



**AGUDATH ISRAEL OF AMERICA
LEGAL SUPPORT SERVICES**

42 Broadway, New York, NY 10004 • (212) 797-9000 • Fax (646) 254-1650

MEMORANDUM

TO: Rabbi Mordechai Biser, Esq.

FROM: Shlomo Cahn

DATE: April 7, 2011

RE: DEFENDING RELIGIOUS OBSERVANCE IN CHILD CUSTODY/VISITATION DISPUTES

The purpose of this memo is to serve as preliminary guide when defending religious observance in custody or visitation disputes between observant and non-observant ex-spouses. It consists of strategic arguments to defend the religious upbringing of a child. Defending religious observance in these disputes is highly fact specific, and the information in this memo can only be useful if it is modified to meet the factual situation in each case. This memo does not cover all areas of the law, and will not reach all factual situations.

Introduction

The courts' standard for deciding custody and visitation disputes is the "best interests of the child" standard.¹ This standard is highly subjective. The cases' outcomes will depend on the best arguments. An effective advocate on behalf of a religious parent must find arguments that persuade the court that it is in the child's best interest to be raised in an Orthodox Jewish environment, and to have Orthodox Jewish beliefs and practices respected during visitation with the non-custodial parent.

Part I of this memo discusses religious observance issues in a custody dispute, and presents arguments why continuing a child's Orthodox lifestyle is in the child's best interest. Part II familiarizes the reader with the Orthodox Jewish practices that are relevant to custody disputes, and discusses methods of presenting the Orthodox Jewish way of life to a secular court. Part III discusses the enforceability of rabbinic arbitration agreements in custody disputes.

Annex A is a NY court case, between a more religious and a less religious parent, that discusses most of the issues and arguments mentioned in this memo, and can be used as a positive precedent for the religious parent.

I. Religion as a Factor in Custody Proceedings

A. The Importance of Custody for the Observant Parent

The custodial parent usually sets the religious upbringing of a child. Thus, an award of custody to the observant parent is an important objective because it resolves much of the difficulty in securing religious observance.

There are many factors that a court will consider in a custody decision, and religion itself will rarely be the determinative factor. Nevertheless, religion should not be ignored as a positive factor in determining the child's best interest. Especially in cases where the child has begun to be raised as an

¹ Normally based on statute, but could also be based on case law.

Orthodox Jew, a strong argument can be made that it is in the interests of the child's emotional and psychological well-being to provide the stability of a continuation of a religious environment.²

B. "Best Interests" Analysis of Religion

Courts are prohibited from preferring one parent's religion over the other parent's religion or lack thereof. Custody determinations cannot be made based on a court's religious preference because of constitutional Establishment Clause restrictions.

However, courts are permitted to consider the *secular* benefits of a child's religious lifestyle in making a custody determination. The exact weight to be accorded to religious considerations varies by jurisdiction. Some courts only allow religion to be considered if there is possible harm to the child because of the religion.³ Other jurisdictions are more liberal, and, by statute, require the consideration of the child's religion, even without a showing of possible harm.⁴ Thus, it is important to know the standard required by each jurisdiction, and to make the "best interests of the child" argument within the confines of that standard.

The best approach to advocating for the religious parent, and the one that is accepted by all courts, is to only reference religion tangentially to the effect on the child. The focus of the argument should be the physical and emotional effects on the child as a result of the religious lifestyle, as opposed to arguing that the child needs religion per se for spiritual reasons. For example, instead of arguing that the child requires religion for his or her spiritual benefit, rather argue that the child needs religion because that is where the child enjoys the most stable environment.

² In rare cases, a court may order a non-religious custodial parent to raise the child with a religious upbringing. This can be a useful fallback position if a court refuses to grant custody to the religious parent.

³ See Joanne Ross Wilder, *Religion and Best Interests in Custody Cases*, 18 *J. Am. Acad. Matrim. Law.* 211, 224 (2002). See also *In re Marriage of Short*, 698 P.2d 1310 (Colo. 1985); *In re Marriage of Hadeen*, 619 P.2d 374 (Wis. Ct. App. 1980).

⁴ See e.g. *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979) (discussing the different approaches to consideration of religion, and upholding a statute that mandates the consideration of religion as a factor in custody determination, even absent any showing of harm).

It is also important to be able to clearly convey to the court the practical applications of Orthodox practices.⁵ Expert testimony may be required for this if the attorney is not sufficiently versed in the Orthodox practices.

Below are several arguments to be used, depending on the situation, of how the child will be emotionally or physically affected by religion or lack thereof. Most situations will involve children that already have a Jewish/ Orthodox upbringing; if the child or parent is not yet practicing religion, then there is less reason that religion would be a significant concern to that child.

Stability. In cases where the child has been raised in a religious lifestyle, the primary argument is stability – keep the child in the religious surroundings that he or she is used to. Divorce and separation are traumatic enough; every effort must be made to keep the child in a familiar environment and to afford him or her at least some stability during the life-changing experience. Stability can be achieved by keeping the child in the same school with the same friends and acquaintances, and continuing the same lifestyle.

This argument can be used in both custody and visitation contexts. In a custody context it can be argued that the child should remain within his or her previous religious environment, and custody should go to the religious parent. In a visitation context it can be argued that the non-religious visiting parent should not be allowed to expose the child to non-religious activity that is inconsistent with the religious practices of the custodial home. Exposing the child to conflicting religious messages will confuse the child and will detract from the child's overall religious success. (Note however, this argument conflicts with the below argument of "well rounded education.").

Social Comfort/Surroundings. The "social surroundings" argument is similar but different to the stability argument. Children in a religious environment, for the most part, are relatively sheltered, especially Orthodox children. They often dress differently than their non-religious peers--Orthodox boys wear yarmulkas [skullcaps] and girls wear modest clothing that covers most of the body, and do not wear pants. These children, if put into a secular school or environment, would be considered outcasts because of, among other things, their dress. Placing a religious child in a non-religious environment will further stigmatize the child already

⁵ Part II *supra* discusses these relevant practices.

stigmatized from a parents' divorce. Changing the child's dress code is also not a solution because that would also impose harmful stress on the child for obvious reasons.

On a similar note, the non-religious parent – be it custodial or non-custodial – should not be permitted to undermine the child's religious observance by making disparaging comments or denigrating actions. Such forms of underhanded anti-religious behavior are, however, harder to identify and police. Nevertheless, if such behavior is detected, it should be highlighted and used to show that the best interests of the child are being contravened.

Respecting the Child's Wishes. Older children's religious preferences are normally considered favorably by the court. Thus, if there is evidence or testimony that the child wishes to be placed in a religious environment, it should be highlighted to the court. The amount of consideration that the child's wishes would be accorded will depend on the age of the child; older children's decisions will be accorded more weight. The child's age and maturity should therefore be used to argue that the child is capable of determining his or her religious preferences.

Informed Decision Making Capacity. Religion is important for the child's educational development. The child needs religious experience in order to be able to make an informed decision about his or her own religious destiny when he or she grows up. Depriving the child of his or her Jewish heritage will deny the child the ability to choose a religion that fits his or her unique needs. Thus, it can be argued that religious instruction/practice is needed not for the religion per se but for the purpose of enabling the child to make competent decisions later in life.

This argument is especially helpful when the client only has visitation rights. Even when the child is in the custody of the other non-religious parent it can still be argued that the non-custodial parent should be able to engage in religious activity in order to provide the child with a different perspective on religion to the one that is being received at home. For example, even if the child is in the custody of the secular parent, the visiting parent should still be able to expose the child to his or her family's religious heritage.

This argument can conflict with the stability argument above because exposing a child to conflicting religious doctrines could also confuse the child. Therefore, if this argument is used,

care must be taken to convince the court that the child would not be confused or otherwise negatively affected by participating in differing religious activities.

C. Parent's Religious Considerations

i. Forcing the Parent to Violate Religious Beliefs

In some situations, a parent may be forced to sacrifice his or her own religious beliefs in order to conform to a visitation order. For example, when a visitation order requires a child to be produced on Saturday, the religious parent will be forced to drive or arrange for someone else to drive the child on the Sabbath in violation of the parent's religion. When the court orders visitation that forces a parent to act in this manner, they are asking that parent to choose between their religious observances and potentially losing custody of, or visitation with, their child. Effectively, this visitation order is forcing the custodial parent to violate his or her religious beliefs.

To counter this, and protect the religious parent, one should argue that such an order would violate the religious parent's First Amendment freedom of religion. Furthermore, one should argue that parental visitation rights should not be used to challenge the religious observances of the custodial parent.

ii. Causing A Non-Religious Parent to Ensure That the Child Participates in Religious Activities

Courts have ruled that a non-religious parent may be forced to bring the child to religious instruction during visitation, and that such activity does not infringe on the non-custodial parent's freedom of religion. This precedent can be useful in ensuring that the child receives a continuous level of religious observance even while spending time with the non-custodial parent.

In *Johns v. Johns*, Ark. App. 90, 94 (Ark. App. , 1996) the court upheld an order requiring a non-religious father to bring his children to religious services against a claim that this violated the father's free exercise rights. The court found that the "chancellor did not order him to attend religious services, but rather that he see that his children did so in order to maintain consistency in the religious regimen that their mother has set for them. Therefore, no limitation has been placed on appellant's freedom of religion." In other words, because the court's order did not impose a direct duty on the father to attend

religious services, the father was free to attend or not attend the services with the children. Thus, it can be argued to a court that a non-religious parent should still be required to ensure that a child attends synagogue on the Sabbath or other religious activities.

II. Explaining Jewish Orthodox Religious Observance

As discussed above, it is often necessary to explain the basics of religious observance to a judge. The amount of information needed will depend on the context of the setting – a judge in an area with many observant Jews may need less basic background information than a judge in a different venue. Strategic planning is needed to decide how much to push for, recognizing that pushing too hard without the possibility of compromise could jeopardize the Orthodox parent’s chances of obtaining custody.

A. The Basics of Orthodox Religious Observance

The Orthodox Jewish tradition is a seamless web of ancient laws, customs and traditions. It is 3000 years old, and yet it remains a vibrant form of life in modern times. The beauty of this ancient religion is that it exists as more than an abstraction. Adherents to Orthodox Judaism balance a rigid discipline with an ability to flourish in the modern world. Orthodox men and women can be found in all strata of modern life – as doctors, lawyers, nurses, professors and engineers.

There are many spiritual and moral reasons for these laws and customs, and this section does not purport to summarize the theological underpinnings of Orthodox Judaism. Rather, this section will outline the basic tenets of religious life as they apply to custody determinations.

i. Education

Jewish education is a central component of Orthodox tradition; its importance cannot be overemphasized. The Orthodox educational system provides the child with a critical base of knowledge to function as a religious Jew in a modern world.

Orthodox school children, in addition to the secular education received by their secular peers, also study Jewish studies. These studies include, at a minimum, learning to read Hebrew; basic prayer classes and sessions; and bible studies. Schools that are more religious will devote more time to these subjects, as well as additional subjects such as Jewish law, Jewish history/tradition, and in-depth study of ancient texts such as Mishna and Talmud. Jewish field trips are also common. Often Orthodox school

children are benefited by school trips to venues of Jewish importance such as Israel, Jewish museums, synagogues, etc.

Jewish students study more subject material than their academic age groups in other schools, and they spend more time in school and doing homework. As with any worthwhile endeavor, Jewish schools require commitment, discipline and hard work. Outside, non-religious influences disturb the intellectual ecosystem and create exponential difficulties for a child.

The Orthodox school system provides a flexibility that belies its seeming rigidity. The system is not monolithic and does not provide a single approach to education. There are many different, yet equally valid, approaches to Jewish education. This panoply of educational choices belies the charge, often made in these cases by the non-observant parent, that Orthodoxy is some form of a cult.

Orthodox education is also not a static rehashing of old ideas. Jewish educators constantly reevaluate their approaches to teaching, attend frequent educational seminars and consult with psychologists and child-rearing experts to dynamically apply new teaching techniques and skills to a time-tested base of knowledge.

A Jewish parent who seeks this kind of education for the child is acting in the best interest of the child because the child is enabled to blend religious observance with the needs of modern life.

ii. Influences of Modern Media

As part of the Jewish educational process, Jewish children generally have a limited exposure to modern media. This is to protect the children from the pervasive sexual and violent content found on television, the internet, and in many newspapers and magazines. Often, Jewish home computers will have child protection software. Exposure to television and print media, if allowed at all, is generally limited and screened for violence and sexual content.

An Orthodox child, even when in custody of the non-religious parent, should be able to maintain his or her protected environment. Exposing the child to influences that he or she is not used to at home will shock and confuse the child, and will detract from the child's overall religious success.

iii. Sabbath and Jewish Holidays

Sabbath observance is a mandatory requirement under Jewish law. Observance requires the cessation of all “work” from before sundown on Friday to nightfall on Saturday. “Work” includes all forms of labor, the use of electronic devices – including cars, and travel. There are many additional Sabbath laws and activities that are considered “work” – too numerous to reference here. Jewish authority should be sought to clarify particular details.

The laws of Sabbath are also applicable to many Jewish Holidays. For a complete list and explanation of Jewish Holidays, see <http://www.jewfaq.org/holiday0.htm>.

iv. Kosher Dietary Laws

Orthodox Jews only eat kosher food, as prescribed by Jewish law.⁶ Kosher food does not mean that the food has received a blessing from a Rabbi. Rather, kosher food derives its status from being suitably prepared according to a series of laws. The consumption of certain animals, fish, and fowl is prohibited. Kosher laws also require the preparation of the food to comply with Jewish legal guidelines. A more extensive discussion of Kosher laws can be found at <http://www.ou.org/kosher/primer.html>

It is essential that the child receive kosher food that complies with his or her kosher standards. Where the custodial parent is observant, the visiting parent must ensure that the child continue to receive kosher food even while away from home.

v. Orthodox Dress Code

Orthodox males and females often adhere to general dress code. Males wear a head-covering, called a “Yarmulke” or “Kippa,” and males over thirteen years of age often wear hats. Females dress in relatively modest clothing – no pants, and skirts often below knee length, and tops that cover most of the arms. Certain Orthodox sects, e.g. Hassidim, have a more specific dress code.

The non-custodial parent should ensure that children who are accustomed to a particular dress code should not be constrained - actively or passively - from dressing as they would at home.

6 *Ferman Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 2004 WL 691399 (C.A.4 (Md.),2004) (“As a juridical religion, Judaism is dependent upon compliance with its laws, including the kashruth . . .”)

III. Enforceability of Rabbinic Arbitration Agreements in Court

The majority of courts refuse to consider arbitration agreements as binding when it comes to custody and visitation. A court may well not accept the arbitrator's determination of the child's best interest, and the court must independently determine if the arbitration panel's decision is truly in the child's best interest.⁷ However, many courts will still allow the arbitration to stand after conducting a de novo review. Other courts take a stricter stance and will void arbitration agreements that consider custody.⁸ There is a minority view that will validate the arbitration agreement without conducting an independent review.⁹ However, this view is not common.¹⁰

⁷ See *Kovacs v. Kovacs*, 633 A.2d 425, 430 (Md.App.,1993) (Holding that when analyzing an arbitration agreement, the court "must first assess the impact of the agreement on the child and determine if the agreement is in his or her best interest"); See also *Bloch v. Bloch*, 693 A.2d 364, 369 (Md. App. 1997) (explaining the holding of *Kovacs*). See also *Crutchley v. Crutchley*, 293 S.E.2d 793, 798 (N.C. 1982) (holding that "the need for the court to protect the welfare of children outweighs the advantages of arbitration"); *Patin v. Patin*, 45 Va. Cir. 519, 520 (Cir. Ct. 1998) (holding that the court should consider an arbitrator's determination of child custody but must not "simply enforce an arbitrator's award without determining whether such an award is in the best interests of the child"); See also E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interest of the Family*, 57 WLLR 1139, 1157 (Fall, 2000).

⁸ See e.g. *Kelm v. Kelm*, 749 N.E.2d 299, 301 (Ohio, 2001) (Holding that arbitration would not be valid and that "[o]nly the courts are empowered to resolve disputes relating to child custody and visitation."); See also *Cohoon v. Cohoon*, 770 N.E.2d 885 (Ind.App.,2002) (Holding that arbitration agreements about child custody are void and inconsistent with public policy.); *Glauber v. Glauber*, 600 N.Y.S.2d 740 (N.Y.A.D. 2 Dept.,1993) ("Accordingly, we hold that the issues of custody and visitation must be put before the court for determination and may not be submitted to arbitration.").

⁹ See *Dick v. Dick*, 534 N.W.2d 185 (Mich.App.,1995).

¹⁰ See *Spitko*, *supra* note 7.

12/9/2010 N.Y.L.J. 39, (col.)

New York Law Journal

Volume 244

Copyright 2010 ALM Media Properties, LLC

Thursday, December 9, 2010

Decision of Interest

Family Law

Family Court, Rockland County

IN THE MATTER OF A CUSTODY/VISITATION PROCEEDING CHAIM B., PETITIONER V. GITTY B., RESPONDENT, V-00621-10/10A

Referee Dean Richardson-Mendelson

Cite as: Matter of Chaim B. v. Gitty B., V-00621-10/10A, NYLJ 1202475832245, at *1 (Fam., RO, Decided November 24, 2010)

Decided: November 24, 2010

*1

The petitioner father commenced this matter by way of an Order to Show Cause signed by the court on October 23, 2009, seeking to modify the custody provisions of the parties Judgment of Divorce issued on July 31, 2007, to transfer custody of the subject child Nechumy B. (referred to as Chumy), born on April 23, 1999, from the respondent mother to the father. The Judgment of Divorce was premised on a stipulation of settlement executed by the parties on April 29, 2007, which was incorporated into the Judgment and not merged therein. The agreement, and subsequent Judgment, called for the mother and father to share legal custody of the parties three children, while granting sole physical custody to the mother. On March 4, 2010, the respondent mother filed a cross motion seeking overnight alternate weekend visitation with Chumy. Throughout the proceedings both parties were represented by counsel, and the subject child was represented by the Legal Aid Society of Rockland County.

*2

During the course of the proceedings, the court issued two temporary orders. On November 17, 2009, the court signed a temporary order of joint legal custody to parties with temporary sole physical custody to father. On May 13, 2010, the court issued a temporary order of visitation to the mother, providing for alternate weekends from Friday at 2:00 p.m. until Sunday at 10:30 a.m. The order required the mother to provide round trip transportation from and to the father's residence in the Williamsburg section of Brooklyn, New York.

Custody is not at issue in this proceeding. Prior to the commencement of the hearing, the parties stipulated that sole legal and physical custody of Chumy would vest with the father, and the mother would be granted sole legal and physical custody of the other two children Dvory B., D.O.B.: 9/29/97 and Hudy B., D.O.B.: 1/25/01. The sole issue before this court is a determination of an appropriate visitation schedule for Chumy and her mother.

At trial, the court heard from both parties, as well as Rabbi Aron Eisenberg and Ms. Rivka Weber, the subject child's current therapist, both of whom were called by the father as witnesses.

FACTUAL FINDINGS

Prior to the summer of 2008, Chumy resided with her mother and two older sisters in the New Square section of Rockland County. Chumy told her mother that she wanted to spend the summer of 2008 with her father. The mother acknowledged that Chumy, who was nine years old, was acting out, having tantrums, and her behavior was bordering on being violent. After consultation with the child's therapist regarding the feasibility of Chumy's request, the mother allowed the father to take the child for the summer on the condition that Chumy's therapy sessions continued uninterrupted. The mother's uncontroverted testimony is that Chumy spent the summer of 2008 with her father, and that the father did not continue Chumy's therapy sessions. For the first four weeks of the summer, the mother attempted to contact the father to ascertain Chumy's whereabouts to no avail. Her calls to the father went unanswered and were not returned. The mother attempted to reach the father through Chumy's therapist and other people. The therapist's calls to the father were likewise not returned. After four weeks, the mother sent a text to the father warning him that his conduct was tantamount to

*3

kidnaping. Shortly thereafter, the father called the mother and provided her with the address where Chumy was staying. When the mother finally did speak to Chumy, the child informed her that she would be starting in a new school in September for the 2008-2009 school year, and would be living with her father. Chumy did in fact remain in her father's care, and has continued to live with him since that time.

Both parties are Jewish. At the current time, the father follows a strict Hasidic form of Judaism. The father was born of Hasidic parents in Montreal, Canada. When the father was 16 years old, he moved to the New Square section of Rockland County and enrolled in a private Hasidic Yeshiva. Throughout the proceedings, the father referred to this form of Hasidic Judaism as 'New Square.' The father explained that at the beginning of his marriage to Gitty Berger, he continued to follow the strict and formal rules of New Square Judaism. However, during the marriage the father experienced 'ups and downs,' of which he did not elaborate, and drifted toward a less strict form of orthodox Judaism. In 2007, the parties divorced and the father returned to the ways and practices of New Square Judaism, and ultimately moved to the Williamsburg section of Brooklyn, NY, an area of which is predominantly populated by other followers of the same faith. The father remarried and resides with his wife Leah, Leah's 12 year old daughter and their 16 month old child and Chumy.

By contrast, the mother, who currently resides with the parties two older daughters, considers herself to be a 'modern orthodox jew', whose religious standards or practices are somewhat more relaxed than New Square Judaism.

It is beyond the scope of this decision to divine between the New Square sect of Judaism and modern orthodox Judaism, nor is it directly relevant to the court's decision. This court cannot, and will not, judge the merits of either party's personal or religious beliefs, or lifestyle choices, except as it impacts upon the best interests of the subject child. However, the father's passion for his chosen path, and the child's preference for the lifestyle of the father's

home, makes relevant the variance of the mother's beliefs and lifestyle in terms of fashioning a visitation schedule which is best suited to meet the needs of the child.

*4

Towards this end, the court takes note of certain differences in lifestyle and religious beliefs of the respective parents. Rabbi Aron Eisenberg was called to testify by the father to provide information regarding Jewish Law (Halakah) as it is interpreted by New Square Judaism. Some examples of the father's beliefs which the mother does not subscribe to are set forth below.

While both parties believe in following Kosher dietary laws, their definition of what is, and what is not Kosher is at variance. The definition of what qualifies as Kosher under the father's belief system is more exacting than the mother's definition. Similarly, while both parties dress conservatively within their faith principals, the father's dress code is more exacting. Both parties celebrate the Jewish Holidays and rituals, however, the father claims the mother does not properly follow all of the rituals to the standards required of his belief system.

The father does not have a television in his home, and does not believe that children should not be allowed to watch any television, videos, movies or cartoons, and that the only acceptable use of a television is to watch Jewish educational videos. The father does not have a computer in his home and he believes children should never have internet access, even for educational purposes. Although the mother employs standards and supervision, the mother approves of appropriate television, as well as computer and internet use.

The father believes in what Rabbi Eisenberg referred to as the 'Jewish law of seclusion', which holds that girls over the age of three cannot be alone in the company of an unrelated male. This rule applies to children and adults alike. According to this rule, Chumy cannot be in the sole company of the mother's boyfriend as they are not related. Another interpretation of this rule prohibits Chumy from being in the company of her mother and her boyfriend, as the mother cannot be in the presence of an unrelated male.

The father believes in the 'Jewish law of segregation', which mandates that men and women be separated at gatherings such as weddings and religious services. An example given at the hearing is the prohibition of men and women visiting a swimming pool at the same time.

*5

The father believes that Chumy should only be spoken to by her parents in Yiddish, and only Yiddish should be spoken in the home. The father believes that only classic or Jewish music should be listened to. Rock music is completely unacceptable. In addition, men may only listen to male vocalists and women may only listen to female vocalists. Public libraries are unacceptable for any purpose, and only libraries which are under the auspices of New Square Judaism are permissible. The mother finds it acceptable to speak to her children in Yiddish, that appropriate rock music and public libraries are likewise acceptable.

POSITION OF THE PARTIES

The father asks this court to limit the mother's visitation to three out of four Sundays per month (daytime visitation), with the father having the child on all the major 'non-drive' Jewish holidays, i.e., the major Jewish holidays on which driving is prohibited. The father concedes that the mother may have half of the 'non-drive' holidays. The father further requests that the mother provide round trip transportation from Rockland County to the Williamsburg section of Brooklyn, NY.

The mother asks the court to grant a more expansive visitation schedule which includes regular overnight weekend visitation, as well as an equal division of Jewish holidays and the summer vacation from school. The mother asks the court to order the father to provide round trip transportation for visitation.

ISSUES AND ANALYSIS

1. Does the father, as custodial parent, have an absolute right to choose the child's religious training and level of religious observance?

While this matter revolves around the religious differences of the parties, this case must be decided upon secular grounds, and the court's determination cannot be premised upon the relative merits of either parties religion or level of religious belief. 'Any discussion about an appropriate level of religious observance during periods of visitation must be viewed in the context of this court's role under the United States constitutionally mandated separation of Church

*6

and State. ([US Const 1st Amend](#); [NY Const, art I, §3.](#)) It must be noted though that the New York State Court of Appeals has held that the Establishment Clause is not violated when neutral principles of law can be utilized to resolve a dispute without reference to religious doctrine. (See, [Park Slope Jewish Ctr. v. Congregation B'nai Jacob, 90 N.Y.2d 517 \[1997\].](#))' [Matter of Ervin R. v. Phina R. 186 Misc. 2d 384 717 N.Y.S.2d 489.](#)

The law is well settled that visitation disputes must be determined solely by what is in the best interests of the child. [Marjorie G. v. Stephen G. 156 Misc. 2d 198, 592 N.Y.S.2d 209](#); [Lincoln v. Lincoln, 24 N.Y.2d 270](#); [Friederwitzer v. Friederwitzer, 55 N.Y.2d 89.](#)

Without passing on the merits of the relative level of the parties religious observance, the policy of the law with respect to religious upbringing is one of noninterference. Subject to a few exceptions, the custodial parent has an almost absolute right to determine a child's religious upbringing and education. The exceptions where State regulation is permitted to intervene into religious issues pertaining to a child in custody / visitation cases are as follows:

- (i) Unfitness of the custodian or the need to protect the child from harm or potential harm.
- (ii) A controlling so-ordered agreement, stipulation, separation agreement or court order.
- (iii) Acquiescence of the custodial parent.
- (iv) The determination of a child, if the child is of sufficient age and intelligence to make such a determination.

See [Marjorie G., Plaintiff, v. Stephen G., Defendant, 156 Misc. 2d 198; 592 N.Y.S.2d 209](#); Denial entered [Beer v. Denial entered Beer, 162 AD2d 165](#); [DeArakie v. DeArakie, 159 AD2d 346](#); [Stevenot v. Stevenot, 133 AD2d 820](#); [Siegel v. Siegel, 122 Misc 2d 932](#); [Mester v. Mester, 58 Misc 2d 790](#); [Matter of Paoella v. Phillips, 27 Misc 2d 763](#); [Matter of Grayman v. Hession, 84 AD2d 2011.](#)

At trial, there was no showing that the father was an unfit parent, nor was there any showing that the father's choice of religious upbringing and education would bring harm to the child. As such, it is beyond the reach of this court to

*7

challenge the father's absolute right to determine the child's religious upbringing upon these grounds.

The question of whether the parties Judgment of Divorce controls the level of the child's religious observance is a moot point. Prior to trial the parties stipulated to a change in legal and physical custody, which nullified any portion of the Judgment which would regulate the father's current right to determine the level of Chumy's religious observance.

Furthermore, it may be said that the mother acquiesced to Chumy being raised according to the father's religious guidelines. The mother sent Chumy to the father for summer visitation in July of 2008. The mother was well aware of the father's level of religious observance at that time. The father did not return Chumy at summer's end, yet the mother did not immediately file a violation petition or writ of habeas corpus to seek the child's return to Rockland County. In the Matter of Stephen G. Grayman v. Eleanor M. Hession, *supra*, the court issued an order directing a custodial parent of the Catholic faith to enroll her child in an after-school Hebrew School upon the grounds that the mother either consented or acquiesced to the child's Jewish religious training in the past.

This leaves the question of the child's choice regarding her religious upbringing. The law is well settled that the initial posture of the courts with respect to religious upbringing of a child should be one of non-interference, [S. E. L. v. J. W. W., 143 Misc. 2d 455](#); [Matter of Paoella v. Philips, 27 Misc 2d 763](#). The determination of religious upbringing belongs to a child, if a child is of sufficient age, intelligence and maturity to make such a decision. See Matter of Paoella v. Philips, *supra*; [Martin v. Martin, 308 NY 136](#); [Mester v. Mester, 58 Misc 2d 790](#); [Hehman v. Hehman, 13 Misc. 2d 318, 178 N.Y.S. 2d 328](#).

In Martin v. Martin, *supra*, the Court of Appeals affirmed an order of the Appellate Division of the Supreme Court in the second judicial department, which affirmed, by a divided court, an order of the Supreme Court, entered in Kings County upon a decision of an Official Referee, which found that a 12 year old child was of sufficient age, intelligence and maturity to determine his own religion. See also Hehman v. Hehman, *supra*, where the Supreme Court referred the matter to the Official Referee to report on the question of the child's preference of

*8

religion. The parties Decree of Separation provided that their 13 year old son John would be raised and educated in the Lutheran faith, while his 14 year old brother and 12 year old sister, with whom John resided, would be raised and educated in the Roman Catholic Faith.

However, in the case at bar, the record does not support a finding that Chumy is of sufficient age, maturity and intelligence to make a religious determination for herself. The lawyer for the child objected to the subject child testifying in open court or in-camera. Neither party called the child as a witness. Chumy's treating therapist did not offer any testimony regarding this issue.

Thus, considering all factors, this court finds that the father, as custodial parent, is the final arbiter of Chumy's level of religious observance.

2. Can visitation be subject to the condition that the mother maintains the child's level of religious observance during visitation in accordance with the father's religious standards?

The law is clear that any visitation order which would adversely impact the mother's free exercise of her religious beliefs would be an unconstitutional infringement of her First Amendment Rights. [S.E.L. v. J.W.W., 143 Misc. 2d 455, N.Y.S.2d 675](#); [Kadin v. Kadin, 131 A.D.2d 437, 515 N.Y.S.2d 868](#). However, it is not necessary in the case at bar to reach this issue. The mother and father are both of Jewish Faith with the father being the more observant of the

two. Thus, in this case, the imposition of conditions upon the mother to ensure the child maintains the child's level of religious observance during visitation would not, per se, violate the mother's right to her free exercise of religion.

Thus, setting aside any 1st amendment constitutional argument, the question remains to what degree the State may regulate the mother's conduct to insure the integrity of the child's level of religious observance during visitation.

It is beyond cavil that the State may regulate, to a certain degree, conduct of a non-custodial parent during periods of visitation, as long as such regulation is necessary to prevent a risk of harm to a child or to preserve the child's best interest. Cases where court's have ordered supervised visitation, restricted a parent's ability to use corporal punishment, conditioned visitation upon a non-custodial

*9

parent's compliance with mental health treatment or abstinence from illegal drug or alcohol use, etc., are legion.

Visitation disputes involving religious differences between the parties are no different. Courts have often intervened in visitation disputes to preserve a child's level and manner of religious upbringing and training during visitation.

For example, the [matter of Margaret B. v. Jeffrey B. 106 Misc. 2d 608](#), affirmed in [Bentley v. Bentley, 86 A.D.2d 608](#), involved a father using his visitation time to instruct his children in the practices of the Jehovah's Witness religion against the wishes of the custodial parent. The Appellate Division did not limit the father's visitation, however, the court ordered the father to refrain from instructing his children in Jehovah's Witnesses doctrine, and also ordered him to refrain from taking his children to any assemblies, meetings, conventions, religious services or other social or religious activities of the Jehovah's Witnesses during his periods of visitation.

In [S.E.L. v. J.W.W., 143 Misc. 2d 455, N.Y.S.2d 675](#), the court permitted the visiting parent to take his child (who was being raised in the Jewish faith) to Jehovah's Witness services, although, other than answering the child's casual questions, he was not allowed to further expose the child to Jehovah's Witness doctrine.

In Efrun U. [Rivera v. Anna Tomaino, 46 A.D.3d 1249, 848 N.Y.S.2d 437](#) the Appellate Court reversed the lower courts denial of the father's request for overnight visitation. The parties in Efrun U. Rivera did not share the same faith base. The matter was remanded to the lower court to fashion an order for overnight visitation with reasonable conditions to protect the subject child from her exposure to any aspect of the father and his fiancée's lifestyle which might confuse the child's faith formation

The conclusion is that courts can regulate a non-custodial parent's conduct during visitation to insure the integrity of the child's level of religious observance during visitation, however such regulation must be reasonable, in the child's best interests and not overly restrictive. See [Horike v. Freedman, 37 A.D.3d 978, 8:30 N.Y.S.2d 60](#).

*10

3. Should the subject child's stated preferences regarding visitation be determinative in this matter?

Ms. Weber, Chumy's current treating therapist, testified that although Chumy loves her mother and sisters, she prefers to be with her father and is more comfortable in her father's home. The lawyer for the child confirmed Chumy's position in regard to this issue. The therapist explained that Chumy is more comfortable with the father's

lifestyle in Williamsburg. Chumy's Williamsburg school friends dress like her, speak Yiddish like her and follow the New Square beliefs and lifestyle. In particular, Chumy prefers to spend the Sabbath (from Friday at sundown to Saturday at sundown) and holidays with the father. Both the therapist and the lawyer for the child reported that Chumy, in conversations with them, never stated what she did not like, but couches her expressed wishes in terms of what she prefers.

However, the practical problem in this case is one of scheduling. Although Chumy did not say that she was opposed to overnight visitation with her mother, her preference to spend the Jewish holidays and the Sabbath with her father all but precludes overnight visitation, and severely limits opportunities for visitation in general.

Chumy attends a Yeshiva which is in session Monday through Friday. As a result of the distance, bridges, tunnels and New York City traffic which separates the parties, traditional mid-week dinner visitation from Monday through Thursday is completely impractical in this case.

The Sabbath lasts from Friday evening at sundown to Saturday evening at sundown, and observant Jews are strictly prohibited from driving, or being driven, during this time. Thus, if the court were to be guided solely by Chumy's preference to be with her father on the Sabbath, visitation from Monday morning through Saturday evening would be thwarted.

Further complicating matters is the fact that, unlike public schools, Chumy's school does not close for the traditional secular holidays, winter or spring breaks, but rather, breaks from school are scheduled in accordance with the Jewish

*11

Holidays. Visitation during Jewish Holidays runs afoul of Chumy's stated preference.

Thus, if the child's wishes were controlling, visitation would be limited to Saturdays evening after sundown to Sunday evening. Even this remaining window of opportunity is limited by the fact that Chumy's therapy appointment in Williamsburg is scheduled for early Sunday afternoon.

Although a child's stated wishes are relevant, and a factor the court must consider, they are not necessarily determinative of the issue of visitation [DeBiase v. Scheinberg, 47 AD2d 657, 364 N.Y.S.2d 34](#); [Hotze v. Hotze, 57 AD2d 85, 394 N.Y.S.2d 753](#); [Resnick v. Zoldan, 134 AD2d 246, 520 N.Y.S.2d 434](#); [Bubbins v. Bubbins, 136 AD2d 672, 524 N.Y.S.2d 50](#). A court may not delegate its authority to determine visitation to either a parent or a child. [William-Torand v. Torand, 73 A.D.3d 605, 901 N.Y.S.2d 601](#). The weight given to the child's preference will depend upon the court's assessment of the child's maturity, the extent to which the parents have influenced the child's views, and the rationality of the child's wishes [Muller v. Muller, 221 AD2d 635, 634 N.Y.S.2d 190](#); [Dwyer v. De La Torre, 260 AD2d 773, 687 N.Y.S.2d 789](#); [Zelnik v. Zelnik, 196 AD2d 700, 601 N.Y.S.2d 701](#) (child's preference deemed not controlling because of the potential for influence having been exerted); [Hughes v. Wiegman, 150 A.D.2d 449, 541 N.Y.S.2d 57](#) (error to deny visitation based on objections of 17 and 15-year-old children where there was no indication that the non-custodial parent posed a physical threat to the children or that visitation would be harmful to their emotional health).

In this case, the court will consider Chumy's wishes, however, the child's wishes will certainly not be dispositive regarding the issue of visitation. It is obvious that Chumy has an opinion regarding what she wants at the present time, however, Chumy at 11 years of age, is not possessed of sufficient age and maturity to make a determination of what is in her long term best interests. Chumy knows what her current preference is, but she is not yet capable

of weighing this against the impact and potential long term emotional harm which may result from cutting short the opportunity to develop a healthy relationship with her mother. To believe that limiting visitation to three days per month, as the father requests, would not adversely impact the long term mother-daughter relationship would be tantamount to engaging in fantasy rather than common sense. The court acknowledges

*12

Chumy's preferences, but as stated in the case of *Y.G. v. D.G.*, NYLJ Supreme Court, Nassau Co. 8/18/10, 'things that make one happy are not always in one's best interests.'

As Chumy matures, she (hopefully) will be in a better position to determine what is in her best interests regarding issues of visitation. At present, however, the court must look further than the child's stated wishes to arrive at a visitation schedule which is in the child's best interests.

4. Will overnight visitation be contra to the child's emotional and psychological health as a result of her exposure to inconsistencies in her parent's religious and lifestyle values?

Rivka Weber, LCSW, the subject child's current treating therapist, was qualified as an expert in social work by stipulation, and was called to testify on behalf of the father. The court found the testimony of Ms. Weber to be credible. Ms. Weber met with both parents as collateral source providers, but did not meet with either parent in session. Ms. Weber described Chumy as shy, anxious and withholding, although she reported that more recently, Chumy has progressed and has become more emotionally and verbally expressive.

Ms. Weber was questioned by counsel, as well as by the court, as to what visitation schedule would be in Chumy's best interest. The therapist acknowledged several times on the stand that her testimony was based upon her position of being an advocate for her client. She indicated that she wanted to respect the child's wishes, and in fact stated 'I'm not a lawyer, I'm a mental health person by profession. I am here to advocate for the child, so I'd like to respect what the child has told me.' During her testimony, Ms. Weber made it clear that she could only state facts (what the child told her), not opinions because she is not a forensic expert and she hasn't evaluated parties. The therapist's testimony, by her own explanation, was based upon what the child told her in session, the child's expressed wishes and her knowledge of child development in general.

Ms. Weber explained that children, in general, like to see consistency in their role models. Inconsistency in parental values, if great enough, could result in a poor sense of self as a result of a need to adapt to and please each parent. Taken

*13

further, in some cases, as time goes on, this could develop into a dependent personality disorder. However, Ms. Weber's testimony in this regard was general, and not specific to Chumy or this case. When pressed, Ms. Weber was unable or unwilling to express an opinion, within a reasonable degree of medical certainty, as to whether overnight visitation would be detrimental to Chumy.

Furthermore, Ms. Weber acknowledged that visitation with her mother is necessary for Chumy to develop normally. When questioned, Ms. Weber was unable or unwilling to express an opinion as to whether or not the potential emotional harm of limiting visitation would be outweighed by the potential harm to Chumy of her exposure to inconsistencies in her parent's religious and lifestyle values.

While Ms. Weber was unable, within a reasonable degree of medical certainty, make a recommendation as to a

visitation schedule that would serve Chumy's best interest, she did not leave the court without some guidance.

Ms. Weber's did make some recommendations in regard to general parameters for the mother's visitation. She testified that it would be best for the mother to adopt, to the extent that she is able, the father's lifestyle and values when Chumy is with her. The mother should try to give Chumy a 'great time' and that visitation should take place in the context of a family unit, i.e., the mother, Chumy and her siblings. The mother should avoid bringing up upsetting subjects and refrain from commenting on Chumy dressing different or having different lifestyle values.

The court will take Ms. Weber's recommendations into consideration in reaching its decision.

5. To what extent should the mother and child's joint right to visitation impact upon the courts decision.

The mother's argument is simple and straight forward. The mother contends that, as Chumy's mother, she has an independent right to visit with Chumy, and that Chumy has an independent right to visit with her mother.

*14

Admittedly, the mother has committed no offense to cause visitation to be limited, has never harmed the child, and was a good custodial parent prior to the time that the father assumed de-facto custody. In addition, the mother argues that any potential harm to the child that may result from exposure to inconsistencies in her parents' value systems would be more than outweighed by a deep and loving relationship with both of her parents.

The mother's argument is well taken, and well settled in the law. Generally, there is a presumption that visitation between a child and the non-custodial parent is in the child's best interests [Buffin v. Quida, 263 A.D.2d 962, 695 N.Y.S.2d 442](#); [Donald C. v. Michelle T., 254 AD2d 124, 679 N.Y.S.2d 290](#). Further, the natural right of visitation jointly enjoyed by the non-custodial parent and the child is more precious than any property right [Levande v. Levande, 308 AD2d 450, 764 N.Y.S.2d 123](#); [Resnick v. Zoldan, 134 AD2d 246, 247, 520 N.Y.S.2d 434](#); [Biamby v. Biamby, 114 AD2d 8:30, 494 N.Y.S.2d 741](#). Denial of this right is so drastic that it must be based on evidence that visitation would be detrimental to the welfare of the child [Kachelhofer v. Wasiak, 10 AD3d 366, 780 N.Y.S.2d 290](#); [Vanderhoff v. Vanderhoff, 207 AD2d 494, 615 N.Y.S.2d 919](#); [Janousek v. Janousek, 108 AD2d 782, 485 N.Y.S.2d 305](#); [Bubbins v. Bubbins, 136 AD2d 672, 524 N.Y.S.2d 50](#); [Eric L. v. Dorothy L., 1:30 AD2d 660, 515 N.Y.S.2d 591](#). To be meaningful, visitation must be frequent and regular [Nelson J. Tabares v. Dina E. Tabares, 64 A.D. 3rd 661; 883 N.Y.S.2d 123](#). Only then may a non-custodial parent provide his or her child with the teaching, guidance and counsel a young child will require to successfully negotiate their formative years. Only then may a non-custodial parent be an available source of comfort and solace in times of his child's need. Only then may a non-custodial parent share in the joy of watching is offspring grow to maturity and adulthood [Frances S. Dagher v. Khalil S. Dagher, 82 A.D.2d 191, 441 N.Y.S.2d 494](#).

The end result is that the court is faced with the task of balancing the father's right to insure continuity of the child's religious beliefs as he sees fit, the potential harm the potential harm to the child which may be caused by inconsistencies in the parents religious beliefs and lifestyle values, the child's wishes regarding visitation, the mother and child's joint right to visitation, and the benefits to the child of having a loving and nurturing relationship with both of her parents.

*15

CONCLUSION

Unfortunately, a crystal ball with which one may foretell the future is not an accouterment bestowed upon the Family Court. As such, it is impossible to know in advance how to strike a balance between the father's position, the mother's position and the child's wishes. Utilizing secular law principals to determine a child's religious upbringing and training in a case where the child's parents cannot agree is an analytical process. The challenge of reaching a judicial decision in this matter which serves the best interests of the child derives from the interplay between religion and lifestyle. This case is somewhat unique in that the parents share a common faith base, i.e., Judaism. What they disagree upon is their interpretation of Jewish Law (Halakah), the expression of their common faith and the differences in lifestyle which their interpretation affords. These lifestyle beliefs strike to virtually every aspect of the conduct of every day life, including diet, clothing, entertainment, education, technology, social engagement, etc. Nonetheless the court is left with using secular principals to determine what is in the best interests of this 11 year old child.

Considering all the factors, the court finds that it is in the best interests of Chumy to continue the May 13, 2010 temporary order of visitation which granted the mother alternate weekend visitation, from Friday at 2:00 pm until Sunday at 10:30 pm. The court's temporary order has been in effect for six months without any emergency applications having been brought to modify the order. Thus, it cannot be said that the drastic remedy of limiting visitation to three days per month is warranted under the circumstances. The court notes that the father's proposal to limit visitation to Sundays would mean that the child would have to endure the drive from the Williamsburg section of Brooklyn to Rockland County and then back to Williamsburg again in one day. Furthermore, alternate weekend visitation will be frequent and regular enough to render the mother's visitation meaningful. See *Nelson J. Tabares v. Dina E. Tabares*, supra. Finally, nothing in the record supports depriving the child and the mother of the opportunity to enjoy late night and early morning routines that are an integral part of family life and the development of a healthy parent-child relationship.

Jewish holidays shall be divided as follows:

Rosh Hashana: The child shall be with the father each year.

*16

Yom Kipur: The child shall be with the father each year.

Succos: The child shall be with the father for first two 'non-drive' days and the last two 'non-drive' each year. In even years the child shall be with the father for the four in-between 'drive-days'. In odd years the child shall be with the mother during the four in-between 'drive-days'.

Passover: The child shall be with the father for first two 'non-drive' days and the last two 'non-drive' each year. In odd years the child shall be with the father for the four in-between 'drive-days'. In even years the child shall be with the mother during the four in-between 'drive-days'.

Chanukah: The child shall be with the mother on days when the Holiday falls within her regularly scheduled alternate weekends, however, if the child has off from school on days adjacent to the mother's regularly scheduled weekend, the mother shall be entitled to add up to two days to her weekend.

Purim: The child shall be with the mother when the Holiday falls within her regularly scheduled alternate weekends.

Shavous: The child shall be with the mother on days when the Holiday falls within her regularly scheduled alternate weekends, however, if the child has off from school on days adjacent to the mother's regularly scheduled

weekend, the mother shall be entitled to add up to one day to her weekend.

Succos and Passover are the two major long holidays with 'non-drive' days separated by a period of 'drive' days. Chumy made it clear that she prefers to spend holidays at her father's home. This schedule will allow Chumy to spend the important 'non-drive' days of both holidays with her father each year. It will also provide the father with one entire 8 day holiday each year, which will allow the father the opportunity to travel with Chumy to visit relatives. However, the schedule will also allow the mother to celebrate part of one of these important holidays with Chumy each year (4 non-drive Succos days in odd years and 4 non-drive Passover days in even years).

The child shall be with the mother for the week in-between the end of school and the beginning of summer camp. In addition, the mother shall be entitled to visit with Chumy on Sunday day visits with Chumy while she is at camp.

*17

Each party requested that the court order the other parent to be responsible for 100 percent of the transportation for visitation. Responsibility for transportation shall be equally divided between the parties.

When the child is with one party, the other party should have regular and reasonable phone contact with the other party.

During visitation, in the presence of the subject child, the mother shall adhere to the father's standard of religious practices as observed by him, including dietary rules, prohibition against TV and computer / internet usage. All clothes to be worn by the subject child shall be provided by the father. The mother shall not permit the presence of her boyfriend for so long as they are unmarried.

The rules for daily conduct as set forth by Chumy's school which pertain to parent and child conduct outside of school are to be followed during visitation. The father is to provide a copy of the school rules to the mother and shall send the mother updates as necessary.

Both parties are to refrain from discussing differences in the other parties religious and lifestyle beliefs with Chumy, and shall not place a good / bad value judgment regarding these differences when speaking to Chumy or in Chumy's presence.

The mother is to have access to all educational, religious, medical and mental health providers and information.

Custody and visitation of Devory B. and Hudy B. are settled in accordance with the stipulation entered into between the parties on the record at the commencement of trial.

Counsel for the parties are directed to settle an order within 30 days in accordance with the within decision.

This constitutes the decision of the court.