THE SUFFOLK LAWYER
THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION
DEDICATED TO LEGAL EXCELLENCE SINCE 1908
www.scba.org Vol. 32, No. 3 – November 2017

State Court Judges Struggle to Weigh Constitutional Protections with Case-Specific Child-Related Concerns

By Christopher Chimeri

The Appellate Division, Second Department recently reversed a Brooklyn trial judge's decision to remove custody from a formerly-Hasidic lesbian mother of her three children, finding, among other things, that the settlement agreement drafted by her ex-husband's father at the time of their divorce imposed an unconstitutional requirement that she continue to observe the tenets of a Hasidic lifestyle as a condition of her custody of their children. In a unanimous decision in *Weisberger v. Weisberger*, 2017 N.Y. Slip Op 06212, the court applied well-established principles of family law that the trial judge overlooked in giving preemptive weight to the father's religious desires to the exclusion of many other factors.

The parties were married in traditional Orthodox fashion when they were 19, had three children during their marriage and raised them according to traditional Hasidic beliefs. Several years into the marriage, the wife informed the husband that she was attracted to women. After several years, the husband agreed to give the wife a "Get" (a Jewish divorce), and they signed a settlement agreement in November 2008. Under the terms, the parents had joint custody of the children with the mother having primary residential custody and the father had a traditional but liberal visitation schedule. The agreement contained a "religious upbringing clause," which provided: "Parties agree to give the children a Hasidic upbringing in all details..."

In November 2012, husband sought a change of custody and to restrict the mother's access to supervised, and claimed that the mother had "radically changed her lifestyle in a way that conflicted with the parties' religious upbringing clause," including telling the oldest child of her sexual preference. The father also alleged that the mother came out publicly as a lesbian, disparaged the basic tenets of Hasidic Judaism in front of the children, allowed the children to wear non-Hasidic clothes, permitted them to violate the Sabbath and kosher dietary laws, and had referred to them by English names rather than the names by which they were known in the Hasidic community. The father also claimed the mother was in violation because she was not herself living according to Hasidic tradition. The mother cross-moved to modify the religious upbringing clause to expand her right to bring up the children with "a conservative or progressive modern orthodox Jewish upbringing" in a community that "is inclusive of gay individuals." She proposed that the father be able to continue the children's Hasidic education by having visitation each Sabbath, and she promised to keep a kosher home and insure that the children go to school and have their needs provided.


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The Appellate Division held that the trial court gave "undue weight to the parties' religious upbringing clause," because New York courts do not consider the parties' settlement agreement provisions as determinative in deciding a custody dispute. Rather, the court's determination of the best interest of the children is paramount. "The mother has been the children's primary caretaker since birth," wrote the court, "and their emotional and intellectual development is closely tied to their relationship with her. The record overwhelmingly demonstrated that the mother took care of the children's physical and emotional needs both during and after the marriage, while it is undisputed that the father consistently failed to fully exercise his visitation rights or fulfill his most basic financial obligations to the children after the parties' separation. Indeed, aside from objecting to her decision to expose the children to views to which he personally objects, the father expressed no doubts whatsoever about the mother's ability to care and provide for the children." The court concluded that courts may not compel a person to adopt any particular religious lifestyle and it was not in the children's best interest "to have their mother categorically conceal the true nature of her feelings and beliefs from them at all times and in all respects, or to otherwise force her to adhere to practices and beliefs that she no longer shares."

However, the court declined to modify the religious upbringing clause in the settlement agreement because, it reasoned, the children had spent their lives in the Hasidic community, attended Hasidic schools, and visited with extended family who were observant Hasidic Jews. Thus, the father was granted final decision-making authority concerning education and religion.

Settlement agreement clauses concerning "homosexual activity"

A unanimous three-judge panel of the Court of Appeals of Tennessee vacated and remanded a marital dissolution agreement that imposed permanent "paramour" and "homosexual activity" restrictions on a gay father when he was around his children in the case of *Brantley v. Brantley*, (Tenn. Ct. App. Sept. 15, 2017). The court also cited authority making clear that, on remand, a revised order cannot impose vague "lifestyle" limitations on the father.

In August 2016, the parties presented the county chancellor with a proposed marital dissolution agreement and permanent parenting plan signed by both parties. At the hearing, the mother requested certain changes. The judge heard from both parties, who revealed that father was HIV-positive and had a boyfriend. Over the father's objections, the chancellor modified the divorce decree with several handwritten "Injunctions by Court," including "No paramours overnight . . . No homosexual activity around children. Father to avoid body fluid exchange with children, no bathing, showering or sleeping with children . . . Father may have no paramours around children whatsoever."

On the father's appeal, the issue was, principally, "whether the Father was deprived of due process by not being afforded a meaningful evidentiary hearing before the trial court made substantive changes to the agreed upon Final Decree of Divorce and Permanent Parenting Plan." The Appeals Court held that "to comport with due process, the trial court should have afforded father and mother notice so they could be prepared to present competent evidence." The court also noted that "some of the injunctions imposed are too vague to be enforced," quoting a 2004 Tennessee appeals ruling analyzing similar "lifestyle" restrictions on a gay father, to hammer home that homophobia must not influence visitation decisions.

Note: Christopher J. Chimeri is partner with the Hauppauge law firm Quatela Chimeri PLLC and heavily focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBT Law Committee. From 2014-2017, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star," and was recently featured in Forbes Magazine, Long Island Business News, and New York Magazine as a "Leader in Law."