, and, as an indispensable concomitant of the appointment, that the custodian be vested not only with commensurate authority but with that degree of discretion upon which the expeditious exercise of authority invariably depends. It must be presumed in the absence of a contrary showing that the custodian, whether he be the child's parent or a stranger, will discharge his duties with fidelity and good judgment ..."

Facing facts very similar to those of the instant case, the court in *Rust v. Rust*, 864 S.W.2d 52 (Tenn.Ct.App.1993) reversed the trial court's decision sustaining the noncustodial father's objections to the mother's decision to home school one of their children. The court held the threshold for judicial

interference with the custodial mother's decision to home school one of her children was not met merely by the noncustodial father's objections and the trial court's determination that the mother's decision was not in the child's best interests. The court recognized that the parent awarded legal custody has the right to make the decisions regarding the child's education and stressed that the new family unit created by the divorce custody order, a single-parent family, has the same fundamental right to child rearing autonomy and freedom from unwarranted governmental interference as is accorded an intact two-parent family: the right to raise children as they see fit. The court cautioned that courts should exercise the same restraint from interfering with a custodial parent's decision regarding a child's education as would be shown to a decision made jointly by divorced parents or by married parents. Courts, it was held, should not second guess a custodial parent's decisions concerning a child's education when those decisions are consistent with state law and should not countermand those decisions unless they are contrary to ***100** an existing custody order, impose increased, involuntary burdens on the noncustodial parent, are illegal, or will affirmatively harm the child. See also *Lane v. Schenck*, 158 Vt. 489, 614 A.2d 786 (1992) (New family unit entitled to deference in considering choice to relocate).

Because home schooling is a permissible lawful educational alternative in this state and the noncustodial father did not present sufficient proof to warrant the trial court's interference with the mother's decision as sole legal custodian of the children to educate them at home over the father's objections, the trial court should not have interfered with her decision. The mother was unquestionably a fit parent and a good custodian and there was no showing that her teaching was illegal or affirmatively harmful to the children.

It is not difficult to see that we will be embarking on a perilous course if we decide to consider and pass on questions concerning the quality of educational choices in motions to modify custody. In addition to weighing arguments concerning home schools vs. traditional schools, we will be opening the floodgates for uncountable and never-ending post divorce challenges regarding the relative merits of all aspects of education: one teacher vs. another, one school system vs. another, one school vs. another, one curriculum vs. another, etc. These are not decisions our courts are competent to make and we should strenuously avoid the temptation to become education analysts.

I am authorized to state that Justice WILSON approves of the views expressed in this concurring opinion. I am also authorized to state that Chief Justice KAUGER, Justice OPALA, and Justice WATT Concur in this separate

opinion.

SUMMERS, Vice Chief Justice, concurring in part and dissenting in part, with whom LAVENDER, J. joins.

The trial court found that the custodial mother's decision to home-school the children herself, in light of the testimony presented, would amount to a material change of circumstances adverse to the best interests of the children, justifying a change of custody unless the mother accepted certain conditions. The issue before us (on the custody question) is whether the trial court should be reversed for doing so. By what standards do we review the trial judge's work?

There are cases in which this Court has said we will not reverse a custody decision where it does not appear that the lower court "abused its discretion". *Gorham v. Gorham,* 692 P.2d 1375, 1380 (Okla.1984); *Roemer v. Roemer,* 373 P.2d 55, 57 (Okla.1962). There are other custody cases where the Court used the traditional equity-based standard, that the findings and decree cannot be disturbed on appeal unless found to be "against the clear weight of the evidence." *Kahre v. Kahre,* 916 P.2d 1355, 1360 (Okl.1995); *Carpenter v. Carpenter,* 645 P.2d 476, 480 (Okla.1982); *Snow v. Winn,* 607 P.2d 678, 681 (Okla.1980). There is a recent case, *Mueggenborg v. Walling,* 836 P.2d 112, 115 (Okla.1992), in which we found "no abuse of discretion" in granting custody because the decision "is not against the clear weight of the evidence."

There is, however, no disagreement that divorce litigation, and custody contests within it, are matters of equitable cognizance. This was thoroughly laid out in *Carpenter, supra,* at 480. I counsel, therefore, that in child custody matters we stay with the traditional norm used in other matters of equity jurisprudence-that custody findings and decrees not be disturbed unless found to be against the clear weight of the evidence.

Having said that, what would I do with this custody judgment on appeal? I would affirm it.

Contrary to the mother's assertion at trial, the trial court was not sitting in judgment with regard to the wisdom of home schooling. The trial judge stated on numerous occasions that he had no personal dislike of home schooling, and that he saw his role only as the defender of the best interests of the children. He repeatedly pointed out that the only question was whether, in this particular case, it was in the best interests of the children to be educated by their mother. The father of the children felt it was not.

***101** At trial the mother admitted that she had on numerous occasions graded the children's papers incorrectly. She did not give the children periodic grade cards. Only in anticipation of litigation did she complete the only grade reports the children received while being home schooled. She frequently failed to

correct misspelled words on their papers. She testified that she did not go beyond algebra or geometry in school, and that she had a grade point average of about 2.85. She had a D in high school biology, the highest science course she took. She testified that she did not tell the children when they progressed to the next grade.

A home schooling expert testified on behalf of the mother. While he advocated home schooling and thought that the mother was doing a good job, he agreed that it was harmful to the children's education to have papers and tests graded incorrectly. He also agreed that the mother used the worst home schooling program available. He concluded that the mother needed improvement as a teacher. While he thought it was possible that she might improve, he advocated the use of a different program (his own), as well as tutors in areas where the mother was weak. In his opinion the children were being educated, but could do much better.

There is some dispute as to whether the children actually progressed under the tutelage of their mother. A court-appointed expert tested the children, determined that each had a high I.Q., and that the older was capable of learning several grades beyond his actual age. In her opinion the children were not learning at a rate commensurate with their abilities. She also pointed out that the children had actually declined after being home schooled in areas such as reading, language and science. Test scores showed that the oldest child was extremely advanced in mathematics, and could learn at the tenth grade level.

The father testified that he filed the modification motion because he does not feel it is in the best interest of his children to be educated by the mother. He did not question the mother's fitness as a custodial parent. He realized that the children are extremely bright and is concerned for their academic well-being. Particularly, he was concerned about the mothers's lack of knowledge in mathematics, and the older boy's high aptitude in that area.

If the parent seeking modification of custody can show that there has been a substantial change which is affecting the moral, temporal or mental welfare of the children, custody may be changed. *Fox v. Fox*, 904 P.2d 66, 69 (Okla.1995). Clearly, there was evidence to support the trial court's ruling. The record shows that the children were bright, but were being slowed by the teacher. In fact, there are test results which show regression instead of progression. Even the mother's expert felt she could use improvement. The court concluded that the educational well-being of the children was in jeopardy.

In making his ruling, the judge attempted to tailor the judgment to fit the best interests of the children. He did not prohibit the children from

being home schooled; rather, he determined that it was in their best interests to be schooled by someone capable of teaching them at the appropriate level, whether it be at home, in public school, or in private school. I do not find his ruling contrary to the clear weight of the evidence.

For these reasons I would affirm the trial court's judgment as to custody. I have no disagreement with the Court's opinion otherwise.

Okl.,1997.
Stephen v. Stephen
937 P.2d 92, 1997 OK 53

Appellate Court of Illinois,
Second District.

In re MARRIAGE OF Susan B. RIESS, n/k/a Susan Greenway,
Petitioner-Appellant,
and
Gregory W. Riess, Respondent-Appellee.
No. 2-93-0224.

April 6, 1994.

Former husband petitioned for change of custody with respect to child who was in custody of former wife. The Circuit Court, Kane County, Richard E. DeMoss, J., granted petition, and wife appealed. The Appellate Court, Inglis, P.J., held that: (1) trial court improperly shifted burden of proving that wife's home schooling of child was in child's best interest to wife; (2) husband did not meet burden of proving that home schooling was not in child's best interests; and (3) improper shifting of burden warranted remand, rather than simple reversal.

Reversed and remanded.

Geiger, J., specially concurred and filed opinion. Bowman, J., concurred in part and dissented in part and filed opinion.

Donald R. Dickinson, Dickinson & Amoni, Aurora, for respondent-appellee.

Presiding Justice INGLIS delivered the opinion of the court:

A judgment of dissolution of marriage was entered on October 10, 1984, for petitioner, Susan B. Riess, n/k/a Susan Greenway (hereinafter the mother), and respondent, Gregory W. Riess (hereinafter the father). The couple had entered into a settlement agreement which was incorporated in the judgment of dissolution. The agreement provided that the mother would retain custody of the couple's infant daughter. After reaching school age, the child attended public school through third grade. At that point, the mother took the child out of public school and for one school year taught the child herself at home. The father filed a petition for a change of custody, arguing that the environment of the child endangered her emotional health and well-being. The trial court issued a written order, changing custody on the basis that a substantial change in the circumstances had occurred and it was against the best interests of the child to maintain custody with the mother. The mother appeals, contending that (1) the trial court abused its discretion in modifying custody because the father failed to prove by clear and convincing evidence that a change of custody was necessary; and (2) the trial court committed reversible error by improperly shifting the burden of proof to the mother. We reverse and remand.

The parties were married on October 17, 1981. The couple had one daughter, who was born on June 22, 1982. The mother filed for dissolution of marriage

in 1984. The parties entered into a settlement agreement which provided that the mother would retain custody of the child, and this agreement was incorporated into a final judgment of dissolution which was entered on October 10, 1984. The mother filed a petition to modify the dissolution decree, which was granted, allowing**637 ***307 her to move with the child to Arizona. The mother and child moved to Arizona.

Subsequently, the father filed a petition requesting that the order allowing the mother to leave Illinois be rescinded or, in the alternative, that he be granted custody of the daughter. The trial court vacated the previous order which had granted the mother leave to remove the child from the State of Illinois. The trial court issued a rule to show cause regarding removal of the child from the State of ***212** Illinois. The trial court then held the mother in contempt of court for failure to return the minor child to the State of Illinois. The father filed a petition for a change of custody, and the mother responded by sending the judge a letter stating that she could not afford to travel to Illinois to defend herself. The matter was dropped, and neither party further pursued the issue that the mother and child were living in Arizona in violation of the order rescinding leave to depart from Illinois.

From December 1984 through December 1992, the mother and child resided in Tucson, Arizona, and the child had periodic visitation with her father in Illinois. On July 30, 1992, the father filed a petition for change of custody. In his petition the father alleged that the mother had removed the child from public school, that the mother was not properly trained to provide home schooling for the child, and that such education was not in the best interest of the child.

In his case in chief, the father presented testimony of several witnesses. His sister testified that the father and daughter had a "special relationship." His second wife testified that she and the daughter got along well and that she would be happy if the daughter joined their home should the father be awarded custody of the child.

The mother testified as an adverse witness. She testified that she lived in Tucson, Arizona, and had been remarried for 5 1/2 years. She was questioned extensively regarding the previous rulings of the trial court which dealt with taking the child out of the jurisdiction. She testified that she did not receive a copy of the order vacating the prior order which granted her leave to take the child to Arizona. She stated that the father did communicate the content of the latter order to her but she was not sure whether he was lying to her.

The mother testified that she was trained as a cosmetologist and that she had no formal education beyond high school. In order to prepare to home educate, she studied on her own and

attended some informal training sessions in subjects such as math, English, social studies, and all the subjects she would be required to teach her daughter. This training went on for two years prior to her removing her daughter from public school. The mother received a computer card from the State of Arizona reporting her teaching certification test scores, which card was introduced into evidence. The mother testified that the card was her certificate that she would need if she were ever challenged to show that she was qualified to home instruct her child. The Arizona laws regulating home schooling require annual testing of the child. The mother testified that she had the child's test scores ***213** with her, although the father's counsel did not ask her to reveal what those scores were, nor did he move to admit them as evidence.

The mother testified that the child had remained in public school through the third grade. She testified that the child's teacher told her that the child would have to repeat third grade if she did not attend summer school. The child could not attend the summer school session because she was to visit her father in Illinois for a month that summer. In the fall of 1991, the mother began home schooling the daughter at the third grade level.

The mother testified that she did not discuss the home schooling issue with the girl's father before the program began. The mother testified that the father did not object to the mother about the change in schooling, but he did tell his daughter several times on the telephone that he was not happy about it. When asked by the father's counsel about socialization, the mother stated that in addition to home schooling the daughter participated in Sunday school, the AWANA club (a church activity group), and field trips with ****638 ***308** other home schoolers, and attended church with her family.

The father testified that he lived in Aurora, Illinois, with his second wife, who was pregnant at the time of the hearing. He testified as to his current and previous employment. He testified that he had regular visitation with his daughter for approximately three to four weeks every summer and that he and the mother alternated visitation on the girl's birthday.

The father testified that he originally agreed to the mother moving with the daughter to Arizona, but later moved to vacate the order granting her permission because of what he claimed were "untruths" from the mother. He told the mother of the order which vacated the order giving her permission to remove the child from Illinois. He could not recall telling her that she had been held in contempt. He said that he requested that the mother move back with the girl, or give him custody of the child, both of which she refused.

The father also testified that prior to

June 1991 he did not know that his daughter was having problems in school. When his daughter visited him in the summer of 1991, he did not enroll her in summer school, although it was available. He testified that he told the mother he did not want her to home school the daughter and that he preferred to have the girl in either a public or private school. He testified that public schooling was his preference at the time of trial. However, he testified that if the court were to determine that the home schooling should continue, he would be willing to become ***214** qualified to conduct part of the home study program himself so that he could further extend his time with his daughter in Illinois. He testified that if he obtained custody of the daughter he would enroll her in a public school.

He said that he had waited to file his petition for custody because when the girl was younger, he was a single male and he did not think it was possible for him to take care of her. He testified that he and his daughter had spoken about his taking custody of her over the years. He had told her that when he remarried and there was someone else to help, he would want to take custody of her.

He admitted on cross-examination that he had had regular visitation with the daughter in the years 1987 to 1992 and that after each of those visitations he or a member of his family had put the daughter on a plane to send her back to Arizona, against the court order. At the close of the father's case, the mother moved for a directed finding, which was denied.

On direct examination, the mother explained the circumstances surrounding the alleged misrepresentations to her former husband regarding work in Arizona. She stated that before she left Illinois, she had been told that she would have a job with a company in Arizona. When she arrived in Arizona, she was informed that she would not be able to work with that company. However, she obtained a full-time job within two months after getting to Arizona and at that point worked full-time.

With regard to home schooling, the mother testified that she took her daughter out of public school because the child was falling behind in her classes. She learned of her daughter's poor performance through her bad grades, parent-teacher conferences, and the mother's personal observation in class as a teacher's aide. She also stated that the girl received little homework, and that which she did have would be done either incompletely or incorrectly. The mother volunteered as an assistant for her daughter's class one day a week. While doing so, she observed that her daughter was not attending to her school work, but was socializing with the other children.

The mother stated that after her daughter began home schooling she

greatly improved her grades and was more respectful to people. As for her written assignments, the mother related that the girl had started off by getting F's and D's on her papers, just as she had done in school. The papers were often incomplete. At the end of the year, she was completing every assignment with C's, B's and some A's. The daughter was also expressing excitement with learning for a change. ***215** The mother testified that the daughter "excelled" through 1 1/2 grades during the time the mother home schooled her.

****639 ***309** With regard to the home schooling, the mother testified that her husband, Kent Greenway, assisted in the instruction, particularly in math, English, and science. He had a four-year college degree and has also passed his certification for home schooling in Arizona.

The judge then conducted an *in camera* examination of the daughter, with a court reporter, outside the presence of counsel. At the time of the hearing the minor was 10 years old. She told the judge she had lots of friends in Arizona and that her mom's sister and dad were there. On the other hand, she said her own father and all her "real relatives" were in Illinois. In addition, her biological father and his wife were going to have a baby, and that was "exciting." She said that home schooling was okay, but she missed being in public school. She said she visited and played with kids her own age and named several of her girlfriends in the neighborhood.

The child testified that she wanted to live in Illinois with her biological father because she missed him a lot and she only got to see him three to four weeks a year. She said that her mother would refuse to let her stay with her father longer. When asked about the situation being reversed so she would live with her father, and visit her mother part of the time, she guessed that something could be worked out wherein she could get to go to Arizona and spend the whole summer.

The trial court entered a written order changing custody from mother to father. We note that although the trial court stated that the order rescinding leave to remove the child from Illinois was in full effect, the trial court did not remark that in order to satisfy the order it would be necessary to change custody to the father since the mother was now married and settled in Arizona. The court found both parties to be fit to exercise custody over the minor. The court found that a substantial change in the circumstances of the minor had occurred since the minor had been removed from public school and was being educated solely through home schooling. The court found scant evidence of the mother's training to home school and noted that the content of the program was uncertain. While not a controlling factor, the court found the minor preferred to live with her father in

Illinois. On these bases, the court rescinded leave to remove the child from Illinois, held that it was in the best interest of the minor that she be placed with her father, held that any findings of the prior finding of contempt were barred for lack of prosecution, ***216** and held that the parties were responsible for their own costs and attorney fees.

The mother filed a motion to vacate or reconsider the order changing custody. The court denied the motion in a memorandum opinion stating, in pertinent part:

> "Plaintiff further argues that the Court misunderstood the law at the prior hearing and placed the burden on plaintiff to prove that custody should remain with her. With this contention, the Court must disagree. The petition originally filed in this matter alleged a change in circumstances in that plaintiff had removed the child from the State of Illinois contrary to Court order and had removed the child from the public school system and was engaged in home teaching. Those allegations were sufficient to bring those issues before a Court for a determination. One of the advantages of the Court system is that the trier of fact can observe the demeanor of the witnesses. After listening to plaintiff's testimony and observing her demeanor, the Court can best describe her as self-righteously inflexible, a view echoed by the minor who firmly believed her mother would discourage contact with her father. In view of plaintiff's conduct in removing the child from Illinois and her reluctance regarding visitation, the Court cannot discount the minor's fears.
>
> While the Court agrees that home teaching is legal in Illinois, and evidently is in Arizona, such a drastic measure must be supported by some competent, admissible evidence to assure that the child's educational needs are being satisfied. Without such assurances, the Court cannot conclude that it is in the best interests of the minor to be removed from the public school system. This was only one of the issues upon which the Court's decision was ****640 ***310** based, but a minor's educational foundation must weigh heavily with any Court."

[1] On appeal, the mother argues, *inter alia,* that the trial judge improperly shifted to her the burden of proving that home schooling was in the child's best interests. A review of the record supports this assertion. Consequently, reversal is required.

[2] The father filed his petition to modify custody under section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610(b) (West 1992)). The statute provides in pertinent part:

> "The court shall not modify a prior

> custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his ***217** custodian, * * * and that the modification is necessary to serve the best interest of the child." (750 ILCS 5/610(b) (West 1992).)

Thus, to modify a custody order, a petitioner must demonstrate by clear and convincing evidence that (1) a change in circumstances of the child or his or her custodian from those existing under the original order has occurred; and (2) a modification is necessary to serve the best interests of the child. *In re Marriage of Burke* (1989), 185 Ill.App.3d 253, 259, 133 Ill.Dec. 408, 541 N.E.2d 245.

[3] In a custody proceeding under section 610(b) the custodial parent enjoys a presumption in favor of his or her continued custody of the child. (*In re Marriage of Andersen* (1992), 236 Ill.App.3d 679, 681, 177 Ill.Dec. 289, 603 N.E.2d 70.) "Section 610(b) reflects an underlying policy favoring the finality of child-custody judgments and making their modification more difficult." *In re Marriage of Wechselberger* (1983), 115 Ill.App.3d 779, 786, 71 Ill.Dec. 506, 450 N.E.2d 1385.

[4] In addition, under Illinois law, the custodial parent has the right to determine the type of education the child will receive:

> "Except as otherwise agreed by the parties in writing at the time of the custody judgment or as otherwise ordered by the court, the custodian may determine the child's upbringing, including but not limited to, *his education,* health care and religious training, unless the court, after hearing, finds, upon motion by the noncustodial parent, that the absence of a specific limitation of the custodian's authority would clearly be contrary to the best interests of the child." (Emphasis added.) (750 ILCS 5/608(a) (West 1992).)

This policy decision by the legislature is reinforced by the specific terms agreed to by the mother and father in their settlement agreement which was approved by the trial court and incorporated in the divorce decree: "the wife shall have the sole care, custody, control and education of the minor child of the parties hereto, subject only to the reasonable visitation rights of the husband." Thus, since the mother was awarded custody of the child, she had the right to determine how to educate the child.

[5] At the oral argument the parties agreed, as do we, that removing the child from school and initiating home schooling constituted a change in circumstances for purposes of section 610(b). Home schooling undertaken haphazardly or without regard to the

social detriment that could befall a child who is kept from his or her peer group may have a disastrous effect on the child's educational and social development. The trial judge correctly determined that the child's best interests warranted judicial inspection of the home schooling issue.

***218** [6] However, "[c]hanged conditions, in itself, is not sufficient to warrant a modification in custody without a finding that such changed conditions affect the welfare of the child." (*In re Marriage of Fuesting* (1992), 228 Ill.App.3d 339, 344, 169 Ill.Dec. 456, 591 N.E.2d 960.) The father had the burden of proving, by clear and convincing evidence, that a change of custody was in the best interests of the child. (See *In re Custody of Dykhuis* (1985), 131 Ill.App.3d 371, 373, 86 Ill.Dec. 728, 475 N.E.2d 1107; *In re Custody of Sussenbach* (1985), 108 Ill.2d 489, 499-500, 92 Ill.Dec. 556, 485 N.E.2d 367.) There is too much confusion in the record on this point.

****641 ***311** During his case, the father elicited testimony from the mother which showed that she had no formal education beyond high school except for her cosmetology training. The mother further testified that the training she had for home schooling consisted of "informal" training sessions. She did, however, take State teaching certification tests, submit the scores of these tests to the court as evidence, and state that she was qualified to home school in the State of Arizona.

While the father's counsel inquired of the mother during his case as to the standardized testing scores of the child after home schooling, counsel did not follow up on that line of questioning to ascertain what the scores were or what they meant. Counsel elicited further testimony that the home schooling began in September 1991, even though the mother did not stop working full-time until January 1992, facts from which counsel inferred that the mother could not have been effectively teaching the child if she was employed full-time outside the home. In addition, the mother testified that the child was involved in a Sunday school program at the church, was a member of an AWANA club, participated in home school field trips, and played with the other children in the neighborhood in the afternoons after she was finished with home schooling and the other children got out of school.

The mother testified in her case that the daughter's performance after home schooling greatly improved and that the girl was more respectful to people. In addition, the child had started off by getting F's and D's on her papers, while at the end of the year she was getting C's, B's and some A's. Additionally, the mother testified that her husband, who had a college degree and was certified to home school in Arizona, assisted her in instructing the child. The child testified that she would prefer to live with her father in Illinois and make

visits to her mother. The father also testified that should he get custody of the child, he would prefer to send the child to public school.

[7] It is arguably of concern that the mother has no formal education beyond her cosmetology training. We determine that the evidence of her informal training and her completion of some State teaching ***219** tests in Arizona does not demonstrate that she is competent to home school her child. The computer card included in the record and which the mother refers to as her certificate to home school states "Do not report the results of the ATPE to the County Superintendent until all basic skill components have been passed." The purported certificate is unsigned and in reality is a "score report." It does not clearly certify either her or her new husband as qualified for home instruction. The record is also silent as to the result of the county school superintendent's review of the child's annual achievement test results, which is the required Arizona independent evaluation of the child's progress academically. The father's counsel presented scant evidence of standardized test scores, which would have been useful in evaluating how the child was faring in the home schooling in comparison to her peer group which attends public school. In addition, it was argued that the child was well-adjusted socially in that she participated in numerous activities and played with friends in the neighborhood. This court is concerned about the fact that the mother was working full-time for the first few months of the home schooling, as this would seem to detract substantially from the time she could be instructing the child. In addition, although the child expressed a desire to live with her father, the desires of immature children are not controlling. *Shoff v. Shoff* (1989), 179 Ill.App.3d 178, 185, 128 Ill.Dec. 280, 534 N.E.2d 462 (case holding preference of eight-year-old child, who did not indicate sound reasoning for preference, was not given considerable weight in custody decision); *cf. In re Marriage of Valter* (1989), 191 Ill.App.3d 584, 590-91, 138 Ill.Dec. 799, 548 N.E.2d 29 (case in which trial court assigned some weight to 14-year-old child's preference in assigning custody on basis that child articulated very specific reasons for wishing to live with his mother).

In sum, little evidence was offered that home schooling was having any detrimental effect on the child. Nevertheless, the trial judge modified custody, primarily based on the home schooling issue. The judge's order ****642 ***312** and memorandum opinion make clear that the judge was unsure about the appropriateness of home schooling for the child. It was the father's job, however, to prove that home schooling was *not* in the child's best interests. The record is weak as to the effect of home schooling on this child.

[8] The reality of the situation before

this court is that custody was changed over 18 months ago. The child was 10 years old when she was uprooted and moved across the country. She is now almost 12 years old. She might well be starting junior high school in the autumn of this year. A simple reversal of the circuit court's decision would result in uprooting the child yet again, without regard to ***220** events that may have transpired in the past 18 months. If such a result furthered the best interests of the child, it would be by pure luck. As our colleagues in the first district have stated, the best interests of the child are the paramount concern for appellate courts in custody cases, and "[t]he strictures of the legal system should not operate to cause more chaos." *Carroll v. Carroll* (1978), 64 Ill.App.3d 925, 929, 21 Ill.Dec. 713, 382 N.E.2d 7.

Our decision, then, is to remand this cause for a full hearing to decide what would be best for this child. Two reasons, both intertwined with the child's best interests, convince us that remand is the preferred route. First, 18 months have passed since the custody change during which time the child went from a 10-year-old being home schooled in Arizona to a girl of almost 12 apparently attending a traditional school in Illinois. How the child has adjusted to these changes is a crucial factor to consider in determining her future. Second, it was never clearly determined whether home schooling was having a positive or negative effect on the child. The father should have proved that home schooling was not in the child's best interests. However, we will not mechanically change custody back to the mother in this case merely because she "won," without examination of the child's best interests.

Although remand in child custody cases is not the norm, it has been done before. In *In re Marriage of Sweet* (1982), 104 Ill.App.3d 738, 60 Ill.Dec. 199, 432 N.E.2d 1098, remand was ordered because the trial court's order changing custody did not contain statutorily required findings, and there was no evidence in the record as to the suitability of either parent or their homes for custody of the child under current circumstances. (*Sweet,* 104 Ill.App.3d at 743-44, 60 Ill.Dec. 199, 432 N.E.2d 1098.) In *Krabel v. Krabel* (1981), 102 Ill.App.3d 251, 57 Ill.Dec. 831, 429 N.E.2d 1105, the court vacated an order denying a petition for change of custody and remanded the case for a hearing on events that had taken place since the denial. (*Krabel,* 102 Ill.App.3d at 253-54, 57 Ill.Dec. 831, 429 N.E.2d 1105.) The court relied on Supreme Court Rule 366(a)(5) (now, as amended, 157 Ill.2d R. 366(a)(5)) giving appellate courts the power to make any order a case may require. (*Krabel,* 102 Ill.App.3d at 253, 57 Ill.Dec. 831, 429 N.E.2d 1105.) The court noted that each putative custodial parent, while otherwise fit, had breached the tenets of fundamental morality, and it was thus appropriate to see which parent had since corrected

his or her ways. *Krabel,* 102 Ill.App.3d at 253-54, 57 Ill.Dec. 831, 429 N.E.2d 1105.

We do not mean to imply that either parent in this case is immoral. The above cases merely show this court's power to protect the child's best interests when appropriate. Use of the power is appropriate in this unique case, despite the concerns of our dissenting colleague. We are not unmindful of the tactical advantage enjoyed by ***221** the father on remand as a result of our decision. We are bound, however, to consider the child's best interests above all other considerations. Our decision today is geared toward meeting that obligation in an informed manner, rather than hoping to meet that obligation by a mechanical application of normal rules.

On remand, the father shall have the burden of proof on the home school issue, assuming that the mother still would plan to home school the child in the event she regained custody. Additionally, the father, having received custody, shall not enjoy a presumption in favor of continued custody. Neither shall the mother benefit from the presumption, in view of the fact that she has not had custody in over 18 months.

****643 ***313** For the above reasons, we reverse the judgment of the circuit court of Kane County and remand this cause for further proceedings.

Reversed and remanded.

Justice GEIGER, specially concurring:

I agree that the record in this case does not support a finding that the father adequately proved that the best interest of the child required a change of custody. Further, I agree with Justice Inglis that the proper procedure here is to remand to the trial court for it to hold a hearing on the current best interest of the child. Unlike Justice Bowman, I find that we clearly have authority under *Krabel v. Krabel* (1981), 102 Ill.App.3d 251, 57 Ill.Dec. 831, 429 N.E.2d 1105, and Supreme Court Rule 366(a)(5) (157Ill.2dR. 366(a)(5)) to order the remand. Moreover, my purpose in specially concurring is to emphasize what I consider to be the important aspect of the remand, which is the nature of the hearing required.

As Justice Inglis' majority decision notes, the circumstances of the child weigh against a simple reversal of the trial court's decision to change custody. Clearly, from the appellant's perspective, the most favorable result would be an outright reversal, revesting custody in her without further proceedings. However, despite the fact that we find that the court lacked support for its order, we must not ignore the impact on the child which could flow from that decision.

Here, by virtue of the trial court's change order, the child was removed, albeit inappropriately, from the mother's household and placed in the father's custody. This change resulted

in significant geographical dislocation of the child. Furthermore, the parents' differences in schooling philosophy have resulted in the child being placed in a new school environment since the entry of the trial court order. As the majority decision notes, since the court changed her ***222** custody, the child has lived with the father for 18 months-long enough possibly to have adjusted to the many differences in her new surroundings.

Because of the strains that changes in custody place on a child, and because we must give preeminence to the best interest of a child in custody cases (see *Carroll v. Carroll* (1978), 64 Ill.App.3d 925, 21 Ill.Dec. 713, 382 N.E.2d 7), a concept which Justice Bowman's dissent generally acknowledges, I agree with Justice Inglis that it would be ill-advised for us merely to order the child automatically uprooted and returned to the mother without regard to the events following the court's change order. While a reversal and a return to the status quo ante may do justice in most cases, a determination of the best interest of the child requires that the court take into consideration what impact the experiences of the intervening time between the entry of the lower court order and the mandate of this court have had upon the child.

Under these circumstances, remand for a full hearing without a presumption favoring custody in either the father or the mother is the only proper disposition in this court. Unlike Justice Bowman, who would distinguish *Krabel* because in that case the appellate court was reviewing a trial court decision *not* to change custody, I do not find that this result disfavors the mother. Rather, I find it is the only way to ensure that the court determines the best interest of the child at the present time. By ordering the new hearing with the restrictions as to presumptions, we recognize that the relocation of the child was not the result of improper conduct by either parent, but rather resulted from an error of the court.

I do not find that our remand order in any way conflicts with our mandate under the supreme court rules. Further, if the result of the order is some measure of judicial inefficiency, ensuring that the best interest of the child is protected renders any inefficiency insignificant.

I strongly believe that the only method that can yield a proper result and protect the minor child following the court's erroneous change of custody in this case is a remand for a hearing that takes into account the events since the court's change order. On remand, the court must consider the child's best interest, and although the mother will ****644 ***314** not automatically regain custody, her position will be supported by our findings here that the father's showing in the original proceedings did not demonstrate that the best interest of the child favored a change of custody to him. After a full hearing the trial court will be in a position to enter

an order providing for the best interest of the child in the real world and not as may have appeared two years ago.

***223** Justice BOWMAN, concurring in part and dissenting in part:

I agree with the majority that reversal is proper, but assert that the cause should not be remanded. The majority was correct in determining that the trial court erred in changing custody from the mother to the father. It is clear from the record that the father did not sustain his burden to show that it was in the best interests of the child to change custody to the father.

However, I decline to rely on *Krabel v. Krabel* (1981), 102 Ill.App.3d 251, 57 Ill.Dec. 831, 429 N.E.2d 1105, as the majority does, to stand for the proposition that Supreme Court Rule 366(a)(5) gives the appellate court the power to remand child custody cases for further evidentiary hearings on the basis of the trial court's error and the need to determine the best interests of the child. Supreme Court Rule 366(a)(5) (now, as amended, 157 Ill.2d R. 366(a)(5)).

In *Krabel,* at issue was the custody of two minor children in a marriage dissolution case. Upon dissolution, custody of the children was awarded to the mother. Three years after the dissolution, the father petitioned for a change in custody on the basis of the mother's cohabitation with her paramour. The trial court denied the petition, and upon appeal, the appellate court vacated the trial court's order and remanded for an evidentiary hearing to determine whether the mother had changed her living situation or had gotten married in the time ensuing since the petition was denied. *Krabel,* 102 Ill.App.3d at 253-54, 57 Ill.Dec. 831, 429 N.E.2d 1105.

Krabel may be distinguished from the present case because in that case no change of custody occurred due to the trial court's decision, so the burden and the presumption which existed at the time of trial in *Krabel* were the same as the burden and presumption in place at the time of the hearing on remand. In contrast, in the present case, while the burden will remain the same, at trial the mother had the presumption in favor of maintaining her custody of the girl. However, upon remand she will be deprived of her presumption since the majority has determined that neither party will have the benefit of that presumption. For this reason, the father unfairly benefits from the majority's decision by having the mother stripped of her presumption.

Furthermore, the majority's ruling gives another advantage to the father: because of the majority's decision, the father will essentially receive another bite of the apple in that he now will be permitted to put on another case to demonstrate that it is in the best interests of the child to award custody to the father. The majority points out on page 16 that it was the father's job to show that home schooling was not in the child's best interests. I assert that

he did not do that and should not be given a second chance to show that.

***224** Thus, for these two reasons the father is unfairly advantaged and the mother disadvantaged by the majority's decision. Such a decision by the majority renders the trial court's decision meaningless, as it effectively mandates a new trial. For the same reason, it also abrogates judicial efficiency. I do not believe that Supreme Court Rule 366(a)(5) was meant to be expanded in this manner. Although the majority is correct in attempting to consider the best interests of the child, I believe that the majority improperly focuses on that purpose while ignoring the unfair advantages arising under this disposition which are not usually imparted during the appellate process.

For the foregoing reasons, I respectfully dissent.

Ill.App. 2 Dist.,1994.
In re Marriage of Riess
260 Ill.App.3d 210, 632 N.E.2d 635, 198 Ill.Dec. 305, 90 Ed. Law Rep. 722

Court of Appeals of Arizona,
Division 1, Department A.
Paollo JORDAN, Petitioner,
v.
The Honorable John REA, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Judge, Gerald Romine, Real Party in Interest.
No. 1 CA-SA 09-0007.

May 28, 2009.

Background: Ex-husband filed a petition to enforce the parenting plan. The Superior Court, Maricopa County, John Rea, J., reduced ex-husband's child support obligations and required ex-wife to choose a different private religious school for the children. Ex-wife then filed a special action, asserting that the trial judge's order was an abuse of discretion, by holding that in all cases, if one parent objects to children attending a religious school, the children must be removed from that school.

Holdings: The Court of Appeals, Barker, J., as matters of apparent first impression, held that:
(1) special action jurisdiction was appropriate on ground that the three issues presented to appellate court were pure questions of law that were likely to recur and had statewide importance;
(2) trial court erred when it resolved dispute of school placement by holding that any objection on religious grounds by ex-husband to a private religious school would be sustained;
(3) trial court is to apply a best interests standard when parents obligated to work together are unable to reach agreement as to school placement;
(4) private religious school may not be precluded from consideration as the child's school placement merely because it is a private religious school; and
(5) trial court has authority to order an objecting parent to pay child support for the school placement that is determined to be in the best interests of the child even if it is a private religious school.

Vacated and remanded.

Mueller & Drury, P.C., By JamesP. Mueller, Scottsdale, Attorney for Petitioner.

Rowley Chapman Barney & Buntrock, Ltd, By TimothyW. Durkin, Mesa, Attorneys for Respondent/Real Party in Interest.

Paul G. Ulrich, P.C. By PaulG. Ulrich, Phoenix, Additional Counsel for Respondent/Real Party in Interest.

OPINION

BARKER, Judge.

***1** ¶ 1 In this special action we address three issues of first impression with statewide application: (1) What standard is the superior court to apply when divorced parents who are to work jointly in determining school

placement for their child are unable to agree? (2) May a child be precluded from attending a private religious school solely because one parent objects on religious grounds? and (3) May a parent be required to pay tuition for a private religious school as part of his or her child support obligation?

¶ 2 As set forth below, we hold: (1) The superior court is to apply a best interests standard when parents obligated to work together are unable to reach agreement as to school placement; (2) A private religious school may not be precluded from consideration as the child's school placement merely because it is a private religious school; and (3) The superior court has authority to order an objecting parent to pay child support for the school placement that is determined to be in the best interests of the child even if it is a private religious school.

I.

¶ 3 Paolla Jordan ("Mother") and Gerald Romine ("Father") are the parents of two minor children, a daughter M., age 10, and a son A., age 7. Mother and Father divorced in December 2005. In the dissolution decree, the court approved of Mother and Father's parenting plan and awarded Mother and Father joint custody of M. and A. The court also awarded Mother child support.

¶ 4 Both M. and A. have attended a private religious school since kindergarten. Until January of this year, M. had attended the private religious school continuously for five years both before and after the divorce. She started attending the school in 2003 and is now in fifth grade. A. began attending the school after the divorce, in 2006, with the consent of both parents when he started kindergarten. He is now in second grade. Tuition for both children to attend the school costs $850 per month.

¶ 5 On September 5, 2007, Father filed a petition to modify child support, requesting a 54% reduction of his monthly payments. Mother requested a hearing on the matter. The superior court, Commissioner Steven Kupiszewski presiding, held an all-day evidentiary hearing on January 28, 2008. Father submitted to the court an updated affidavit of financial information and contended that he did not think it was economically feasible for his children to continue in a private school. Mother asserted that she and Father had previously agreed that the children would be home-schooled or placed in a private school, and she requested that the court include the children's $850 per month school tuition in Father's child support payments. Commissioner Kupiszewski noted that the parties entered a settlement agreement as to "all issues" but that "[t]he Agreement makes no mention of the modification of child support before this court nor any agreements regarding the issue of

private schooling for the children."Accordingly, on April 30, 2008, the Commissioner ruled as to each issue. The April 30 order required Father to pay the full tuition costs for both children at the private religious school on the basis that "this was the parties' pattern and practice and neither parent may modify the choice of schooling without the consent of the other parent or absent a court order."Father appealed the April 30 order to this court. That appeal is presently pending.

***2** ¶ 6 Father subsequently filed a petition in the family court to enforce the parenting plan. In his petition, Father argued that the April 30 ruling violated his constitutional right to direct the education and upbringing of his children and that it violated the terms of the parenting plan. Among other arguments, Mother asserted in response that the issue of which school the children should attend was addressed in the April 30 order. The family court, through Judge John Rea, issued a second order on December 9, 2008, reducing Father's child support obligations and requiring Mother to choose a different school for the children at the end of the term. The December 9 order effectively "reversed" the April 30 order which was (and is) pending appeal, and precluded the children from attending the private religious school after the month's end. In pertinent part, the December 9 order stated: "[F]or the purpose of our hearing today, if Father objects to continuing in the religious school, he has a right to make that objection, and the Court will uphold that objection."Mother then filed a special action asserting that the December 9 order was an abuse of discretion "by holding that in all cases, if one parent objects to [the] children attending a religious school, the children must be removed from that school."

¶ 7 After receiving the petition, we ordered the parties to file simultaneous briefs on whether the superior court had any jurisdiction to issue the December 9 order as it addressed the same issue presented in the April 30 order. *See* *State v. O'Connor,* 171 Ariz. 19, 21, 827 P.2d 480, 482 (App.1992) ("[A]n appeal generally divests the trial court of jurisdiction to proceed except in furtherance of the appeal."). As a result of the parties' briefing, this court discovered the April 30 order was unsigned, a necessary requirement for an appeal. *Eaton Fruit Co. v. Cal. Spray-Chemical Corp.,* 102 Ariz. 129, 130, 426 P.2d 397, 398 (1967) (holding that the court did not have jurisdiction to consider the appeal because the underlying minute entry order "was not signed by the judge and filed with the clerk of the court"). The department of this court before which the appeal of the April 30 order is pending then issued an order pursuant to *Eaton Fruit,* suspending the appeal in that matter and giving the parties an opportunity to obtain a signed version of the April 30 order. A form of signed order has now

been filed.

II.

[1][2][3][4]¶ 8 As the matter before us is a special action, our first task is the issue of jurisdiction. Special action jurisdiction is appropriate when there is no "equally plain, speedy, and adequate remedy by appeal."Ariz. R.P. Spec. Act. 1(a). Special actions may not be used as a substitute for an appeal. *Neely v. Rodriguez,* 165 Ariz. 74, 76, 796 P.2d 876, 878 (1990) (recognizing the "strong Arizona policy against using extraordinary writs as substitutes for appeals"). However, "where an issue is one of first impression of a purely legal question, is of statewide importance, and is likely to arise again, special action jurisdiction may be warranted." *Vo v. Superior Court,* 172 Ariz. 195, 198, 836 P.2d 408, 411 (App.1992); *see also In re Guardianship/Conservatorship of Denton,* 190 Ariz. 152, 154, 945 P.2d 1283, 1285 (1997) (accepting special action jurisdiction as the issue was "one of first impression in Arizona"; had "statewide significance," affecting more than just the parties involved; and was "purely a question of law"); *Qwest Corp. v. Kelly,* 204 Ariz. 25, 27, ¶ 3, 59 P.3d 789, 791 (App.2002) (accepting special action jurisdiction when "significant threshold questions raised are purely legal and of statewide importance"). This is such a case.

***3** [5]¶ 9 The three issues presented to us here (the applicable legal standard regarding a minor's school placement when parents are divorced, whether a private religious school may be disqualified for a child's school placement simply because it is a religious school and, if not, whether child support may be awarded based on tuition for a private religious school) are pure questions of law that are likely to recur and have statewide importance. As set forth in detail below, every joint custody arrangement in the state of Arizona is required to have a parenting plan that addresses education for the child. *See infra* ¶ 19;*see also*Ariz.Rev.Stat. ("A.R.S.") §§ 25-403.01, 25-403.02(A)(1) (2007). Thus, the issues arising here may arise in any joint custody case in Arizona when one parent desires the child to attend a private religious school and the other objects, unless the parenting plan leaves school choice to one parent alone or specifically addresses the parties' intentions with regard to private religious schools. Accordingly, jurisdiction is appropriate on this ground.

¶ 10 Based on the foregoing factors, we conclude that it is appropriate to exercise our discretion to accept special action jurisdiction. Having done so, we turn now to the three issues presented.

III.

[6]¶ 11 Because of the sequence in which the issues presented were ruled on below, we address first the question whether the superior court may decline to consider one parent's choice of a

private religious school for a child solely on the basis of the other parent's objection on religious grounds. We first examine pertinent terms of the parties' parenting plan. They provide:

7. The children shall attend school in the area and school district in which Mother resides, unless otherwise agreed to by Mother.

* * *

10. Both parents shall make all major educational decisions together for the children.

11. Mother and Father shall raise the minor child in the church of his/her choice/faith/religion. Mother and Father shall cooperate concerning all religious decisions for the children.

* * *

16. ... [a]ny disputes or conflicts with reference to childcare or major life decisions that cannot be resolved between the parties, or in the event of substantial and/or material changes which may occur making this parenting plan logistically impractical, the parties will submit their dispute to mediation ... before filing any action with the court.

In construing these provisions of the parenting plan, the trial court ruled as follows:

As to the question of the school that the children are currently attending, the evidence is clear that the academics in the school have been of benefit to the children. There is no reason to disapprove the school on the basis of academics. At the same time, it is clear that religion is an integral part of the curriculum, and the children are exposed to that. The parenting plan provides that both parents may raise the children in the church/faith of their choice. Neither parent has a veto power over the other parent's religious instruction and religious practices during that parent's parenting time. Both parents have the right to impart the religious training and follow the religious practices of their choice in a very broad range as long as it is not detrimental in some way to the children, or in some cases denigrating to the other parent, but that is not part of this case. *School is a time in which essentially it is neither parent's parenting time or both parent's parenting time. So, it is a theologically neutral time, and one parent does not have the authority to impart religious instruction during that time over the objection of the other parent, and this school has as an integral part of its curriculum religious instruction.*

***4** The Court reads the parenting plan to give Mother some discretion in choosing schools, and for the purpose of our hearing today, *if Father objects to continuing in the religious school, he has a right to make that objection, and the Court will uphold that objection.*At the same time, the children should certainly finish the existing term at

> the school where they are regardless of Father's objection. After the existing term is finished at the end of December 2008, Mother shall have the discretion to choose a school within her area or district, unless the parties agree otherwise.

(Emphasis added.)

¶ 12 The superior court's interpretation of the parenting plan precludes the children from attending the private religious school at issue.[FN1]Mother argues that the family court in effect gave Father "veto power" with regards to the children's schooling because the family court held that "if Father objects to continuing in the religious school, he has a right to make that objection, and the Court will uphold that objection."Father argues that because he has joint authority over the religious and educational upbringing of his children, he may refuse to consent to their attendance at a private religious school.

¶ 13 We agree with Mother that the court in effect vetoed her position. The parenting plan provides for mutual cooperation as to the children's education and religious upbringing: "Both parents shall make all major educational decisions together for the children."Thus, the parenting plan requires both parents to decide together the appropriate school. The family court, however, acted to exclude Mother's preference and accept Father's preference, finding it must uphold Father's objection to continuing in the religious school. The court explained that both parents "have the right to impart religious training," but that school "is a theologically neutral time." As one scholar, now judge, noted: "The problem with the secularization baseline is that it is not neutral in any realistic sense."Michael W. McConnell, *Religious Freedom at a Crossroads,* 59 U. Chi. L.Rev. 115, 189 (1992).[FN2] Excluding religious schooling from all potential school options, in effect, eliminates the option of religious schooling rather than treating it neutrally. *See id.*

[7][8]¶ 14 The United States Supreme Court has long held that parents have a fundamental liberty interest, under the Constitution, "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of Sisters of the Holy Names,* 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *see also Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (holding that the liberty guaranteed by the Fourteenth Amendment includes freedom to "establish a home and bring up children"). Thus, Mother has a constitutionally guaranteed right to participate in the education of her children, as does Father, and that right is not limited to providing education in a secular school as contrasted with a private religious school. Just as importantly, as described below, it may be directly contrary to the child's best interests to preclude a child from attending a religious school based solely

on the objection of an opposing parent.

***5** [9][10]¶ 15 Further, to the extent the superior court based its view that education must be "a theologically neutral time" on any specific terms of the parenting plan, it erred. As the parenting plan was incorporated into the dissolution decree, we review the interpretation of the parenting plan itself *de novo*. *See* *Palmer v. Palmer,* 217 Ariz. 67, 69, ¶ 7, 170 P.3d 676, 678 (App.2007) (applying a *de novo* review "regarding the interpretation of statutes and decrees of dissolution"). The parenting plan is also akin to a type of contractual agreement between the parties, which must be approved by the court. It was agreed to in writing by both Father and Mother. Viewed in that light *de novo* review is also appropriate. *Taylor v. Graham County Chamber of Commerce,* 201 Ariz. 184, 192, ¶ 29, 33 P.3d 518, 526 (App.2001) ("We review de novo ... any issues concerning contract interpretation.").

¶ 16 The parenting plan provides for mutual agreement, or, if anything, grants a preference on some issues to Mother ("The children shall attend school in the area and school district in which Mother resides, unless otherwise agreed to by Mother."). Nothing in the parenting plan gives either party the ability to object, based on the terms of the parenting plan, to placement in a private religious school. This is particularly so when one of the children was enrolled in the school prior to the divorce and continued to be enrolled in that school after the divorce. Had the parents wished to agree that a private religious school could not be considered for the children's school placement, they could have done so. *See* *Giacalone v. Giacalone,* 876 S.W.2d 616, 619 (Ky.Ct.App.1994) (holding that the parents' agreement with regards to custody did "not grant [the father] a veto power over the type of school chosen" when it stated that he "shall have the right to participate in decisions concerning each child's education" and that because he "could have bargained for veto power over the selection of a high school, but did not," the court could not "grant him power that he did not bargain for in the agreement"). Of course, this is not to suggest that the parties may so agree absent approval of the court. All terms in a parenting plan are subject to the court's approval to ensure that they are in the best interests of the child. A.R.S. § 25-403.01(C).

¶ 17 The family court resolved the dispute of school placement by holding, as a matter of law, that any objection on religious grounds by Father to a private religious school would be sustained. This was error.[FN3]

IV.

[11]¶ 18 Having resolved that the court may not preclude consideration of a private religious school simply because it is religious, we now turn to the question of the applicable standard to resolve the dispute over school

placement. Mother argues that the family court should have applied a best-interests standard rather than focusing only on Father's objection to the religious school. We agree.

***6** [12]¶ 19 In determining what standard to apply to this dispute of educational placement, we look to the statutory scheme to guide us. *Logan v. Forever Living Prods., Int'l,* 203 Ariz. 191, 193, ¶ 8, 52 P.3d 760, 762 (2002) ("We begin our analysis with the statute ... our foremost goal is to discern and give effect to legislative intent."). The statutory procedure for ordering joint custody requires that the family court find joint custody to be "in the child's best interests." A.R.S. §§ 25-403(A), -403.01(B), (C). Joint custody may be awarded whether or not the parties agree to it. A.R.S. § 25-403.01(B). When there is no agreement, the court must make "specific written findings of why the order is in the child's best interests."*Id.* Regardless of whether joint custody is awarded over the objection of one parent or upon the agreement of both, the parents are required to submit a proposed parenting plan. A.R.S. § 25-403.02(A). The parenting plan must include "each parent's rights and responsibilities ... for decisions in areas such as education ...."A.R.S. § 25-403.02(A)(1). Thus, in any child custody setting in the state of Arizona in which joint custody is awarded, a plan with regard to educational decisions for the child must be submitted. The legislature has also provided that "[i]f the parents are unable to agree on any element to be included in a parenting plan, the court shall determine that element."A.R.S. § 25-403.02(B). Overriding all of the court's considerations with regard to both approving joint custody and the parenting plan which is necessary for a joint custody order, is that the order "is in the child's best interests."A.R.S. § 25-403.01(B), (C). Thus, based on this clear statutory directive, we have no difficulty in concluding that when post-decree disputes arise under the specific terms of a parenting plan included as part of a joint custody order, a best-interests standard should be applied. Other jurisdictions have applied this same standard. *Infra* ¶ 25.

¶ 20 Father objects to applying this standard on the basis that it interferes with his constitutional right to direct the upbringing of his child. What Father's argument does not accommodate is that *each* parent has a constitutional right to the upbringing of his or her child. *Pierce,* 268 U.S. at 534-35, 45 S.Ct. 571; *Meyer,* 262 U.S. at 399, 43 S.Ct. 625.In this case, however, each parent has chosen to exercise that constitutional right in a different manner. Consequently, the court is called upon to resolve that conflict. In such a setting, there is no usurpation by the court of either parent's constitutional rights. We find apt the Alabama Court of Civil Appeals' description of this scenario:

> Like the courts in other states, Alabama courts have long recognized that one

> of the bundle of rights associated with custody is the right to direct and support the education of the child. Alabama law further recognizes that parents sharing joint legal custody without modification have equal constitutional rights to the care, custody, and control of the child and that, therefore, as a general rule, a court may apply the best-interests standard in a custody dispute between such parents without implicating the Fourteenth Amendment due-process rights of either parent.

***7** *Morgan v. Morgan,* 964 So.2d 24, 31, 32 (Ala.Civ.App.2007) (citations omitted) (holding that family court's exercise of jurisdiction granting the mother's motion to place their child in a public school "did not violate the father's constitutional right to control the education of the child").

[13]¶ 21 Mother also argues that we should be wary of the "religious argument" in this case, given that Father enrolled his first child in the private religious school, remained silent when his second child was also enrolled in the school, and did not raise any religious objections to the private school until Mother was awarded additional child support to pay for the tuition costs. Father's religious-based objection came within months of his statement to the court that he was "amenable" to the children continuing at a private Christian school, "if Mother desires to pay the tuition" notwithstanding that he was not a Christian. In terms of establishing the pertinent legal standard for reviewing a disputed educational placement, we need not consider whether or not Father's religious objection is genuinely held or based on a monetary or other motive. It is irrelevant to the issue before us.[FN4]For our purposes, it suffices simply to hold that Father's religious objection, whether genuine or not, cannot be the basis of precluding the superior court from *determining* what educational placement is in the child's best interests. *See Hoedebeck v. Hoedebeck,* 948 P.2d 1240, 1242, ¶ 8 (Okla.Civ.App.1997) ("This religious argument is neither new nor rare. Any time divorced parents have different religious faiths, [the religious argument] may be made by the losing party. The fact that one parent is awarded custody of the children does not, in itself, violate the other parent's religious rights.").

[14][15]¶ 22 Our holding is also consistent with "the firmly established principle that at all levels, at all times and in all forums, the welfare and best interest of the child is of prime and overriding importance as measured by the particular facts and circumstances of each case before the courts." *Funk v. Ossman,* 150 Ariz. 578, 581, 724 P.2d 1247, 1250 (App.1986). Of course, the "best interests of the child" standard does not and cannot abrogate a fit parent's constitutional right to direct the upbringing of his or her child. *Pierce,* 268 U.S. at 534-35, 45 S.Ct. 571; *Meyer,* 262 U.S. at 399, 43 S.Ct. 625.

Unless fit parents disagree, the courts have no jurisdiction to become involved with a fit parent's choices for the upbringing of the child and override that paramount parental privilege. The best-interests standard only applies to fit parents when they are unable to agree. *See* Morgan, 964 So.2d at 31-32; *Hoedebeck*, 948 P.2d at 1242, ¶ 8.

[16]¶ 23 Having established that the best-interests standard applies to a dispute about an educational placement and that the superior court may not rule out a placement in a private religious school simply because it is a private religious school, we now turn to the factors which should be applied. Here again, we look first to the statutory scheme. *Logan*, 203 Ariz. at 193, ¶ 8, 52 P.3d at 762.There is no specific statutory enumeration as to factors to be considered with regard to school placement. Accordingly, we draw upon the factors that the legislature has set forth for a determination of best interests as to custody in general as stated in A.R.S. § 25-403(A) and modify them to reflect school placement.

***8** The court shall consider all relevant factors, including:

1) the wishes of the child's parent or parents as to [school placement]

2) the wishes of the child as to [school placement]

3) the interaction and interrelationship of the child with [persons at the school] who may significantly affect the child's best interests, and

4) the child's adjustment to [any present school placement].

The family court should consider each of the foregoing factors. This listing, however, is not exclusive. As noted under § 25-403(A), the court should consider all relevant factors for guidance.

[17]¶ 24 Other jurisdictions, in applying a best-interests standard to the school placement question, have also considered the following factors. Arizona trial courts should consider them when applicable and as the circumstances warrant: (1) the child's educational needs; (2) the qualifications of the teachers at each school; (3) the curriculum used and method of teaching at each school; (4) the child's performance in each school; (5) whether the proposed or current school situation complies with state law; (6) whether one school is more suitable given the child's medical condition or other special needs; (7) whether one school would allow the child to maintain ties to a nonresidential parent's religious beliefs; (8) whether requiring the child to leave the child's current school would aggravate the difficulties of the divorce; and (9) whether continuing in a particular school would be essential or beneficial to the child's welfare. *See*

Donna G.R. v. James B.R., 877 So.2d 1164, 1168-69 (La.Ct.App.2004) (finding that homeschooling was not in the best interests of the children); *In re Marriage of Manning*, 871 S.W.2d 108, 110-11 (Mo.Ct.App.1994) (selecting a private school for the child, given that she had gone there the past nine years and not allowing her to continue would make the dissolution even more difficult); *Karetny v. Karetny*, 283 A.D.2d 250, 724 N.Y.S.2d 410, 410-11 (2001) (finding that it was not in the child's best interests to be educated only in an Orthodox Jewish yeshiva given that the longer school day at the yeshiva compared to a public school aggravated the child's Tourette's Syndrome); *In re Marriage of Shore*, 135 Ohio App.3d 374, 734 N.E.2d 395, 403 (1999) (upholding ruling that child's "best interests were served receiving a religious education"); *Staub v. Staub*, 960 A.2d 848, 856 (Pa.Super.Ct.2008) (concluding that home schooling was in the children's best interests); *Anderson v. Anderson*, 56 S.W.3d 5, 9 (Tenn.Ct.App.1999) (concluding that home schooling was not in the child's best interests).

[18]¶ 25 Therefore, to conclude this issue, the court must consider whether it is in the best interests of the children to continue attending the private religious school or to transfer to another school. The court may not preclude the private religious school as an educational placement simply because it is religious.

V.

***9** [19][20]¶ 26 We regard child support as a separate issue and therefore separately address whether Father may be required to pay for the school chosen under a best-interests standard. We do not consider that the obligation to pay child support for a private religious school is necessarily tied to the determination that attending a private religious school is in the child's best interests. However, as described below, it would seem unlikely that, if it were in the best interests of the children to continue attending (or be placed in) a private religious school, those expenses would not be factored into the child support equation. The exception to this may be when, even though it is in the child's best interests to attend a private religious school, it is still not consistent with "the ability of the parents to pay."Arizona Child Support Guideline 1(A), A.R.S. § 25-320 app. ("Guidelines").

[21][22]¶ 27 We review a family court's decision as to child support for abuse of discretion. *In re Marriage of Robinson and Thiel*, 201 Ariz. 328, 331, ¶ 5, 35 P.3d 89, 92 (App.2001). We review *de novo* a family court's interpretation of the Arizona Child Support Guidelines. *Id.* The applicable Child Support Guideline, Guideline 9(B)(2), provides that in determining the total child support obligation, the court "[m]ay add ... [a]ny reasonable and necessary expenses for attending private or special schools or necessary expenses to meet particular educational needs of

a child, when such expenses are incurred by agreement of both parents or ordered by the court."

¶ 28 The family court determined there was no agreement by both parents and concluded that it would only include private school tuition "if there [was] a written agreement by both parents."Therefore it did not include the costs of tuition in Father's monthly child support obligation.

[23]¶ 29 The family court's analysis is flawed as it does not acknowledge the disjunctive in Guideline 9(B)(2): child support based on an agreement of the parties *or* as ordered by the court. As set forth above, the court may find a private religious school is in the best interests of the children and order such a school placement without an agreement between the parties. *Supra* ¶¶ 20-22.The family court then has the ability, notwithstanding the lack of agreement by a parent, to order the objecting parent to pay the costs of tuition if the court determines that the tuition costs are "reasonable and necessary." Guideline 9(B)(2). The question of what is "reasonable and necessary" is within the sound discretion of the family court.

[24]¶ 30 Father argues that the family court cannot constitutionally require him to "financially support a religious institution that he does not subscribe to."In the setting of child support, other courts that have examined this issue have rejected this argument, and we do as well. An objecting parent is not being required to support a religious institution; rather, the objecting parent is being required to make a child support payment to his or her co-parent to provide for the child's education in a school the court has determined to be in the child's best interests. *See* *Flynn v. Flynn,* 7 Conn.App. 745, 510 A.2d 1005, 1007 (1986) (rejecting defendant's religious objection to paying for a parochial school, asserting that the court's order "in no way implicate[d] the constitutional provisions cited by the defendant" but "merely authorized a payment by the defendant for the education of his children," who had attended parochial school since kindergarten, paid for by defendant); *see also* *Hoefers v. Jones,* 288 N.J.Super. 590, 672 A.2d 1299, 1307-09 (Ch. Div.1994) (rejecting the defendant's arguments that "requiring him to contribute towards tuition costs at King's Christian School constitute[d] an involuntary support of religion," noting that the defendant was paying the tuition costs on his children's behalf, not his own behalf, in exchange for educating his children-a child-rearing need he was required to provide-and not for the purpose of financially supporting that institution); *Smith v. Null,* 143 Ohio App.3d 264, 757 N.E.2d 1200, 1202-04 (2001) (holding that the trial court did not violate the federal or state constitution by requiring the father to pay tuition for his son to attend a Catholic school, noting that the father's payments would

not be made to the school itself but rather to the other parent, that the government was not expressing a preference for a particular religion, and that parents are obligated to pay for their children's educational expenses).

***10** [25]¶ 31 Thus, if the trial court concludes that it is in the child's best interests to attend a private religious school, the trial court may also determine that such expenses are "reasonable and necessary" and order a parent to participate in paying for them, notwithstanding the parent's objection. There is no constitutional impediment to such an order. *See supra* ¶ 30.As noted at the outset, however, the trial court may also decline to order these expenses based on "the ability [or inability] of parents to pay."Guideline 1(A).

VI.

¶ 32 For the foregoing reasons, we vacate the family court's order and remand this case to the family court for proceedings consistent with this decision.

CONCURRING: SHELDON H. WEISBERG, Presiding Judge and JOHN C. GEMMILL, Judge.

FN1. The parenting plan provides for mediation. The record does not show that any mediation has taken place. Neither party, however, has invoked that portion of the parenting plan in this special action, and we do not address it. We note that Mother raised the issue of required mediation below. Our decision is without prejudice to Mother's (or Father's) assertion of the mediation clause upon remand.

FN2. Judge Michael W. McConnell presently serves on the United States Court of Appeals for the Tenth Circuit.

FN3. We further conclude that the trial court erred by ruling that the re-enrollment of the children in the same school they had been attending for several years constituted a new "major educational decision" that required the consent of both Mother and Father. To the contrary, Father apparently had originally consented to the children's attendance at the religious school. Now, he has changed his mind and wants the children to attend a public school. Therefore, it is Father, rather than Mother, who wishes to reach a new "major educational decision" under the terms of the parenting plan, and without Mother's agreement, it is Father who has the burden to show that his proposed change in the children's school is in their best interests.

FN4. We do not preclude the

> trial court's consideration of this factor, however, as it may be relevant to evaluating the Father's wishes which are to be considered when determining what is in the child's best interests. *See infra* ¶¶ 24-25.

Ariz.App. Div. 1,2009.
Jordan v. Rea
--- P.3d ----, 2009 WL 1491343 (Ariz.App. Div. 1)

Prystay v. Avildsen
251 A.D.2d 87, 673 N.Y.S.2d 679
N.Y.A.D.,1998.

251 A.D.2d 87673 N.Y.S.2d 679, 1998 WL 297726, 1998 N.Y. Slip Op. 05426

In the Matter of Myroslawa Prystay, Respondent,
v.
John G. Avildsen, Appellant.
Supreme Court, Appellate Division, First Department, New York

(June 9, 1998)

CITE TITLE AS: Matter of Prystay v Avildsen

Order, Family Court, New York County (Leah Marks, J.), entered on or about February 14, 1997, which rejected respondent's objections to the decision and order of the Hearing Examiner dated November 29, 1996 directing respondent to pay all expenses for the subject child's attendance at private school, unanimously affirmed, without costs.

We agree with Family Court that it would be in the best interests of the subject child to remain at the private military boarding school he has attended for the past five years and at which he has only one year to go before graduation (*see, Valente v Valente,* 114 AD2d 951), and, accordingly, that an award of educational expenses for that purpose pursuant to Family Court Act § 413 (1) (c) (7) is appropriate. The child's performance at the boarding school has been successful in both academic and military areas of instruction and has been free of the difficulties and behavioral problems exhibited by him at the public school he attended prior to his enrollment at the boarding school. Respondent is fully able to pay for the child's attendance at the boarding school, and while two other sons of his attended public school, "it would be improper to assume that whatever is good for one child is automatically good for the other [child]" (*Matter of Cassano v Cassano,* 203 AD2d 563, 565,*affd*85 NY2d 649).

While we agree with respondent that certain documents proffered by petitioner should not have been received in evidence ***88** as business records pursuant to CPLR 4518 (a) (*see, Matter of Jodel KK.,* 189 AD2d 63,*lv denied*82 NY2d 652), even without the disputed evidence it is clear that it is in the child's best interests to allow him to complete the course of private school study in which he has been successfully engaged for the last five years.

We have considered respondent's remaining contentions and find them to be without merit.

Concur--Sullivan, J. P., Rosenberger, Wallach and Andrias, JJ.

Matter of Prystay v Avildsen

251 A.D.2d 87

Court of Appeals of Kansas.
In the Matter of the MARRIAGE OF
David B. DEBENHAM, Appellant,
and
Donna L. (Debenham) Ellis, Appellee.
No. 71,700.

June 9, 1995.

After award of joint custody of child in divine action, father challenged mother's enrollment of child in private religious school. The District Court, Shawnee County, Gary L. Nafziger, J., assigned, ruled that it was in child's best interest to remain at private school. Father appealed. The Court of Appeals, Elliott, P.J., held that decision that child should remain at private school was justified.

Affirmed.

*****1099 *121*** *Syllabus by the Court*

1. K.S.A. 60-1610(a)(4) is construed and applied.

2. When a trial court, under a joint custody order, bases a decision concerning educational placement of a minor child on the best interests of the child, that decision will not be reversed absent an abuse of judicial discretion.

3. A presumption of validity attaches to the judgment of a trial court.

Alan F. Alderson and Mark A. Burghart, of Alderson, Alderson & Montgomery, Topeka, for appellant.

Robert E. Keeshan and Mark L. Burenheide, of Hamilton, Peterson, Tipton & Keeshan, Topeka, for appellee.

Before ELLIOTT, P.J., and LEWIS and GREEN, JJ.

ELLIOTT, Presiding Judge:

David Debenham appeals the post-divorce order concerning where his minor child Cortney shall attend school.

We must affirm.

David and Donna Debenham Ellis were divorced in 1990; the trial court awarded joint custody of Cortney, with Donna having primary residential custody. Under the order, both parents had equal rights to make decisions regarding Cortney's schooling and educational placement.

Donna enrolled Cortney in the Cair Paravel Latin school against David's wishes. Eventually, the trial court ruled that Cortney remain at Cair Paravel "until such time as the parties shall agree otherwise or upon further order of the Court."

***122** K.S.A.1993 Supp. 60-1610(a)(4)(A) provides that in the event of joint custody, "the parties shall have equal rights to make decisions in the best interests of the child under their custody."

Our standard of review on this issue is one of first impression; other states have resolved the question in numerous ways, none of which is completely satisfactory. See, *e.g., Jenks v. Jenks,* 385 S.W.2d 370, 376-77 (Mo.App.1964) (agreements to agree in the future are unenforceable; custodial parent responsible for making decisions covering schooling); *Griffin v. Griffin,* 699 P.2d 407 (Colo.1985) (court not in a position to substitute its choice of schools for that of parents; therefore, custodial parent's decision upheld); *Burchell v. Burchell,* 684 S.W.2d 296, 300 (Ky.App.1984) ("Once the parents have abdicated their role as the custodians to the trial court, its decision is binding on the parties until it is shown that the decision is detrimental to the child physically or emotionally, or is no longer in his best interest.").

Unlike the parties in *Jenks* and *Griffin,* David and Donna do not have a joint custody agreement; they have a joint custody *order.* K.S.A. 60-1610(a)(4) provides that joint custody is preferred in Kansas; accordingly, dissolving the joint custody arrangement would violate public policy.

[1] In the present case, the trial court determined it was in Cortney's *best interest* to attend Cair Paravel, Donna's choice of school. Donna argues the joint custody order is unenforceable-and, if not, the primary custodian should become the decision maker. But if we were to adopt Donna's latter argument, the primary custodian would have the trump card in *all* decisions contrary to the statute, which provides for "equal rights" to make decisions.

This case demonstrates the accuracy of the Kentucky Court of Appeals' statement concerning joint custody: "Like so many theories which have a noble purpose they often prove to be unworkable when tested in a practical world." ****1100***Burchell v. Burchell,* 684 S.W.2d at 301 (Gudgel, J., concurring and dissenting).

We need not set a bright line rule. The trial court based its decision on its perception of what was in the best interest of the child. We are unable to state that test is inappropriate since the ***123** statute uses that phrase. See *In re R.P.,* 12 Kan.App.2d 503, 504-05, 749 P.2d 49,*rev. denied*243 Kan. 779 (1988).

[2] David next argues the trial court erred in not following the Shawnee County Family Law Guidelines providing that the court should usually not order a child to attend a private or church-sponsored school. Shawnee County Family Law Guidelines 7.20. Our Supreme Court has held these guidelines are not court rules and are not binding on the court. *In re Marriage of Soden,* 251 Kan. 225, 235, 834 P.2d 358,*cert. denied* 506 U.S. 1001, 113 S.Ct. 604, 121 L.Ed.2d 540 (1992). The trial court did not abuse its discretion in refusing to follow the guidelines.

[3] David also argues the trial court order violates the First Amendment

because it effectively established a preference for a private religious school. Here, the trial court expressly found it "does not view this as a matter of religious or educational preference but solely an issue of stability and the continued best interest of the minor child." The trial court's order does not violate the First Amendment. See *Griffin,* 699 P.2d at 410-11.

[4] David also argues the trial court abused its discretion in finding what is in the best interests of Cortney. David argues the trial court's ultimate findings are a complete reversal of the court's prior findings that it only involved kindergarten. We have searched the record in vain to find a statement by the trial court that the initial ruling involved "only kindergarten."

Further, at the ultimate September hearing, David testified:

"Q. Are you asking the court to make an immediate change?

"A. No, we're not.

"Q. All right.

"A. We have reviewed the-Cortney has already started kindergarten at Cair Paravel. We believe it's in her best interest to go ahead and finish the school year out at Cair Paravel, no matter which ruling.

....

"A. The kids in her class-she knows the kids in her class, knows the curriculum, procedures-knows the rules. Knows what she's supposed to do and not supposed to do. It's in her best interest to stay where she is for this year."

In our opinion, David not only acquiesced in that portion of the trial court's ruling that Cortney remain at Cair Paravel for the remainder***124** of the 1993-94 school year, but also relieved the court of making a faster ruling because any ruling made prior to the end of the school year would not change the situation.

[5] We mention this almost nonissue because Donna argues David is now estopped from objecting to Cortney's school placement. Such is simply not the case. David and Donna have joint custody and thus have and continue to have equal rights regarding educational placement. Donna's good faith effort to include David in the school decision regarding kindergarten does not stop him from objecting to her decision regarding school placement in the future. While the trial court did not abuse its discretion in deciding (in the best interest of the child) which school Cortney should attend for the term here involved (see *In re Marriage of Ross,* 245 Kan. 591, 597-98, 783 P.2d 331 [1989]), David is *not* estopped from challenging Donna's choice of schools in future years.

[6] Finally, David argues the trial court's order is not supported by

substantial competent evidence. The trial court found Cortney was well adjusted to Cair Paravel and therefore should remain there. David did acquiesce in that portion of the order that Cortney complete kindergarten at Cair Paravel. And there was evidence that it would be in Cortney's best interest to not change schools in first grade.

The public school principal where David wanted Cortney to attend testified that although changing her to her neighborhood ****1101** school would be less of a problem than other changes of schools, any change between kindergarten and first grade "could affect the child." He also testified that regarding any change of schools, consistency is important in early childhood. David testified that Cortney was well adjusted at Cair Paravel.

[7][8] The trial court's finding that the stability of continuing Cortney at Cair Paravel, at the time, was in the child's best interest was supported by the evidence and was not an abuse of discretion. And a presumption of validity attaches to the trial court's judgment. *Cason v. Geis Irrigation Co.*, 211 Kan. 406, 412, 507 P.2d 295 (1973).

This was not an easy case to decide. We recognize that, probably, neither party will find much satisfaction with our decision. The ***125** parties may well litigate the school issue on a yearly basis. But our legislature has declared joint custody and equal decisional rights as the public policy of this state. Under such mandate, courts are ill-equipped to decide these questions; but the courts must do so as best they can.

Affirmed.

Kan.App.,1995.
Matter of Marriage of Debenham
21 Kan.App.2d 121, 896 P.2d 1098, 101 Ed. Law Rep. 454

Missouri Court of Appeals,
Southern District,
Division Two.

In re the MARRIAGE OF Linda MANNING and Boyd H. Manning, Jr.,
Linda Manning, Petitioner-Appellant,
and
Boyd H. Manning, Jr., Respondent.
No. 18489.

Feb. 28, 1994.

The Circuit Court of Greene County, Donald E. Bonacker, J., entered decree dissolving parties' marriage, and wife appealed. The Court of Appeals, Prewitt, J., held that: (1) trial court erred in calculating husband's gross monthly income for child support based on earnings that were reduced shortly before trial, and (2) costs of daughter's private school should be considered in assessing child support.

Affirmed in part, reversed in part, and remanded.

***109** John S. Pratt,Pratt & Fossard, Springfield, for petitioner-appellant.

David A. Fielder, Michael K. Cully, Lowther, Johnson, Joyner, Lowther, Cully & Housley, Springfield, for respondent.

PREWITT, Judge.

Petitioner appeals from a decree dissolving the parties' marriage. She states that the trial court erred in determining child support, awarding respondent the dependency tax exemption, denying her maintenance and denying her attorney's fees and suit money.

[1][2] Review is under Rule 73.01. It requires that we affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or unless it erroneously declares or erroneously applies the law. *In re Marriage of Goostree,* 790 S.W.2d 266, 267 (Mo.App.1990). Due regard is given to the opportunity of the trial judge to determine the credibility of witnesses. Rule 73.01(c)(2); *In re Marriage of Lafferty,* 788 S.W.2d 359, 361 (Mo.App.1990).

The parties were married on May 12, 1974. They adopted a female child, Christy Ann ***110** Manning, born May 10, 1979. The parties separated on October 15, 1991, and petitioner's petition for dissolution of their marriage was filed on November 12, 1991. The court heard this matter on August 31, 1992 and October 6, 1992. The court entered its decree on October 15, 1992.

[3] In her first point petitioner asserts that the trial court erred in following the Form No. 14 (see Rule 88.01) which calculated respondent's monthly gross income as $2,016 per month. Petitioner states this figure was not supported by the evidence as the proper amount "was $5,544.05 which was the amount historically earned by

the respondent until shortly before the trial ... and such reduction of income was of a transitory or temporary basis". Petitioner states that the reduction of income was "brought on by either situational depression because respondent was involved in a relationship with another woman or such reduction was brought on by the voluntary and deliberate actions of the respondent in performing his work in such a manner that his income was reduced by his employer."

[4] Past, present, and anticipated earning capacity is considered in determining the ability of a parent to pay child support. *Goodwin v. Goodwin,* 746 S.W.2d 124, 126 (Mo.App.1988). *See also Schulze v. Haile,* 840 S.W.2d 263, 264 (Mo.App.1992); *Riaz v. Riaz,* 789 S.W.2d 224, 228 (Mo.App.1990) (manipulation of income).

The testimony presented by respondent as to his income was suspect at best. Respondent's immediate supervisor testified that he cut respondent's commission rate from 3% of the total dealership business to 1.5% May 1, 1992. This was, he said, due to the car business being down for the last two years and a poor performance by respondent beginning in April 1991. During that time, however, respondent's income was increasing. He averaged approximately $4,300 per month in 1990, $5,200 a month in 1991 and $5,500 a month for the first four months of 1992. Respondent also testified that depression, to which he attributed the poor performance referred to by his supervisor, had been present for three years previous to the trial.

Even if we presume the evidence of respondent's income and work performance was true, that does not mean the income used by the trial court was correct. The evidence indicated that it was a temporary reduction.

Courts in other cases have been hesitant to fashion orders based on substantial changes in income shortly before trial. *See Steffens v. Steffens,* 773 S.W.2d 875, 877 (Mo.App.1989) (approving child support of $204.25 per month per child for three children where father had been on sick leave for four months preceding trial, seeing a psychiatrist for depression, and receiving disability payments of $257.00 per week). *See also Bathon v. Bathon,* 741 S.W.2d 100 (Mo.App.1987) (approving denial of maintenance to wife who had missed six months of work preceding trial due to a "nervous condition" brought on by "too much pressure" causing numbness throughout her body, for which she was being treated).

As the reduction in respondent's income occurred shortly before trial and as the last evidence was heard on this matter well over a year ago, we believe this matter should be further examined. Rule 84.14 empowers an appellate court to enter such decree as the trial court should have entered. However, "we should not do so absent

a record and evidence upon which we can perform that function with some degree of confidence in the reasonableness, fairness, and accuracy of our conclusion." *In re Marriage of Parker,* 762 S.W.2d 506, 514 (Mo.App.1988). *See also Grunden v. Nelson,* 793 S.W.2d 569, 576 (Mo.App.1990). Under the circumstances here we think reversal and remand is necessary. The determination of child support is reversed and upon remand further evidence regarding it may be presented.

[5][6] Petitioner's second point also relates to child support. The parties' child attends Greenwood, a "laboratory" school at Southwest Missouri State University. She has gone there since kindergarten, the past nine years. Tuition there is currently $2,100 a year and her books for the school year of the trial cost $155. Petitioner borrowed money for these expenses from her mother. ***111** The parents, joint legal custodians under the decree, apparently could not agree on the proper school for Christy. In such a case it is within the trial court's discretion to participate in school selection in order to protect the best interests of the child. *Sunderwirth v. Williams,* 553 S.W.2d 889, 894 (Mo.App.1977). *But cf.*§ 452.405 RSMo 1986*and Anderson v. Anderson,* 437 S.W.2d 704, 712 (Mo.App.1969) (decisions regarding child's education are for the custodian).

[7] The trial court determined that there was "no special need for the Child of the parties to attend a particular school" and no cost for this schooling was used in calculating child support. We believe this is erroneous. Dissolution is difficult for a child. Not allowing the child to continue at the school she has been attending would make it more so. Allowing children to continue at a private school can be "a condition essential to the welfare of the [child]". *See Margolin v. Margolin,* 796 S.W.2d 38, 43 (Mo.App.1990).

[8][9] The cost of education, including for a private school, is a proper factor in awarding child support. *Stitt v. Stitt,* 617 S.W.2d 645, 647 (Mo.App.1981). *See also* Form 14 and amended Form 14. However, including costs for private education is conditional upon such education being within the financial means of the person or persons providing support. *Markowski v. Markowski,* 793 S.W.2d 908, 910 (Mo.App.1990); *Stitt,* 617 S.W.2d at 647; *Degenar v. Degenar,* 478 S.W.2d 687, 689 (Mo.App.1972). We are convinced that the parties' means were such that the child should be allowed to continue at Greenwood and that the cost should be considered in assessing child support.

[10] Petitioner's third point goes to the trial court's determination that respondent should receive the dependency tax exemption for the child. *Vohsen v. Vohsen,* 801 S.W.2d 789, 790-792 (Mo.App.1991) held that the trial court may determine that the

noncustodial parent can claim a child as a dependent for income tax purposes if the trial court orders the custodial parent to annually sign the proper form and the noncustodial parent attaches that declaration to the noncustodial parent's tax return (apparently federal return). *Vohsen* was followed and approved in *Mehra v. Mehra*, 819 S.W.2d 351, 357 (Mo. banc 1991). As child support will be again considered, whether there was error regarding the dependency exemption need not be determined.

Petitioner contends in the remaining two points that the trial court erred in not granting her maintenance and ordering petitioner to pay her attorney fees. In view of the large disparity in the parties' income, we agree. However, the amount of maintenance and attorney fees to be paid may well hinge upon respondent's current income. The trial court should give further consideration to both matters upon remand.

The portions of the decree of dissolution regarding child support, the dependency tax exemption, maintenance and attorney fees are reversed and in all other respects the decree is affirmed. The cause is remanded for further proceedings in accordance with this opinion.

FLANIGAN, P.J., and CROW, J., concur.
Mo.App. S.D. 1994.
In re Marriage of Manning

Supreme Court of Nebraska.
Lawrence E. Von TERSCH, Appellee and Cross-Appellant,
v.
Geraldine A. Von TERSCH, Appellant and Cross-Appellee.
No. 89-776.

May 4, 1990.

Parties' marriage was dissolved by the District Court, Douglas County, Paul J. Hickman, J., and they appealed from custody and dissolution provisions. The Supreme Court, Shanahan, J., held that: (1) language in dissolution court's custody order, requiring mother to remove children from religious school in which they were enrolled and to place them in public school, did not impinge on mother's First Amendment rights; (2) order nevertheless constituted abuse of dissolution court's discretion, absent showing that children's enrollment in religious school posed demonstrated, serious threat to health or well-being; and (3) order awarding custody to mother and requiring father to abstain from liquor in connection with visitations was not abuse of discretion.

Affirmed in part and reversed in part.

Boslaugh, J., dissented in part and filed opinion.

****131** *Syllabus by the Court*

***263** 1. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Divorce: Child Custody.** A custodial parent in a marital dissolution proceeding may determine the nature or extent of the education for a child legally affected by the dissolution proceeding unless there is an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the child's safety, well-being, or health, whether physical or mental.

3. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
Lorin C. Galvin, for appellant.

James S. Jansen, of Stave, Coffey,

Swenson, Jansen & Schatz, P.C., for appellee.

Kelly K. Duncan, for amicus curiae Rutherford Institute of Neb.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

***264** SHANAHAN, Justice.

In this appeal from the district court for Douglas County, which dissolved the marriage of Geraldine A. Von Tersch and Lawrence E. Von Tersch, Geraldine Von Tersch (Geri), as custodial parent, contends that the district court erred in (1) requiring that the parties' minor children attend a public school rather than a private school of Geri's choice and (2) awarding insufficient child support, distributing the parties' marital property, allocating debts, awarding an inadequate attorney fee for Geri's lawyer, assessing Geri with the costs of the eventual sale of the parties' residence, and charging the gross marital estate with the costs of a psychological child custody evaluation. Lawrence Von Tersch (Larry) cross-appeals, contending that the district court erred in granting Geri custody of the Von Tersch minor children and in ordering Larry to refrain from drinking alcoholic liquor in relation to visitation of his children.

****132** Von Tersches were married in November 1964 and have four children from their marriage. Only two of the Von Tersch children are legally affected by the dissolution proceedings, namely, Kurtis and Kyle, twin boys born May 17, 1980. During the early years of the marriage, Larry earned a degree in physical education in 1967 and, after graduation, taught high school physical education from 1967 through 1973, although his teaching career was interrupted by 1 year's military service in Vietnam. Eventually, Larry became a high school head football coach and physical education instructor, but in 1984 left teaching and joined the sales force for an Omaha-based corporation. At the time of trial, Larry had an annual gross salary of $37,000 as a senior account representative.

When Larry and Geri married, Geri worked as a medical assistant and secretary at Physicians Clinic, but took time off regarding the birth of the two oldest Von Tersch children. In 1979, Geri went to work as a secretary and receptionist and earned approximately $4.50 per hour, but, due to complications in her pregnancy with the Von Tersch twins, had to leave her secretarial-receptionist job. Since the twins' birth, Geri has not been employed outside the Von Tersch home. However, at the time of trial, Geri worked full time as a volunteer secretary and ***265** teacher's aide at the grade school attended by the Von Tersch twins and received no compensation for her services at the twins' school. Throughout the marriage, Geri was mainly responsible

for rearing the Von Tersch children.

The Von Tersch marital estate included a southwest Omaha residence, which was valued at $62,500 and was subject to a $20,000 mortgage. Von Tersches also owned 2 acres of land in rural Douglas County, which was sold for $9,300 some 3 weeks before the dissolution trial. Other assets included a money market account, a 401K plan with Larry's employer, an IRA account, stock and various insurance policies, two automobiles, and miscellaneous household goods and furnishings.

Prior to trial in the marital dissolution proceedings, the Von Tersch family had attended a Catholic church fairly regularly until 1978, when they began going to various Protestant churches. In 1986, Geri commenced attending services at the Sword of the Spirit Church and enrolled the Von Tersch twins in kindergarten at the church's school, a "private Christian school" which had as its primary purpose "to train the student in the Christian way of life and to give the student a good general education." Although Larry and Geri do not share the same religious beliefs, the dissimilarities of their religions are not a major source of controversy between the couple. After Larry returned to the Catholic church in May 1988, the parties alternated the twins' church attendance, that is, one Sunday Larry took the boys to his church, and the following Sunday Geri took them to her church. Neither party objects to this arrangement, which exposes the twins to both the Catholic faith and Geri's religious beliefs.

Geri and Larry experienced various difficulties, such as problems arising from Larry's drinking and gambling activities. On at least five occasions, professional counselors suggested that Larry seek treatment for his drinking problem. Geri expressed concern about Larry's drinking in the presence of the twins, particularly when he was driving the car in which the twins were riding. Larry regularly attended races at horse or dog tracks.

Geri and Larry differed in their views on rearing and ***266** disciplining the twins, and also disagreed about the twins' participation in sports, especially when Geri balked at the boys' playing soccer. As a former physical education teacher, Larry felt that the twins' participation in sports was very important to their development and, consequently, encouraged and coached the twins in baseball, soccer, hockey, and basketball.

The couple attended marriage counseling, but their marital problems persisted. In September 1985, Larry filed a petition for dissolution of his marriage to Geri. The court entered a temporary order that ****133** the parties have joint custody of the children. Nevertheless, Larry and Geri continued to live together in the family residence and attempted to reconcile their differences. Despite a provision in the temporary order that attendance at a

public school was in the twins' best interests, Geri wanted the twins to attend Sword of the Spirit school. Larry, however, believed that the boys would be better off in a public school. "[T]o make the marriage workable," Larry acquiesced in Geri's wishes for education of the twins.

Sword of the Spirit school is a small private school operated in urban Omaha. Although the school was founded in 1981 and was state approved, after adoption of "Rule 13" of the Nebraska Department of Education's regulations and procedures in 1984, the school elected to become exempt from state approval or accreditation requirements and standards, an exemption authorized by 92 Neb.Admin.Code, ch. 13, § 003.01 (1984), and Neb.Rev.Stat. §§ 79-1701 et seq. (Reissue 1987) which, generally, provide for exemption from state accreditation or approval requirements, such as certification requirements for teachers in private, denominational, and parochial schools.

Children attending the Sword of the Spirit school are taught in small classes, consisting of approximately 12 students. The school has 14 teachers, some of whom are teachers certified by the state, while others are not. Teachers assigned for the Von Tersch twins held valid teaching certificates. The school's academic program follows traditional approaches to education with a wide range of subjects. The kindergarten curriculum consists of language arts, science, and arithmetic. For first grade and succeeding grades, the curriculum, in addition to the ***267** aforementioned kindergarten subjects, includes history, geography, health, safety, and manners. All classes engage in daily Bible study. At the time of trial, the Von Tersch twins were in the third grade, with satisfactory performance in their studies.

In 1988, the court appointed a guardian ad litem for the Von Tersch twins and ordered a comprehensive child custody evaluation, which was rendered by Joseph L. Rizzo, a clinical psychologist. The custody evaluation included interviews with Geri and Larry, psychological evaluations of the parents and the twins, and psycho-educational testing of the twins by a certified school psychologist. Dr. Rizzo described the twins as "very socially conscious, precocious, challenging, and seem to have the capability of generating a wide variety of interests."

Regarding the Sword of the Spirit school and the needs of the twins, Dr. Rizzo stated:

[T]he strong focus on academic basics [at the school] will have a very limiting effect as these children are not the Above Average children who can self teach themselves. They, themselves, tend to be in need of structure, guidance and active teaching, in which The Sword of the Spirit School is limited. Additionally, not having any supplemental programs in place as of

this date in Art, Physical Education, Reading, Shop, Special Ed as well as not having any laboratory, Science or Laboratory Math courses compounds and generates a sense of awkwardness and potential vulnerability for the children.

Dr. Rizzo believed that Geri "takes responsibility of the children extremely seriously," but indicated that she minimizes the twins' needs to be with their peers or to have time to themselves. Dr. Rizzo stated that, while first amendment, namely, her freedom of religion, see U.S. Const. amend. I, and refers to *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), which, when read together, support the constitutional principle that a state cannot interfere with a parent's liberty interest to direct the upbringing of the parent's child or children, including educational and religious instruction, in the absence of jeopardy to the child's health, safety, or significant social concerns. See, also, U.S. Const. amend. XIV (no state shall deprive any person of life, liberty, or property without due process of law).

While Geri points out the constitutional limitations on a state's interference with parents in the religious upbringing of their children, we do not believe that the Von Tersch case rises to the level of a question about a parent's constitutionally protected right concerning religious training or upbringing of the parent's child. Larry does not object to his sons' attending Sword of the Spirit school and receiving religious instruction at the school. Rather, Larry's disapproval of the school is based on the school's physical structure, lack of state certified teachers, and the absence of supplemental classes, such as physical education, art, music, industrial arts, and computer programming. As previously noted, although Larry and Geri have "religious differences," neither complains that the twins' exposure to the differing parental religions has a deleterious or detrimental effect on the health, safety, or well-being ****135** of the twins. Also, Larry expresses no disagreement about or ***270** disapproval of daily Bible study by the twins as students at Sword of the Spirit School, or instruction emphasizing Bible-based principles. The district court concluded that the issue of the twins' education was determined by the best interests of the twins, independent of any consideration based on religion or religious belief. The language in the custody provision of the dissolution decree indicates that public school attendance was ordered for secular reasons only. From our de novo review of the record, we find no first amendment issue arising from the district court's order for education of the Von Tersch twins.

[2] The issue remains, however,

whether the district court abused its discretion in ordering that the twins attend public school, rather than private school, against the wishes of the custodial parent, Geri. Courts of most jurisdictions take the view and, therefore, espouse the principle that when parents in a marital dissolution proceeding disagree about the course of their child's education, a court should decline to enter an order directing the child's education and should leave the child's education to a determination by the custodial parent in the absence of unusual circumstances or a showing that the child's health, safety, or well-being are, or will be, endangered by the parental decision concerning the child's education. See, *Griffin v. Griffin,* 699 P.2d 407 (Colo.1985) (control over a child's education remains in the custodial parent in the absence of a showing that the parental decision on education causes mental or physical harm to the child); *Majnaric v. Majnaric,* 46 Ohio App.2d 157, 347 N.E.2d 552 (1975) (child custody implies that the custodial parent has the immediate personal care and control of the child, including the right to determine what school the child will attend); *Selby v. Selby,* 124 N.E.2d 772 (Ohio App.1952) (generally, a court has limited power to restrict the custodial parent's choice of a school to be attended by the child); *Fanning v. Warfield,* 252 Md. 18, 248 A.2d 890 (1969) (in a marital dissolution proceeding, child custody, in the absence of some extraordinary or highly unusual circumstances, includes the right of the custodial parent to make decisions about the child's education); *Mester v. Mester,* 58 Misc.2d 790, 296 N.Y.S.2d 193 (1969) (the nature and extent ***271** of a child's education is a value judgment committed to the custodial parent, whose decision may be subject to judicial interference on an affirmative showing that the parental decision injures the child); *Zande v. Zande,* 3 N.C.App. 149, 164 S.E.2d 523 (1968) (custodial parent determines what education the child will have); *Bateman v. Bateman,* 224 Ga. 20, 159 S.E.2d 387 (1968) (child custody includes corresponding privileges, such as the right to decide what educational advantages children shall receive); *Montandon v. Montandon,* 242 Cal.App.2d 886, 52 Cal.Rptr. 43 (1966) (a custodial parent is permitted to select the religious, cultural, and educational forum of the child), *overruled on other grounds; In re Marriage of Schiffman,* 28 Cal.3d 640, 620 P.2d 579, 169 Cal.Rptr. 918 (1980); *Jenks v. Jenks,* 385 S.W.2d 370 (Mo.App.1964) (the right of a custodial parent to direct a child's training and education, whether religious or secular, is contained within custody itself and should be free from court interference unless the court is convinced that the welfare of the child demands judicial intervention); *Kritzik v. Kritzik,* 21 Wis.2d 442, 124 N.W.2d 581 (1963) (educational decisions for a child are left to the custodial parent).

The rationale for the preceding principle regarding a custodial parent's

determination with respect to a child's education is abundantly clear: As a matter of Larry admits a history of drinking and gambling, he tended to downplay the importance or effect of those activities on his marriage and family, and was "manifesting an untreated alcohol abuse reaction and ... approaching the bounds of a problem area in regard to his gambling." Regarding the relationship between the parents and the twins, Dr. Rizzo indicated that the twins are very close to both Geri and Larry, and are very troubled by the divorce.

***268** The court granted Geri custody of the twins, subject to Larry's right of visitation concerning the twins. Regarding visitation, the court ordered that Larry refrain ****134** from drinking alcohol for the 4 hours preceding any visitation during which he would operate a motor vehicle in which the twins would be passengers. Larry was ordered to pay child support of $300 per month per child and alimony of $300 per month for 121 months. Geri was ordered to register the boys in the Millard public school system for the school term beginning in the fall of 1989. Out of the $9,300 in proceeds from the sale of the rural land in Douglas County, $2,450 was set aside to pay Dr. Rizzo's fee and the fee of the guardian ad litem. Geri was awarded the family residence, subject to the existing mortgage, plus an IRA account and the 1988 state and federal income tax refunds. According to the court's division and distribution of Von Tersches' marital estate, Geri's share of the estate was valued at $36,411, while Larry's share was valued at $36,340. Larry was granted a lien on the family residence for $9,612, which represented his share of the net equity in the Von Tersch residence and which was due and payable on occurrence of any of several events, including emancipation of the minor Von Tersch children. In lieu of interest assessed on account of deferred payment of Larry's share of the residential equity, Geri bore the costs of any eventual sale of the Von Tersch residence.

STANDARD OF REVIEW

In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Huffman v. Huffman, 232 Neb. 742, 747-48, 441 N.W.2d 899, 903-04 (1989). See, also, *Ritter v. Ritter,* 234 Neb. 203, 450 N.W.2d 204 (1990); ***269***Ensrud v. Ensrud,* 230 Neb. 720, 433 N.W.2d 192 (1988).

COURT-ORDERED EDUCATION IN A PUBLIC SCHOOL

[1] In the dissolution decree pertaining to child custody, the court ordered Geri to register the Von Tersch twins "in and have them attend a school in the Millard Public School System, commencing in the Fall of 1989, and continue in said school system thereafter until further order of the Court." Geri contends this order infringes on her rights under the

practicality, a court, being somewhat a stranger to both a child and the parent in a marital dissolution proceeding, is usually ill equipped to fully comprehend and act astutely on the varied and exact but everyday needs of the child and, therefore, should not substitute judicial judgment for that of the custodial parent who selects schooling or education for the child. See *Griffin v. Griffin, supra.* As stated in *Jenks v. Jenks, supra* at 377:

Courts are not so constituted as to be able to regulate the details of a child's ****136** upbringing. It exhausts the imagination to speculate on the difficulties to which they would subject themselves were they to enter the home or the school or the playground and undertake to exercise on all occasions the authority which one party or the other would be bound to ascribe to them. Considerations of the most practical kind, therefore, dictate that in these cases the duty of ***272** attending to the details of the child's rearing be delegated to a custodian, and, as an indispensable concomitant of the appointment, that the custodian be vested not only with commensurate authority but with that degree of discretion upon which the expeditious exercise of authority invariably depends. It must be presumed in the absence of a contrary showing that the custodian, whether he be the child's parent or a stranger, will discharge his duties with fidelity and good judgment.

[3] We have previously stated that a custodial parent in a marital dissolution proceeding normally has the right to control the religious training of a child legally affected by the proceeding unless there is a demonstrated serious threat to the health or well-being of the child. *Goodman v. Goodman,* 180 Neb. 83, 141 N.W.2d 445 (1966). See, also, *Burnham v. Burnham,* 208 Neb. 498, 304 N.W.2d 58 (1981); *Kaufmann v. Kaufmann,* 140 Neb. 299, 299 N.W. 617 (1941), *overruled on other grounds, Lakey v. Gudgel,* 158 Neb. 116, 62 N.W.2d 525 (1954). The aforementioned rule regarding a custodial parent's determination of a child's religion provides an analogue for a similar rule concerning a child's education. Accordingly, we hold that a custodial parent in a marital dissolution proceeding may determine the nature or extent of the education for a child legally affected by the dissolution proceeding unless there is an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the child's safety, well-being, or health, whether physical or mental.

[4] In Von Tersches' case, Dr. Rizzo indicated that continued attendance at the Sword of the Spirit school would reduce the twins' opportunity for social interaction and competition, to the extent that they may "tend to perceive themselves as being perhaps more qualified and competent than they truly are." However, none supplied evidence that Sword of the Spirit school in any way adversely affects the Von Tersch twins' physical or mental health and well-being. Although the argument is made that a public school, with numerous extracurricular activities, elaborate science labs, sports facilities, and computer sciences, provides more opportunities to a student than does Sword of the Spirit school, we decline to ***273** evaluate the relative educational merits of the schools or school systems. While it is possible that the twins' social progression might be enhanced through public school education, there has been no evidentially demonstrated harm, actual or likely, to the twins' safety, well-being, or health, either physical or mental, from their continued attendance at Sword of the Spirit school. Therefore, the evidence does not establish that the Sword of the Spirit school has, or will have, a detrimental effect on the Von Tersch twins.

[A] judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

State v. Juhl, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989). See, also, *Ensrud v. Ensrud,* 230 Neb. 720, 433 N.W.2d 192 (1988); *Younkin v. Younkin,* 221 Neb. 134, 375 N.W.2d 894 (1985).

In the case now before us, the trial court abused its discretion by intruding upon the right of a custodial parent to determine the nature and extent of educating a child for whom the parent has been granted custody. Accordingly, we reverse the district court's judgment that the Von Tersch twins must be educated in a public school.

****137** OTHER ASSIGNED ERRORS

Regarding Geri Von Tersch's contention that the court abused its discretion regarding child support, alimony, property division, and fees in the proceedings, we have conducted a de novo review of the district court's judgment and conclude that, regarding the matters just mentioned, Geri Von Tersch has failed to establish that the district court abused its discretion. Hence, the district court's judgment regarding child support, alimony, property division, and fees is affirmed. See, *Buche v. Buche,* 228 Neb. 624, 423 N.W.2d 488 (1988) (amount of child support is discretionary with the trial court); *Ritter v. Ritter,* 234 Neb. 203, 450 N.W.2d 204 (1990) (child custody and

amount of alimony are discretionary with the trial court); *Taylor v. Taylor,* 222 Neb. 721, 386 N.W.2d 851 (1986) (nature ***274** of property division is discretionary with the trial court); *Smith v. Smith,* 222 Neb. 752, 386 N.W.2d 873 (1986) (allowance and amount of a guardian ad litem fee are discretionary with the trial court).

CROSS-APPEAL

[5] In his cross-appeal, Larry Von Tersch argues that the district court erred in awarding custody of the minor children to Geri, and in ordering Larry to refrain from drinking intoxicating beverages for the 4 hours preceding a visitation during which Larry would be operating a motor vehicle in which the Von Tersch twins would be passengers.

When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests....

....

... [N]either parent is presumed to be more fit than the other or granted custodial preference on the basis of gender.

Ritter v. Ritter, supra, 234 Neb. at 210-11, 450 N.W.2d at 210-11 (1990).
In determining a child's best interests in custody matters, a court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.

Christen v. Christen, 228 Neb. 268, 271-72, 422 N.W.2d 92, 95 (1988). See, also, *Ritter v. Ritter, supra.*

***275** No dispute exists concerning the fitness of Geri or Larry Von Tersch as a parent. The district court found that both parties were fit to have custody of the Von Tersch children, but that the best interests of the children warranted custody in Geri, subject to Larry's visitation of the children. Both parents have a close relationship with the twins. "In determining whether a noncustodial parent will have visitation rights and the nature of such visitation rights, the best interests of a child are the primary and paramount consideration by a court." *Gerber v. Gerber,* 225 Neb. 611, 618, 407 N.W.2d 497, 502 (1987). In view of the extent

of Larry's use of alcohol, the district court's requirement that Larry's visitation of his children be liquor-free is not an abuse of discretion by the trial court. Consequently, the district court did not abuse its discretion in granting child custody to Geri Von Tersch or in imposing a restriction on the child visitation by Larry Von Tersch.

CONCLUSION

For the reasons given above, that part of the district court's judgment requiring that Geri place Kurtis and Kyle in Millard Public Schools is reversed, but the judgment of ****138** the district court in all other respects is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

BOSLAUGH, Justice, dissenting in part.
The record shows that both the guardian ad litem and the psychologist, Dr. Rizzo, were concerned about the continued attendance of the children at the Sword of the Spirit school.

It was the opinion of the psychologist that if the children continued to attend the Sword of the Spirit school, "their performance would need to be monitored on a yearly basis to see if they are in fact continuing to acquire 'the basics'." He further stated that if the children did leave the Sword of the Spirit school to go into a standard junior high school, "they will probably have a very difficult time because they will be substantially behind in the social and emotional and will need at least one to two years to shift into the public school system."

In view of this evidence, it seems to me that the trial court did not abuse its discretion in finding that it was in the best interests of the children to attend a public school and in ordering the ***276** respondent to register the children in the Millard public school system commencing in the fall of 1989.

Neb.,1990.
Von Tersch v. Von Tersch
235 Neb. 263, 455 N.W.2d 130, 58 USLW 2720

Valente v. Valente
114 A.D.2d 951, 495 N.Y.S.2d 215
N.Y.A.D.,1985.

114 A.D.2d 951495 N.Y.S.2d 215

Jeanette Valente, Respondent-Appellant,
v.
Frank Valente, Appellant-Respondent.
Supreme Court, Appellate Division, Second Department, New York

November 18, 1985

OPINION OF THE COURT

Mangano, J. P., Gibbons, Niehoff and Kunzeman, JJ., concur.

In a matrimonial action, the defendant husband appeals, as limited by his brief, from so much of a judgment of the Supreme Court, Westchester County (Buell, J.), dated March 14, 1984, as set his child support obligation at $200 per week, plus two thirds of the children's parochial school tuition not to exceed $2,000 per year, and awarded plaintiff the sum of $7,153.70 for her attorney and expert fees, and the plaintiff wife cross-appeals, as limited by her brief, on the ground of inadequacy, from so much of the same judgment as awarded her a sum of money for her attorney and expert fees.

Judgment affirmed, insofar as appealed from, with costs to plaintiff.

A review of the record reveals that the trial court properly exercised its discretion in awarding the sum of $200 per week as child support (Domestic Relations Law §§240, 236 [B] [7]). Nor was it an abuse of discretion, under the facts of this case, to require defendant to contribute towards the parochial school education of the parties' children *(see, e.g., Prospero v. Prospero*, 39 AD2d 634). Ordinarily, a parent "'should not be compelled, over his [or her] objection to pay for private schooling where "the community makes available to children through the public school system the education which each child is entitled to as a matter of course"'" *(Matter of Ladner v. Iarussi*, 92 AD2d 895, quoting from *Gartin v. Gartin*, 64 AD2d 600). Yet tuition has been awarded, when practical, where it was warranted by the educational background of the parents and history of the child *(see, e.g., Kaplan v. Wallshein*, 57 AD2d 828) or special needs or circumstances of the child *(see, e.g., Benson v. Benson*, 79 AD2d 694). Here, the court properly found that religious values and education were an integral part of the family life-style and value structure. Furthermore, the children, who are already in their mid-teens, have been in parochial school since kindergarten. Therefore, it is in the best interests of the children that their school and social lives not be disrupted at this juncture. The ***952** parties' finances indicate an ability to afford the costs of tuition.

We have examined both parties' contentions on the issue of the attorney and expert fee award and find them to

be without merit.

N.Y.A.D.,1985.
VALENTE V VALENTE

114 A.D.2d 951