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To: Mordechai Biser, Esq.
From: Aryeh Haselkorn
Re: Child Custody Determination Update, New York Area

Date: January 8, 2002

Agreements

Question Presented:

Will courts uphold custody or visitation agreements that specify religious observance?

Answer:

Courts will uphold agreements between divorced parents governing the religious upbringing of their children provided such agreements are incorporated into separation agreements, court orders, or signed stipulations. *Gluckstern v. Gluckstern*, 4 N.Y.2d 521, 176 N.Y.S.2d 352 (1958); *Orner v. Orner*, 263 A.D.2d 544, 694 N.Y.S.2d 683 (1999, 2nd Dept.); *Arain v. Arain*, 209 A.D.2d 406, 619 N.Y.S.2d 591 (1994, 2nd Dept.); *Jabri v. Jabri*, 193 A.D.2d 782, 598 N.Y.S.2d 739 (1993, 2nd Dept.); *De Arakie v. De Arakie*, 172 A.D.2d 398, 568 N.Y.S.2d 778 (1991, 1st Dept.); *Stevenot v. Stevenot*, 133 A.D.2d 280, 520 N.Y.S.2d 197 (1987, 2nd Dept.); *Spring v. Glawon*, 89 A.D. 2d 980, 454 N.Y.S.2d 140 (1982, 2nd Dept.); *Perlstein v. Perlstein*, 76 A.D.2d 49, 429 N.Y.S.2d 896 (1980, 1st Dept.); *Garvar v. Faltings*, 54 A.D.2d 971,

389 N.Y.S.2d 32 (1976, 2nd Dept.) Note that for signed stipulations to be binding, they must be acknowledged in form of deed. *Ervin R. v. Phina R.*, 186 Misc. 2d 384, 717 N.Y.S.2d 849 (Fam. Ct. 2000).

Furthermore, it is important to note that the background rule is still the "best interests of the child." As the Court of Appeals wrote in *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 95, 432 N.E.2d 765, 768, 447 N.Y.S.2d 893, 896 (1982), "No agreement of the parties can bind the court to a disposition other than that which a weighing of all of the factors involved shows to be in the child's best interest." Courts will modify or reject agreements that they consider harmful. For example, in *Barax v. Barax*, 246 A.D.2d 382, 667 N.Y.S.2d 733 (1998, 1st Dept.) the court held that despite a stipulation in the judgment that "it is anticipated that the children will attend a Hebrew school which will give the children a Jewish religious education," it was permissible for Sharon Barax to transfer their son Harry to a secular school because stress associated with attending a Yeshiva Day School was exacerbating a pre-existing medical condition.

In contrast to post-nuptial agreements, New York courts have refused to enforce oral contracts pertaining to the religious upbringing of the children made either prior to or during marriage. *Stevenot*, 133 A.D.2d at 820, 520 N.Y.S.2d at 198; *Schwarzman v. Schwarzman*, 88 Misc.2d 866, 388 N.Y.S.2d 993 (1976). The court's stated rationale in *Schwarzman*, 88 Misc.2d at 873-74, 388 N.Y.S.2d at 998, is that the oral agreement was intended to govern only during the marriage, not after divorce. It is unclear how a court would view either a written ante-nuptial agreement, or an oral ante-nuptial agreement that specifically contemplated divorce, and purported to be governing even after the dissolution of the marriage. For an overview of ante-

nuptial agreements, an argument in favor of their enforceability and a sample agreement, see Strauber, Jocelyn E., *A Deal is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 Duke L.J. 971 (1998). Also see Rocha, Karel, *Should Religious Upbringing Antenuptial Agreements Be Legally Enforceable?*, 11 J. Contemp. Legal Issues 145 (2000).

Courts

Question Presented:

How do courts deal with religion when evaluating the "best interests of the child?"[1]

Answer:

The Establishment Clause has long been held to prohibit the courts from passing on the substantive merits of one religion over another. For a full Constitutional treatment of the issue, see Drobac, Jennifer Ann, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 Stan. L. Rev. 1609. It is sufficient for our purposes to take as a baseline rule that New York courts refuse to evaluate the relative merits of the respective religions of the parents when evaluating the "best interests of the child" in making custody determinations. Once custody is determined, and in the absence of an agreement, the custodial parent then has the sole right to determine the religious upbringing of the child. *De Arakie*, 172 A.D.2d 398, 568 N.Y.S.2d 778; *Ervin R.*, 186 Misc. 2d at 393, 717 N.Y.S.2d at 857; *Marjorie G. v. Stephen G.*, 156 Misc.2d 198, 592 N.Y.S.2d 209 (1992). The court will intervene only if the non-custodial parent can demonstrate that it is in the "best interest" of the child to do so.

[1] This question arises either in the absence of a post-nuptial agreement, or when one of the parties claims that the agreement in place is harmful to the child.

There are several ways in which courts have found intervention to be in the "best interest" of the child. Firstly, courts have held in the past that once a child has begun a religious upbringing, it is in the best interest of the child to continue that upbringing. *See Grayman v. Hession*, 84 A.D.2d 111, 446 N.Y.S.2d 505 (1982, 3rd Dept.) (Holding that the Catholic custodial parent was obligated to enroll the child in a Hebrew school as continuing religious training was in the best interest of the child); *Robert O. v. Judy E.*, 90 Misc.2d 439 (Fam. Ct., Erie County 1977) (Holding that it is in the best interest if the child for the non-custodial parent to be allowed to continue to take the child, age 9, to religious services, even after the custodial parent had become a non-believer.)

Secondly, the court in *Marjorie G.*, 156 Misc.2d at 202, 592 N.Y.S.2d at 211-12 held that when the religious preferences of the parents are similar, the non-custodial parent may "engage [with the children] in the traditional activities and cultural aspects of Conservative Judaism…as long as no attempt is made to indoctrinate the children with any purely theological or ideological dogmas, principles or beliefs that are unacceptable to the Reform movement [the religion of the custodial parent.]" It is interesting to note that the court in *Ervin R.*, 186 Misc. 2d 384, 717 N.Y.S.2d 849 despite the fact that the parent's dispute lay between "Orthodox Judaism" and "Hasidism," did not cite this case. Rather, the court in *Ervin R.* 186 Misc. 2d 384, 717 N.Y.S.2d 849 chose to focus on the detrimental effect of the stress generated by the parental conflict over religion on the children, as discussed below.

Thirdly, when the parents have turned the religious upbringing of the children into a stress-filled battleground, courts have held that it is in the best interest of a child to be raised in only one religion. *Lebovich v. Wilson*, 155 A.D.2d 291, 547 N.Y.S.2d 54 (1989, 1st Dept); *Bentley v. Bentley*, 86 A.D.2d 926, 448 N.Y.S.2d 559 (1982, 3rd Dept.); *Margaret B. v. Jeffery*

B., 106 Misc.2d 608, 435 N.Y.S.2d 499 (Fam. Ct., Warren County, i1980). More recently, In *Ervin R.,* 186 Misc. 2d 384, 717 N.Y.S.2d 849 each parent had custody of one of the children. The court focused on taking both parents to task for poisoning the children against the religious observance of the other parent, while reaffirming the right of the custodial parent to determine the level of observance of the child.

Conclusion

Courts will enforce specific provisions incorporated into separation agreements, court orders, or signed stipulations, provided those agreements do not go against the "best interests" of the child. Courts will not enforce vague ante-nuptial agreements on the rationale that such agreements do not contemplate divorce. No New York court has ever ruled on an written ante-nuptial agreement that did specifically contemplate divorce. While the possibility exists that such an agreement would be enforceable, a specific separation agreement is far safer.

In the absence of an agreement, courts will not pass on the substantive merits of the religion of one parent as opposed to the religion of the other parent. The custodial parent has the sole right to determine both the religion and the observance level of the child. The non-custodial parent typically has the right to expose the child to their religion, so long as there is no conflict with the religion of the custodial parent that would harm the child.

There is a small line of cases that seems to suggest that once a child begins a religious upbringing, it is in the "best interests" of that child to continue that upbringing. However, those cases deal with the introduction of a very low level of religious upbringing by the non-custodial parent. Furthermore, both cases contemplate a case where the custodial parent has ceased all religious observance, not a case where the custodial parent has chosen a different, contradictory religion for the child. In all likelihood, once the couple is divorced without an agreement as to

the religious upbringing of the children, the non-custodial parent is almost completely at the mercy of the custodial parent as to that upbringing.