State of New Hampshire
Supreme Court

NO. 2009-0751

2010 Term
July Session

In the Matter of

MARTIN F. KUROWSKI

and

BRENDA A. VOYDATCH

Rule 7 Appeal of Final Decision of Laconia Family Division

Brief of Petitioner-Appellee Martin Kurowski

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SUMMARY OF ARGUMENT

Mr. Kurowski and Ms. Voydatch are parents who disagree whether their daughter should be home-schooled or public-schooled. An evidentiary hearing highlighted their religious differences, Ms. Voydatch's questionable ability to know and accurately report the child's preferences, and the small range of alternative choices. The court found, and the record easily supports, that the child's best interest is in the public school.

Mr. Kurowski dispels the claim that religious and parental rights create a right to home-schooling. No such right exists because it would ignore the rights and interests of the other parent, the child, and the community, and because the United States Supreme Court opinion relied on to make the claim of right was limited by its own terms to traditional established agrarian communities. Even if such a right existed, at most it is something that can be narrowly asserted against the government, not between parents. But *this* case is governed by the best interest of the child, which has nothing to do with either parent's rights.

Mr. Kurowski also dispels Ms. Voydatch's suggestion that this is a modification of an earlier order – with a higher burden of proof than best-interest – because this is the first and only court ruling on the nature of this child's schooling. Finally, he notes the record does not show the GAL was biased, nor the court improperly swayed.

ARGUMENT

I. Difference in Religious Outlooks

A. Religion of the Parents

From the record both Ms. Voydatch and Mr. Kurowski appear to have strongly-held moral values they wish to pass on to their child.

Mr. Kurowski is an Episcopalian, *2009 Trn*. at 257.[1] "I believe in God. I don't necessarily believe that to get to heaven, you know, you do it through faith. I tend to believe you get to heaven by doing good things and doing the right thing for the world and the right thing for people."[2] *2009 Trn*. at 225.

Ms. Voydatch acknowledges the strength of her Christian beliefs. DECREE ON PENDING MOTIONS (July 15, 2009) at 5, VOY.APPX. at 126.[3] "[O]ur belief … is that you get to … heaven by faith in Jesus Christ, not by works." *2009 Trn*. at 189. "If you don't believe that you only get to

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[1]There are two transcripts in this case. The April 19, 2006 hearing is cited herein as "*2006 Hrg*." Because it was not prepared for this appeal, it is included in the appendix to this brief. The transcript of the June 2, 2009 hearing is cited herein as "*2009 Trn*." It was prepared for this appeal, and thus is already part of the appellate record.

[2]"[C]ourts must refrain 'from evaluating the merits of differing religious beliefs,' and consider the parties' religions solely as they relate to 'the concerns and temporal welfare' of the children." *Sanborn v. Sanborn*, 123 N.H. 740, 748(1983), quoting *Provencal v. Provencal,* 122 N.H. 793, 798-99 (1982).

Here the court heard some evidence of the tenets of the parties' religions. During the hearing the court allowed the evidence on the grounds that it was relevant to the child's "discomfort … with spending time with her dad [which] appears to flow directly from [her]religious training." *2009 Trn*. at 191. In its order the court wrote it "has not considered the merits of [the child's] religious beliefs, but considered only the impact of those beliefs on her interaction with others, both past and future. DECREE ON PENDING MOTIONS at 8 (July 15, 2009), VOY.APPX. at 126. The court also noted that [e]vidence of some of the specific tenets of Ms. Voydatch's faith were only admitted because of statements and behaviors of [the child] suggesting that [her] application of the logical consequences of those tenets was impacting her feelings toward her father and might impact her development in other areas. ORDER ON MOTION FOR RECONSIDERATION at 6 (Sept. 17, 2009), VOY.APPX. at 175.

As the court made clear in both its contemporaneous ruling and afterward, the reason it heard the evidence was its effect on the child's temporal welfare, and not for the tenets of the religion itself. Consequently there was no error in hearing the evidence.

[3]The appendix to Ms. Voydatch's brf is cited herein as VOY.APPX. The appendix to Mr. Kurowski's brief is cited herein as KUR.APPX.

heaven through the Lord Jesus Christ, then you are not a born-again believer or saved.… [F]irst, you need to admit that you, yourself, are a sinner and are not perfect, and that you need a savior to get to heaven. There's nothing you can do to get to heaven." Ms. Voydatch testified she believes that what happens to people who are not saved, such as Mr. Kurowski, is "[y]ou have eternal separation from God, which is in hell." *2009 Trn*. at 190.

B. Religion of the Child

There was testimony about the child's religious beliefs, from Ms. Voydatch, Mr. Kurowski, and the GAL.

Accordingly to the GAL the child "believes the set of beliefs that are espoused by her religious training through her church," considers herself "saved," and understands that those who believe differently will "burn forever in hell." *2009 Trn*. at 72. Her religion affects everyday activities. She does not like going to the mall, for instance, "because there is inappropriate music playing," and "segregates herself during birthday parties because children are dancing." GAL REPORT, VOY.APPX. at 57. Ms. Voydatch denies trying to influence the child's beliefs, but acknowledges she daily teaches them to the child. *2009 Trn*. at 194-95; DECREE ON PENDING MOTIONS (July 15, 2009) at 5, VOY.APPX. at 126. Thus the court held that:

> Despite Ms. Voydatch's insistence that [the child's] choice to share her mother's religious beliefs is a free choice, it would be remarkable if a ten year old child who spends her school time with her mother and the vast majority of all of her other time with her mother would seriously consider adopting any other religious point of view.

DECREE ON PENDING MOTIONS (July 15, 2009) at 6, VOY.APPX. at 126.

Mr. Kurowski accommodates the child's religion. He took her to her mother's church for several years, and has been careful to not argue with her about her beliefs. *2009 Trn*. at 222-23, 255; DECREE ON PENDING MOTIONS (July 15, 2009) at 5, VOY.APPX. at 126. He attends the child's

activities at her church. *2009 Trn*. at 90, 93. But he believes the child should be exposed to more religions. *2009 Trn*. at 231-32; DECREE ON PENDING MOTIONS (July 15, 2009) at 5, VOY.APPX. at 126. In the record he appears indifferent to Ms. Voydatch's beliefs.

He clearly does not like the effect Ms. Voydatch's religion has on his daughter, and has become increasingly uncomfortable with it over time. Asked why he now had concerns about religion when he had taken the child to her church for several years, Mr. Kurowski testified:

> Because now she's a lot older. I think she's experiencing more of what the church has to say. So as she gets older, … as she starts to be able to learn more, she's starting to hear and take in and believe in certain things that I'm not sure are what I believe in, and I'm not sure it's what I think is the best for Amanda.

2009 Trn. at 255.

Mr. Kurowski observes his daughter uncomfortable in situations that challenge her beliefs.

2009 Trn. at 218-19.

> [I]f there's ever anything that goes against what she believes in, she doesn't really know how to respond and she automatically thinks that somebody's attacking her or somebody is going up against her."

2009 Trn. at 224-25. Mr. Kurowski testified:

> "[I]f somebody doesn't believe in her religion, if somebody does something differently from what she has been told by her mom is either right or wrong, based on this religion, she has a real, real hard time with it. She really can't, you know, engage in doing things outside of her religion.

2009 Trn. at 216.

For instance, the child tried to proselytize her counselor by offering bible material to read. When the counselor deliberately demurred, according to the GAL the child "became quite angry with [the counselor] about not reading it and not saving herself." *2009 Trn*. at 73-74.

He credits this attitude to Ms. Voydatch's overbearing religion. Mr. Kurowski testified:

> [She] was told by her mom in front of me numerous times that he's a sinner. He doesn't want to be in heaven with you. She told me this numerous times, twice at the parking lot at Sanbornton General Store.… [S]he said, your dad is a sinner. He's not going to go to heaven. He doesn't want to be with you.

2009 Trn. at 219.

Hoping to broaden her experience, Mr. Kurowski has several times tried to take the child to churches of other religions.

> [T]wice we tried to take her to our church. Well, actually three times. The first time, she said, dad, if you take me to a Catholic church, if I see somebody come out with a – I forget the word she used for the – for the thing around the priest's neck, she said, I'm going to get up and storm out of there because my mom said I cannot believe in Catholic religion. I said, don't worry, Amanda, we're not going to go to Catholic church, so that that's not a worry.
>
> So we took her to the Episcopalian church in Portsmouth and the very next time that I picked Amanda up at her mother's – at Johnson's Dairy Bar for her time with her dad, her mom leaned in the car and said you don't have to take her to that church. She doesn't want to go to that church. And her mom actually screamed and yelled in the car with [the child] there that [the child] doesn't want to go to that church. You can't take her to that church. She doesn't believe in the Episcopalian way of doing things from religious perspective.
>
> I said okay. We drove off, and Amanda said to me, dad, I talked to Pastor in church, and Pastor said that the Episcopalians are wrong in what they believe in. They believe in doing the right thing and the good things, and that's the way you get to heaven. I said, Amanda, that's what I believe in. She said, well, that's not what we believe in, so I don't want to go to the Episcopalian church. So that was – that was – we – I said, okay, let's work on this. We won't do it right away.
>
> So a couple months went by, and I said, okay, … we're going to go to the Episcopalian church again. So I took her to the church. She was fine in the church. She wasn't bad whatsoever. She was a little bit quiet, but she was fine. This was on a Sunday. Brought her back.

2009 Trn. at 256-57.

The GAL characterized the issue as the child is "fearful" "she's going to be hurt by not being able to experience the type of religious joy with [Mr. Kurowski] that she would like and that she longs for." *2009 Trn*. at 75; DECREE ON PENDING MOTIONS (July 15, 2009) at 5, VOY.APPX. at 126.

These incidents show, as the court found, that the child "appear[s] to reflect her mother's rigidity on questions of faith." *Id.* at 4. The GAL testified, "I don't care what, ultimately, [the child] ends up believing. That will be her choice. I just want to make sure that she has the ability to think about her choice." *2009 Trn*. at 209.

II. Parents' Positions on Home Schooling and Public Schools

A. Why Ms. Voydatch Likes Home-Schooling

Despite Mr. Kurowski's opposition, he went along with Ms. Voydatch choice to home-school the child from first through fourth grade. DECREE ON PENDING MOTIONS at 3 (July 15, 2009), VOY.APPX. at 126. By 2007 when the child was in fourth grade, however, Mr. Kurowski felt that his observations over the years confirmed his skepticism, and he finally applied to the court to resolve the parties' differences regarding education.

Ms. Voydatch likes home-schooling for a number of reasons. She testified that "I've always wanted to – I like homeschooling." *2009 Trn*. at 100.

She believes public schools are generally dumbed-down to accommodate those less able than her daughter, *2006 Hrg*. at 73, and that home-schooling would provide an opportunity for academic excellence. *2009 Trn*. at 123-130. On the other hand Ms. Voydatch thinks there is too much competition in public school. *2009 Trn*. at 176-77. Nonetheless, all agree that the child has kept up with her age-group academically, *2009 Trn*. at 117 (mother); *2009 Trn*. at 264 (father), although the GAL was concerned that her academic success has declined over time. *2009 Trn*. at 29, 47. DECREE ON PENDING MOTIONS at 7 (July 15, 2009), VOY.APPX. at 126 ("clear that the home schooling … has more than kept up with the academic requirements of the Meredith public school system). Ms. Voydatch believes that colleges look kindly on home-schooled students. *2009 Trn*. at 125.

Ms. Voydatch believes home-schooling teaches better logical and creative thinking. *2009*

Trn. at 125, 139-40. She thinks it provides more individual attention, *2006 Hrg*. at 73-74, although the GAL was doubtful because of the standardized lessons Ms. Voydatch uses. *2009 Trn*. at 78.

Ms. Voydatch alleges home-schooling is more diverse because public school teaches only evolution, whereas home-schooling teaches origins from all major religions. *2009 Trn*. at 139.

Ms. Voydatch believes home-schooling produces fewer behavioral issues, *2009 Trn*. at 123-130, although she admits it may be simply be that there are fewer ways way for a home-schooled child to make choices that might her into trouble. *2009 Trn*. at 178. She credits the absence of peer pressure, *2006 Hrg*. at 74, although she admits that home-schooled children lack participation in such activities as Brownies, Girl Scouts, and sleep-overs, and that they miss friendships, fights on the playground, and the opportunity to stick up for themselves. *2009 Trn*. at 176-77.

Ms. Voydatch believes home-schooling provides sufficient socialization, and points to how well the child fits into her various group activities, *2009 Trn*. at 123-130, 133-134, although she admits in home-schooling there is no one for the girl to talk to. *2009 Trn*. at 177.

Overall, Ms. Voydatch could not list any positive attributes of public school, and didn't like it herself. *2009 Trn*. at 175-76. She claims the child doesn't like it either. *2009 Trn*. at 135.[4]

B. How Ms. Voydatch's Home-Schools

To effectuate home schooling, Ms. Voydatch purchases materials from Bob Jones University

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[4]There can be no doubt in many cases home-schooling provides a good education and produces well-socialized citizens, and it is easy to recall newsworthy anecdotes about successful home-schooled students.

> However, the widely-touted studies showing that homeschooled children outperform their public school peers deserve skepticism. They generally suffer from selection biases among homeschoolers and do not control for the family characteristics of the homeschooling and non-homeschooling families being compared. With only half of all states requiring standardized testing or evaluation of homeschooled students, and with poor enforcement of such requirements where they do exist, there is simply no good data on what and how much homeschooled students are learning.

Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 156-158 n.48 (2008).

on CDs, which contain grade-appropriate lessons by certified teachers as well as bible studies. *2009 Trn*. at 103-07, 119. The curriculum is "based on God's word." *2006 Hrg*. at 70.

Although Ms. Voydatch distinguishes between "self-schooling" and "home-schooling," *2009 Trn*. at 108, the child's learning activity consists of watching lectures on TV in a corner of Ms. Voydatch's bedroom. There is no interactive component, and the lessons are not live. *2009 Trn*. at 16-18. If the child has questions, Ms. Voydatch says "you rewind the DVD," or call Bob Jones University. *2006 Hrg*. at 91. During this, the parent is on standby. DECREE ON PENDING MOTIONS (July 15, 2009) at 3, VOY.APPX. at 126. Bible lessons are first, and then other subjects. *2009 Trn*. at 213. The total elapsed time of a day's lessons is about three-and-a-half hours, followed by assignments, which are corrected by the parent. *2009 Trn*. at 215.

Mr. Kurowski has sat through some home-schooling sessions, *2009 Trn*. at 101, and characterizes them as "she sits on the couch and watches a video the entire day." *2006 Hrg*. at 12; *2009 Trn*. at 213-14. He reports that the child is often bored by the process, *2009 Trn*. at 214, and "extremely isolated … by herself in front of a computer in her mother's house." *2009 Trn*. at 217; REPORT OF DR. DERAPELIAN , VOY.APPX. at 12 (child reports feeling "very lonely in her days.").

Ms. Voydatch has completed the statutory certification process through her local school superintendent, *2009 Trn*. at 106, and does required annual testing. *2009 Trn*. at 110, 113-117. At the urging of the GAL Ms. Voydatch entered the child in a variety of additional classes. *2009 Trn*. at 101-02, 140. Others, including theater, music, language, and gym, required by the Meredith school district, *2009 Trn*. at 107, are satisfied by programs through Ms. Voydatch's church, and the child is also enrolled in some town sports. *2009 Trn*. at 119, 132, 183-86.

Some aspects of the child's education are more troubling. Mr. Kurowski testified:

> I had picked [the child] up at her mom's house in Meredith and we were coming home and it was during the election season, and there was a sign for Mike Huckabee. And she said, dad, that's who you're going to vote for for President. And I said, no. I'm not going to vote for Mike Huckabee for President. She said, well, who are you going to vote for? I said, well, I'm going to probably vote for Hillary Clinton.
>
> And she immediately got this look on her face and said dad. And this was in the backseat of the car.… She said, dad, do you know that Hillary Clinton is a sorcerer and believes in magic and sorcery and doing all those bad things? And I said, you know, wait a minute. I said, that's not true.… Where did you hear that? She said, that's what my mom told me, and that's true about Hillary, and you can't vote for Hillary because she's a woman, and in our religion, you know, the woman can't really do something like that. That's a man's job. And I said, Amanda, you know, where is all this coming from?
>
> [S]o we had a discussion about Hillary Clinton and I tried to tell her that's not true. There's no such thing as magic and sorcery and Hillary is a great woman. And I even tried to say to her, … you know, one of the reasons I'm voting for Hillary Clinton is because I want you to know that a woman can be President. I want you to feel like you can do anything you want in this world. Anything, and that includes being a President. And she said, no. I can't. Women can't do that, you know, that's a man's job.

2009 Trn. at 223-24.

Similarly, Mr. Kurowski testified that he and his [new] wife were having a debate, and the child said, "I know dad's going to win this debate … because he's the man and the man is the one that makes all the decisions and is the person in charge. So dad's going to win that debate." *2009 Trn*. at 226. These attitudes Mr. Kurowski finds "pretty scary.… I'm not sure that's what any person wants to have their daughter say to them." *2009 Trn*. at 255-56.

C. Why Mr. Kurowski Does Not Like Home-Schooling

Mr. Kurowski acknowledges he is simply skeptical of home-schooling, regardless of the rationale. *2009 Trn*. at 215.

Nonetheless, he notes that the child is not "engaged in doing things outside her religion" *2009 Trn*. at 216. He sees her as being isolated socially and philosophically. *2009 Trn*. at 218, 233.

"I know who Amanda hangs around with. I know who … her friends are. They are basically people of the same religious beliefs." *2009 Trn*. at 262. This is a problem, Mr. Kurowski testified, because:

> I want her to be able to make her own decision about what she believes in, what she wants to do. But I want it to be an educated decision based on a lot of different experiences, not just her religion and the kids from her church.

2009 Trn. at 218. To bring this about, Mr. Kurowski told the court:

> I really think she needs to see other people, see different beliefs, talk to different people, be put in situations where she has to, you know, handle things that are not necessarily exactly the way they are at her mom's house or in her religion.

2009 Trn. at 233.

Mr. Kurowski does not think the child's extra-curricular activities go far enough, for two reasons. First, many of the outside activities are organized within her church, and thus involve the same too-narrow group of people and outlooks. *2006 Hrg*. at 40-42. Second, most are not social activities and therefore do not replace the social engagement one would expect among a larger group of peers at school. *2009 Trn*. at 217. For instance:

> Gymnastics is basically an instructional activity where she basically – the entire class is made up of, I think, five to six girls. The girls are basically taught to listen to the instructor. I've been there. She barely speaks to any of the other kids. It's not really a team building.… It's really an individual type of thing.

2009 Trn. at 252-53. Her music lessons are similar. "Piano is a one-on-one activity with her teacher where she sits in a tiny, tiny room and practices piano for a half hour with her teacher." *2009 Trn*. at 252. Mr. Kurowski is delighted with her basketball team, which he sees as very positive socially. *2009 Trn*. at 217, 253. The GAL's observations were that the child did not appear intimate with those in her group activities. DECREE ON PENDING MOTIONS at 4 (July 15, 2009), VOY.APPX. at 126.

Mr. Kurowski, who has had a successful career in the corporate world, testified that the social aspects of school are important as an educational matter:

> I want her to, you know, think outside the box. I want her to experience everything that people experience when they go to school. I mean, you have to learn to think on your feet. You have to learn to make quick decisions. You have to learn to compromise with other people. When somebody has a different belief or a different thought than you, it's – you're not always right, you're not always wrong. You have to learn how to work with the other people to make sure that, you know, you can get along. And some people – you know, sometimes you're right, sometimes you're wrong.

2009 Trn. at 216-17. Mr. Kurowski wants the child in public school because he thinks it will bring her into contact with new and diverse ideas and experiences. He would like the child "to experience different things, … see different people, explore different ideas." *2009 Trn*. at 216. He believes it is important for the child to be exposed to

> Different points of view, different religions, different beliefs, different attitudes, different cultures, different experiences, different people. Anything outside of, you know, just the religion that her mom and her are taking now.

2009 Trn. at 251. He thinks the child should "be able to make her own decision about what she believes in, what she wants to do. But I want it to be an educated decision based on a lot of different experiences." *2009 Trn*. at 218.

When asked whether he is "hoping that public school will change [the child's] religious beliefs, Mr. Kurowski answered:

> Change her religious beliefs? I'm not necessarily hoping that it will change her religious beliefs. What I'm hoping it will do is expand her beliefs, allow her to see different beliefs, and then make an educated decision based on a lot of different experiences. I don't want it to be based on just one experience from her mother. I'd like her to experience different things, then she can decide.

2009 Trn. at 257-58.

Mr. Kurowski testified in his discussions with Ms. Voydatch about the education of their child, Ms. Voydatch was preoccupied with things like "riding on a bus with kids who swear," *2009 Trn*. at 216, and "girls at public school wear[ing] short dresses. They get pregnant. They drink.

They do drugs." *2009 Trn*. at 215. He testified that Ms. Voydatch "talked about how the kids in the public school systems dress like, you know, somebody that's looking to have sex all the time, the girls get pregnant at an early age, there's drugs and rock 'n roll involved." *2006 Hrg*. at 5. It appears that Ms. Voydatch simply doesn't want the child exposed to these things, while Mr. Kurowski thinks good choices come from an understanding of the difficulties they pose.

D. Mr. Kurowski Accommodates Home-Schooling

Despite his misgivings, Mr. Kurowski accommodates Ms. Voydatch's education preferences, and "supervises [her] home schooling work when she is with him during 'school' hours." DECREE ON PENDING MOTIONS at 3 (July 15, 2009), VOY.APPX. at 126.

During Mr. Kurowski's residential responsibility times, the child brings along her education kit assembled by Ms. Voydatch, who provides written instructions so the child know what she's supposed to do. *2009 Trn*. at 122. Mr. Kurowski has an apple computer in the child's room, room set up the way she desires. *2009 Trn*. at 212. Although there were some issues at the outset regarding matters such as how frequently she needed adult supervision, the child and Mr. Kurowski, with the oversight of the GAL, appear to have worked them out. *2009 Trn*. at 212-13, 251.

Mr. Kurowski has surreptitiously watched the child during her self-education, and thus has a basis for his observation that she is often bored with it. *2009 Trn*. at 214.

III. Unreliability of Ms. Voydatch's Testimony

One of the on-going disputes between Ms. Voydatch and Mr. Kurowski has been how much the child shares the extent of Ms. Voydatch's views toward disconnection from broader social surroundings, and whether the child is unhappy when Mr. Kurowski exposes her to them. This has occurred in the context of Mr. Kurowski's suggestion of increased parenting time.

Mr. Kurowski reports that during the periods the child is in his care she wants to listen to

music, see movies, attend theater, dance, wrestle, and enjoy other activities in relatively cosmopolitan Portsmouth that the child knows her mother does not approve of. He testified that the change occurs as soon as the child is out of Ms. Voydatch's sight, and that the longer Ms. Voydatch is afar, the more the child opens up, has more fun, and tries more new and different things. *2009 Trn*. at 220, 231, 233-34, 237.

Ms. Voydatch claims, however, that she is "the trusted adult" in the child's life, and that the child "discloses things to me that she doesn't disclose to others." *2009 Trn*. at 186. When asked how to account for Mr. Kurowski's reports of the child being happy enjoying new things, Ms. Voydatch could not offer any cogent response. *2009 Trn*. at 173-74. Ms. Voydatch does not accept that it is possible that the child is telling her what she wants to hear. *2009 Trn*. at 187.

> Q: Is there any other explanation that you'll allow, other than that you're the only one she trusts? Any other explanation as to why [the child] seems to be doing great in school, happy to meet new friends, that … she does wonderfully at [Mr. Kurowski's] house, is joyful and happy? Is there any other explanation to her depression other than what you've said, that you're the trusted one?
>
> A. Other than increased visitation time, no. I don't think there's any other explanation.

2009 Trn. at 186-77. At one point Ms. Voydatch alleged that the explanation for these issues might be Mr. Kurowski was jealous of Ms. Voydatch's new husband and that Mr. Kurowski needed to be the "alpha dog," *2009 Trn*. at 143, despite that Mr. Kurowski happily remarried years ago.

During the GAL's testimony, the GAL refused to answer questions regarding things the child told the GAL with the understanding that the GAL would keep the disclosures confidential.

> [S]he's not able to be open, fully open, with her mom.… I know that she may have some thoughts or have engaged in some activities or have liked certain things during her experience when she has not been under mom's guidance, which she found either enjoyable, interesting, curious, and she was concerned that those things not be related to mom.

2009 Trn. at 204. The court wisely allowed the GAL to maintain the confidentiality. *2009 Trn*. at 205, 207. Asked, "[W]ould it surprise you to learn that Amanda talked to [the GAL] about events that occurred at her father's house that she did not want … share[d] with you," Ms. Voydatch replied, "Yes. I guess that would surprise me." *2009 Trn*. at 200-01.

The court understood the implications of Ms. Voydatch's assertions. It ruled:

> [T]he fact that [the GAL] has testified that there are things that [the child] has told her and asked her not to share with her mother, virtually completely undermines any claim that Ms. Voydatch has a monopoly on the truth with respect to [the child].

2009 Trn. at 207. The court briefly reiterated that conclusion in its order, and stated it "considered this finding in analyzing the reliability of the rest of Ms. Voydatch's testimony." DECREE ON PENDING MOTIONS at 6-7 (July 15, 2009), VOY.APPX. at 126.

IV. Public Schooling is in the Best Interest of This Child

In two well-reasoned orders totaling 24 pages, the court wrote: "The evidence compels a finding that the parties have had a long standing disagreement whether [the child] should be home schooled, and that their level of communication makes it virtually impossible for them to reach an agreement about this issue." DECREE ON PENDING MOTIONS at 2 (July 15, 2009), VOY.APPX. at 126. It then held, "Beginning with the 2009-2010 school year, [the child] shall attend public school in the Meredith school district, where Ms. Voydatch resides." *Id.* at 10.

There were only three possible alternatives here: public school, home-schooling combined with more parenting time with Mr. Kurowski, and other schools. *2006 Hrg*. at 96.

As to other schools, the parties together searched for something suitable. *2006 Hrg*. at 9 They were either too expensive, *2009 Trn*. at 100; *2006 Hrg*. at 9, did not offer sufficient academic credentials, *2009 Trn*. at 100, or were not compatible with Ms. Voydatch's religious beliefs. *2009 Trn*. at 215; *2006 Hrg*. at 12, 61, 66. The court recognized that "[b]efore the issue was presented to

the court, the parties made reasonable efforts to resolve the issue, and the court presumes they considered all of the alternatives." ORDER ON MOTION FOR RECONSIDERATION at 9 (Sept. 17, 2009), VOY.APPX. at 175. The court also invited the parties to continue searching for "a Christian school or other school with a religious education program," and specified that because educational decisions should be made by parents, if they found something, the court would readily approve it. *Id.*

As to increasing parenting time with Mr. Kurowski, the child's "counselor concluded that [she] would likely benefit from continued and frequent contact with her similarly aged sibling (Mr. Kurowski's other daughter, age seven), and in the community." DECREE ON PENDING MOTIONS at 5 (July 15, 2009), VOY.APPX. at 126. And Mr. Kurowski offered the alternative of the child having more time in his care.

> She could spend more time with myself and [my family] in Portsmouth. That would be another way to do it. Engaging in more activities would be another way to do it. So I think there's a lot of ways to improve this situation.

2009 Trn. at 252. Because the court did not find that Mr. Kurowski's care of the child harms her – and the evidence would not support such a finding – it did not undertake "any dramatic deviation from the basic structure" of the current parenting schedules which any significant increase in Mr. Kurowski's parenting time would entail. DECREE ON PENDING MOTIONS at 8 (July 15, 2009), VOY.APPX. at 126.

Thus the court picked the only available alternative.[5] Ms. Voydatch testified that even if the child goes to public school, she will continue to be involved in her schooling, checking homework, providing remedial instruction if necessary, and doing whatever the situation demands to ensure her

[5]Despite Ms. Voydatch's claim that the court improperly employed a definition of education, the court explained that it merely "intended to illuminate the difference between the experience of home schooling and the experience of public schooling, based on the evidence, rather than to suggest or apply a different educational standard." ORDER ON MOTION FOR RECONSIDERATION at 6 (Sept. 17, 2009), VOY.APPX. at 175. To the extent that constitutes a definition of education, it is consistent with the State's own definition. RSA 193-E.

success. *2009 Trn*. at 178-80. The court held that the decision to send the child to public school does not impinge on anyone's religious rights because both parents are free to provide religious guidance, and because religion is not necessary to Ms. Voydatch's home-schooling program. DECREE ON PENDING MOTIONS at 8 (July 15, 2009), VOY.APPX. at 126; ORDER ON MOTION FOR RECONSIDERATION at 7, 9 (Sept. 17, 2009), VOY.APPX. at 175.

The evidence supports the Family Division's pick, and this Court must therefore affirm.

V. There is no Constitutional Right to Home-School

Ms. Voydatch claims the court's order violates her constitutional rights. It is obvious that government cannot substantially burden rights, but simply saying in the same sentence "parent," "religion," and "education" does not imply a right to home-school, that the community has no role, or that the child's own rights don't matter.

A. Parenthood Rights

Although parenthood is an important right, *see*, *e.g.*, *Troxel v. Glanville*, 530 U.S. 57 (2000) (mother's fundamental right to bar visitation by child's paternal grandparents); *Santosky v. Kramer*, 455 U.S. 745 (1982) (high burden of proof necessary to terminate parental rights); *Stanley v. Illinois*, 405 U.S. 645 (1972) (fatherhood equally fundamental as motherhood), it may be defeated by competing rights of others, particularly those of the child. *See*, *e.g.*, *Ouilloin v. Walcott*, 434 U.S. 246 (1978) (biological father's parental rights lost to child's best interest, by neglect over long period); *Parham v. J.R.*, 442 U.S. 584 (1979) (parents' right to voluntarily commit troubled child lost to child's due process rights); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (parent's right to direct child's medical care lost to child own right to care). Thus in *Prince v. Massachusetts*, 321 U.S. 158 (1944), the parent asserted a right to allow a child to sell religious magazines, contrary to the state's child labor laws. The Supreme Court held that "the

family itself is not beyond regulation in the public interest, as against a claim of religious liberty," and found the statute was permissible.

B. Religion Rights

Likewise although the state cannot impose a religion, *see*, *e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (state cannot pay salary of religious school teacher) *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking law making teaching evolution a crime), it may burden religious practices for secular purposes. *See*, *e.g.*, *Employment Division v. Smith*, 494 U.S. 872 (1991) (upholding crime to possess peyote even though part of religious observance); *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (upholding law baring Sunday commerce).

C. Education Rights

The state may not ban private or religious schooling by requiring all children attend a public school. *Pierce v. Society of the Sisters of the Holy Names*, 268 U.S. 510 (1925) (striking portion of Oregon's compulsory public education law). And because of their 300-year religiously-based separatist agrarian culture, government cannot force Amish teens to attend school out of their community. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (finding unconstitutional law requiring mandatory attendance until age 16 when Amish home-schooled after 8th grade); *In re Davis*, 114 N.H. 242 (1974) (parents not liable for neglect where failure to send child to school stemmed from extreme concern for children's education). These cases were decided on rational-basis review. *Pierce v. Society of Sisters*, 268 U.S. at 535 ("As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."); *Jonathan L. v. Superior Court*, 165 Cal. App. 4th 1074, 1101-1102, 81 Cal. Rptr. 3d 571, 592-593 (Cal. Court. App. 2008) (discussing scrutiny-levels regarding alleged right to home-school).

D. No Broad Constitutional Right to Home-School

Despite claims of Ms. Voydatch and *amici*, there is no federal constitutional right to home-school. The United States Supreme Court wrote:

> Indeed, the State's interest in assuring that [high educational] standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes.

Board of Educ. v. Allen, 392 U.S. 236, 246-47 (1968); *State v. Hoyt*, 84 N.H. 38 (1929) (upholding conviction of home-schooling parent for failing to have child attend an educational institution, distinguishing then-brand-new *Peirce v. Society of Sisters*).

A number of courts, including at least four federal circuits, have indicated that *Yoder* is not extensible to home-schooling generally, that it is narrowly fact-based, and that it applies only to the traditional Amish lifestyle for the reasons stated in *Yoder* itself. *Yoder*, 406 U.S. at 238 (*White*, J., concurring) ("This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State."); *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 250 (3d Cir. 2008), *cert. denied*, 129 S. Ct. (2009) ("*Yoder's* reach is restricted by the Court's limiting language and the facts suggesting an exceptional burden imposed on [those] plaintiffs … which placed the continued survival of Amish communities in 'danger.'"); *Duro v. District Attorney*, 712 F.2d 96, 98 (4th Cir. 1983) (distinguishing Pentecostal parents' claim against compulsory school attendance laws from "fact that for almost 300 years the Amish society had not altered their lifestyle, which was centered around a separate agrarian community"), *cert. denied*, 465 U.S. 1006 (1984); *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987) (holding that the "Amish exception" to Iowa's compulsory attendance law does not apply to fundamentalist Christians); *Swanson v. Guthrie Indep. Sch. Dist*, 135 F.3d 694, 700 (10th Cir. 1998) (emphasizing

"the nature revealed by [the Yoder] record); *Hanson v. Cushman*, 490 F. Supp. 109 (1980). *Yoder* might conceivably apply to someone who is not Amish, but to make a constitutional claim the home-schooler would have to show the child was part of a centuries-long successful tradition in danger of extinction by enforcement of compulsory attendance laws.

E. Community May Regulate Home Schooling

States clearly have the authority to regulate home-schooling in innumerable ways to ensure that the child is in fact getting educated. *Bd. of Educ. v. Allen*, 392 U.S. 236, 246 n.7 (1968); *see*, *e.g.*, *Bangor Baptist Church v. State of Maine*, 576 F. Supp. 1299 (D.Me. 1983) (all private schools, including religious schools, required to submit 5-year plan); *Annotation*, Validity, Construction, and Application of Statute, Regulation, or Policy Governing Home Schooling or Affecting Rights of Home-Schooled Students, 70 A.L.R.5th 169 (detailing numerous home-schooling regulations); Timothy Brandon Waddell, *Bringing It All Back Home: Establishing A Coherent Constitutional Framework for the Re-Regulation of Homeschooling*, 63 VAND. L. REV. 541, 548 (2010). These are easily justified under rational-basis review. *Id.*

Indeed New Hampshire has a duties regarding education, as the community interest is constitutionally explicit:

> Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.

N.H. CONST. pt. 2, art. 83. *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 192 (1993) ("our

constitution expressly recognizes education as a cornerstone of our democratic system"). Accordingly, regulation of home-education in New Hampshire is constitutionally required:

> There is no accountability when … rules … tolerate noncompliance with the duty to provide a constitutionally adequate education. While the State may delegate this duty, it must do so in a manner that does not abdicate the constitutional duty it owes to the people.

Claremont Sch. Dist. v. Governor, 147 N.H. 499, 513 (2002) (citation omitted). The State has implemented regulatory its duties through RSA 193-A, with which Ms. Voydatch complied.

It is because of this authority to regulate that the right to education in a parochial school is distinguished from the lack of such a right at home. States routinely demand teachers in private schools have the same qualifications as those in public institutions, and mandate the same standards for educational facilities. But it is generally not practical to impose such requirements on home-schooling parents. *See e.g.*, *Jonathan L. v. Superior Court*, 165 Cal. App. 4th 1074, 81 Cal. Rptr. 3d 571 (Cal. App. 2008) (home-schooling not satisfy California's "private tutor" exemption from compulsory public education; *Birst v. Sanstead*, 493 N.W.2d 690 (N.D. 1992) (home school not subject to health, fire, and safety laws applicable to school buildings).

F. Community May Mandate Curriculum

States also have the authority to mandate specific curricula, even to children of religions which oppose some aspects. *Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003) (parent asserted 14th amendment and religious rights to opt child out of Connecticut's mandated health education course; court rejected strict scrutiny, used rational basis review, and upheld law); *Brown v. Hot, Sexy and Safer Productions, Inc*., 68 F.3d 525 (1st Cir.1995), *cert. denied*, 516 U.S. 1159 (1996) (similar); *Swanson v. Guthrie Independent School District*, 135 F.3d 694 (10th Cir.1998) (rejecting right to attend public school part-time, employing rational basis review). Thus in *Davis*

v. Page, 385 F. Supp. 395, 401, 405 (D. N.H. 1974) (*Bownes*, J.), the court held that parents may not withdraw their children from health education, music class, or from any instructional period because of their claimed religious objection to use of audio-visual equipment.

In *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), the state criminalized foreign language education, and convicted a parochial school teacher who taught bible stories in German. The Supreme Court reversed on the grounds that "liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.

Meyer v. Nebraska, 262 U.S. at 399-400. These cases are easily reconciled:

> We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems.

Brown v. Hot, Sexy & Safer Productions, Inc., 68 F.3d 525, 533-534 (1st Cir. 1995).

Among the curriculum issues commentators have identified as raising community concerns and children's constitutional rights is the teaching of female subordination and blatantly sexist attitudes, which is prevalent in fundamentalist Christian home-schooling curricula. *See*, *e.g.*, Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling* 96 CAL. L. REV. 123, 156-158 nn.161-165 (2008) (quoting curricula).

The community has an interest in ensuring these things are not taught – or are taught with

balance. RSA 354-A:1.[6]

G. Children's Rights to Non-Discriminatory Education

Children have constitutional rights that differ from their parents, and thus may assert them against parental actions. In *Parham v. J.R.*, 442 U.S. 584 (1979), for instance, parents and guardians voluntarily committed their troubled children to mental institutions. The court held that the children nonetheless had due process rights regarding their commitment. Similarly, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the court held that mature children have the right to direct their own medical care regardless of the preferences of parents. And children may assert their own rights against the government. *In re Winship*, 397 U.S. 358 (1970) (right to proof beyond reasonable doubt in juvenile criminal proceeding).

While there is no federal right to education, *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1 (1973), New Hampshire and many states do provide such a right. *Claremont School Dist. v. Governor*, 142 N.H. 462 (1997). Although no known case has reached the issue, presumably children asserting their constitutional right to adequate education could make claims regarding the content of curriculum to which they are mandatorily exposed. If that curriculum contained discriminatory teaching, for instance, such students may have a variety of statutory and constitutional claims regarding those elements. Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling* 96 CAL. L. REV. 123 (2008); James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996).

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[6]RSA 354-A:1 provides: "It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights. The general court hereby finds and declares that practices of discrimination against any of its inhabitants because of age, sex, race, creed, color, marital status, familial status, physical or mental disability or national origin are a matter of state concern, that such discrimination not only threatens the rights and proper privileges of its inhabitants but *menaces the institutions and foundation of a free democratic state* and threatens the peace, order, health, safety and general welfare of the state and its inhabitants." (emphasis added).

H. Any Home-School Right Based on Parenthood or Religion is Narrow

Accordingly, there is no right to home-school. The community retains sufficient interest in children and thus the authority to regulate home-schooling where it exists, and to prescribe what information and skills students are taught. In addition, children themselves have constitutional interests in their own education. Given this, whatever educational rights can be claimed on the basis of parenthood or parents' religion are exceedingly narrow.

Despite the superficial allure of a claimed right to home-school, and *amicus* HSLDA's 30-year nation-wide campaign to establish such a right and deregulate home-schooling,[7] the existing law makes sense. If a citizen says bad things, the government generally cannot pluck the words. If a citizen practices an eccentric religion, unless it causes harms, the state cannot tell them to quit. But if a parent is doing a substandard job teaching a child, the community has both authority and duty to require attendance at a state-certified educational institution. *See*, *e.g.*, *Jonathan L. v. Superior Court*, 165 Cal. App. 4th 1074, 81 Cal. Rptr. 3d 571 (Cal. App. 2008) (allegedly home-educated child of family which had been adjudicated neglectful required to attend school).

VI. Claims of Constitutional Right are Irrelevant

All Ms. Voydatch's claims of right are not relevant to this case, for several reasons.

A. When Parents are in Dispute Court Must Chose Child's Best Interest

First, this is a dispute between two parents who stand on absolutely equal ground. They possess identical rights concerning religion, parenthood, education, and any other legal metric. *Stanley v. Illinois*, 405 U.S. 645 (1972). Consequently, and as noted *supra*, the statutory standard

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[7] *See* Timothy Brandon Waddell, *Bringing It All Back Home: Establishing A Coherent Constitutional Framework for the Re-Regulation of Homeschooling*, 63 VAND. L. REV. 541, 548 (2010) (examining HSLDA's history and position).

by which this case must be reviewed is the best interest of this child.

Constitutional rights of the parents – whether based on religion, parenthood, or something else – are all about the parents. The assertion of such rights is at odds with the court's role here to determine the child's best interest. The best interest of children trumps parents' claims of constitutional rights. *Ouilloin v. Walcott*, 434 U.S. 246 (1978) (biological father's claim of parental rights defeated by best interest of child, who had been raised by stepfather); *In re Berg*, 152 N.H. 658 (2005) (where father asserted constitutional right to children's medical records over mother's objection, court held "parental rights are not absolute, but are subordinate to the State's *parens patriae* power, and must yield to the welfare of the child.").

Applying some presumption that the custodial parent should make decisions when both parents otherwise cannot agree, *see*, *e.g.*, *Von Tersch v. Von Tersch*, 455 N.W.2d 130 (Neb. 1990), flatly contradicts both New Hampshire's parenting statute, RSA 461-A:5 ("[T]here shall be a presumption … that joint decision-making responsibility is in the best interest of minor children."), and this Court's holding in *Chandler v. Bishop*, 142 N.H. 404, 413 (1997) (New Hampshire not "vest legal custodians with the exclusive right to choose the religion of the child"). It would also ignore the concomitant constitutional rights of the non-custodial parent.

B. Parent-versus-Parent is not Parents-versus-Government

Second, Ms. Voydatch cannot show that her claim of right matters in this context. Even if she had an unambiguous fundamental, constitutional, religious, substantive due process, and parenthood right to direct the child's education, that would matter only if the posture of this case were *parent* versus *government*. But it's not. This case arises intra-familial: It posits *parent* versus *parent*, in which neither parent's rights versus the *state* matter at all, and the court's job is simply to decide in the best interest of the child here.

All the cases cited by Ms. Voydatch's and by the *amici curiae* to make a claim of right to direct the child's education present themselves in a context different from here. The cases they cite are either a single parent or a united pair of parents asserting rights against government intrusion into the claimed right. The cases appear either in the context of applications to home school or convictions for violation of compulsory education laws. None of the cases are where two parents with equal rights simply disagreed as to education.

Pierce v. Society of Sisters, 268 U.S. 510 (1925), was brought by two private schools on behalf of parents asserting rights against the state of Oregon. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), was a criminal case enforcing Wisconsin's compulsory attendance statute against a group of Amish parents. *Peterson v. Minidoka*, 118 F.3d 1351 (9th Cir. 1997), was a suit by the Petersons, husband and wife, against an Idaho school district protesting Mr. Peterson's demotion for Ms. Peterson's home-education of their children. *Brunelle v. Lynn Public Schs.*, 702 N.E.2d 1182 (Mass. 1998), was a suit by parents against school district regarding whether a home-visit was necessary for permission to home-school. *Delconte v. State*, 329 S.E.2d 636 (N.C. 1985), was a declaratory judgment action by the parent seeking permission to home-school. *Grigg v. Commonwealth*, 297 S.E.2d 799 (Va. 1982), was a neglect proceeding for violation of compulsory education statutes. *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993), *Minnesota v. Newstrom*, 371 N.W.2d 525 (Minn. 1985), and *State v. Popanz*, 332 N.W.2d 750 (Wis. 1983), were criminal convictions for violation of compulsory education statutes.

The parenthood cases cited by Ms. Voydatch's and *amici curiae* likewise present themselves in contexts so different that they are of no use here. The cases either assert parenthood rights against the state, *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights by state); *Stanley v. Illinois*, 405 U.S. 645 (1972) (termination of fatherhood rights by state), *Appeal of Peirce*, 122

N.H. 762 (1982) (denial of home-schooling permit by state agency); *State v. Robert H.*, 118 N.H. 713 (1978) (termination of parental rights by state); *State v. Popanz*, 332 N.W.2d 750 (Wis. 1983) (criminal conviction for violating compulsory attendance statute), or assert parenthood rights against those who do not also have competing parenthood rights, such as grandparents, *Troxel v. Glanville*, 530 U.S. 57 (2000), or children. *Parham v. J.R.*, 442 U.S. 584 (1979). None are where two parents with equal parenthood rights simply disagreed.

The difference in posture is crucial. In *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), the Supreme Court held that the procedure by which New York removes foster children from their foster families was adequate.

> One of the liberties protected … is the freedom to establish a home and bring up children. If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on the private realm of family life which the state cannot enter. But this constitutional concept is simply not in point when we deal with foster families as New York law has defined them. The family life upon which the State intrudes is simply a temporary status which the State itself has created.

Smith v. Org. of Foster Families For Equal. & Reform, 431 U.S. 816, 862-863(1977) (*Stewart*, J., concurring). *Smith* merely shows that parental rights asserted against the state are categorically different than rights asserted in other contexts.

Accordingly, even if there were religious or parental rights to home-school, they would matter only when asserted against a government body impinging on the alleged rights. That, however, is not the posture of the dispute between Mr. Kurowski and Ms. Voydatch here. Thus all the law she and her *amici* cite is irrelevant.

C. Courts Apply Best Interest Standard to Education Disputes Between Parents

Third, *all* of the state cases cited by Ms. Voydatch and her *amici* that arise in the same

posture as here – parent versus parent in a separation, divorce, or custody action – even if they discuss hoary rights in passing, do nothing more than apply the best-interest standard in determining the nature of the child's education.[8] *Jordan v. Rea*, 212 P.3d 919, 922 (Ariz. App. 2009) ("[C]ourt is to apply a best interests standard when parents obligated to work together are unable to reach agreement as to school placement."); *In re Marriage of Riess*, 632 N.E.2d 635(Ill.App. 1994) (noting application of best interest standard); *Matter of Marriage of Debenham*, 896 P.2d 1098 (Kan.App. 1995) (maintaining child in current private school in child's best interest); *In re Marriage of Manning*, 871 S.W.2d 108 (Mo.App. 1994) (same); *Von Tersch v. Von Tersch*, 455 N.W.2d 130 (Neb. 1990) (applying state law providing custodial parent makes educational decisions in child's best interest unless showing of harm); *Valente v. Valente*, 495 N.Y.S.2d 215, 216 (N.Y.App.Div. 1985) ("[T]he 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."); *Stephen v. Stephen*, 937 P.2d 92, 97 (Okla. 1997) (best interest of child to maintain current home-schooling); *Staub v. Staub*, 960 A.2d 848, 849 (Pa.Super. 2008) ("[W]e 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."); *see also*, *In re Barrett*, 150 N.H. 520 (2004) (whether court may order non-custodial parent pay for private school education).

Thus, in cases where there are two parents, one of whom wants their child educated at home and the other prefers traditional schooling, courts uniformly apply the best interest standard, regardless of any claim of right.

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[8] *See* Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991 (2010) (suggesting best interest standard means courts should apply presumption in favor of formal schooling when parents disagree).

VII. Not a Modification – Court Applies Best Interest Standard

A. 2006 Proceeding Did Not Determine Where Child Goes to School

Martin Kurowski and Brenda Voydatch parents were divorced in Massachusetts in 1999, when the child was an infant. *2009 Trn*. at 85-86. The parents have always had joint decision-making responsibility, and the child has lived primarily with Ms. Voydatch. The parents' divorce stipulation, which was approved by the Massachusetts court, does not mention the child's schooling options. In 2002 Mr. Kurowski registered the Massachusetts decree in New Hampshire,[9] with a motion to expand his visitation schedule. Later in 2002 when the child was three years old, the parents entered a stipulation, which was approved by the court, regarding visitation issues. It provided that "[t]he parties shall consult with one another with respect to the educational plans for said child." PARTIAL STIPULATION (Oct. 9, 2002), KUR.APPX. at 1; ORDER (Oct. 15, 2002), KUR.APPX. at 4.

In 2005 Mr. Kurowski requested the court hold Ms. Voydatch in contempt because she entered the child in a certain kindergarten without consulting him, and because she had told him that the child will be home-schooled regardless of his views, allegedly in violation of their 2002 agreement. MOTION TO BRING FORWARD AND FIND IN CONTEMPT (Aug. 19, 2005), KUR.APPX. at 5. Ms. Voydatch's defense was that she did consult. RESPONDENT'S ANSWER TO PETITIONER'S MOTION TO BRING FORWARD AND FIND IN CONTEMPT (Oct. 11, 2005), KUR.APPX. at 8.

The court (*Martha W. Copithorne*, M.M.) conducted a hearing at which both parents testified. *2006 Hrg*., *passim*. In Ms. Voydatch closing argument, her lawyer stated:

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[9]The decree was registered in the Belknap County Superior Court docket number 02-M-215. The last superior court action was an order issued in April 2006. On May 12, 2006 jurisdiction was transferred to the then-new Laconia Family Division, docket number 2006-DM-669.

> I believe that the only issue regarding home schooling is whether or not my client consulted with Mr. Kurowski. That's what was pled in the initial pleading. And the prayer before the court is to find my client in contempt and order that she consult with Mr. Kurowski. That's all that's before this court.

2006 Hrg. at 105. The court held that Ms. Voydatch was not in contempt. It also wrote:

> The father is not requesting … that the court resolve the parties' dispute by directing the mother to enroll the child in the public schools or in any other private school.
> …
> When joint legal custody breaks down because the parties are unable to reach agreements, the court's powers are limited. The court is reluctant to substitute itself as a decision maker and counsel has not asked the court to do so.

ORDER (Apr. 26, 2006). The court went on to comment about each parent's concerns, the child's progress academically and socially, the difficulties the mother's strong religious convictions caused when the child visits Mr. Kurowski's home, and other matters.

In the context of how well Ms. Voydatch consulted Mr. Kurowski, the hearing revealed their deep division on religious and educational philosophies. *See e.g.*, *2006 Hrg*. at 65, 73, 96. Two things are clear, however, from the pleadings, the hearing record, and the resulting order: no party asked the court to order the child engage in any particular schooling; and the court did not rule on where or how the child should be schooled.

B. 2008 Approved Agreement Did Not Determine Where Child Goes to School

The child was home-schooled for first through fourth grade. *2009 Trn*. at 99. Given his observations of it, in January 2007 Mr. Kurowski first formally requested the court settle how the child will be educated. MOTION FOR MODIFICATION OF PARENTING TIME (Jan. 12, 2007), VOY.APPX. at 15. His pleading alleged:

> The relationship between Mr. Kurowski and his daughter has been impaired by the decisions Ms. [Voydatch] makes regarding the child's education, religion and social environment. Decisions that Mr. Kurowski does not agree with, does not believe are in [the child's] best interest and have created an environment that is detrimental to [the child's] mental and emotional well-being. These decisions have isolated

> Amanda from her father, his new wife and their daughter, [the child's] half sister, effectively preventing Mr. Kurowski from being a father to his child.

Id. A long time passed during which the parties litigated a multitude of issues, conducted discovery, changed lawyers, attempted negotiations, and requested many continuances. The court appointed a Guardian *Ad Litem*, Janice McLaughlin, Esq. The court also consolidated all then-pending issues, including where the child goes to school, for a hearing, ORDER (Dec. 19, 2007), KUR.APPX. at 13, for which both parents and the GAL filed proposed parenting plans. RSA 461-A:4, I.

The three proposed plans highlighted the parties' differing views on education:

- Mr. Kurowski's proposed parenting plan suggested that "[c]ommencing immediately, [the child] shall be enrolled" in the public school to supplement home schooling and "[c]ommencing January 2010, [she] shall be enrolled as a full-time student" in the local public school. PETITIONER'S PROPOSED PARENTING PLAN ¶ I (Sept. 24, 2008), KUR.APPX. at 14

- Ms. Voydatch's proposed parenting plan asserted "[s]o long as she continues to perform well academically and be enrolled in outside activities, [the child] may continue to home school." RESPONDENT'S PROPOSED PARENTING PLAN ¶ I (Sept. 24, 2008), KUR.APPX. at 23.

- The GAL's proposal took a middle position: "[T]here shall be a meeting in January 2010, when [the child] is completing fifth grade, to discuss [her] transition to public school, unless the parents agree she should continue home schooling at that time." GAL's PROPOSED PARENTING PLAN ¶ G2 (Sept. 17, 2008), KUR.APPX. at 31.

All parties showed up for the scheduled hearing, but instead used the day together to negotiate. They started with the proposed plan document offered by the GAL, which they extensively marked-up. Residential responsibilities were specified in detail. Regarding education, the operative language they agreed upon and the court ultimately approved was:

> Irrespective of any other meetings the parents may hold, there shall be a meeting in January, 2010, when [the child] is completing fifth grade, to discuss [her] transition to public school, unless the parents agree she should continue home schooling at that time.

AGREED UPON PARENTING PLAN ¶ G2 (Nov. 19, 2008), VOY.APPX. at 84. Thus the parties agreed,

and the court ordered, "a meeting," to talk about "transition to public school."

The court's approval was accompanied by a narrative, which three times explicitly recited that the nature of the child's education remained unresolved. It noted that the parties "agreed that the court could schedule a one day hearing … on the issue whether the minor child should be enrolled in public school." ORDER ON PENDING MOTIONS at 1 (Nov. 19, 2008), VOY.APPX. at 73. It again found that "[t]he parties agreed that the Court could schedule a one day final hearing on the issue of whether [the child] will attend public schools for the 2009-2010 school year." *Id.* at 3.

And at the end of its order the court directed the clerk to "schedule a one day final hearing with a record. … The Court will address at this hearing the issue of enrollment in public school." *Id.* at 10-11.

C. 2009 Proceeding for First Time Determined Where Child Goes to School

Numerous pleadings were filed leading up to the 2009 hearing. In one, Ms. Voydatch noted that among the pending issues to be decided at the upcoming hearing was "Homeschooling v. Public Schooling for the Minor Child." MOTION FOR CONTEMPT AND TO CLARIFY (May 20, 2009), KUR.APPX. at 42.

Also leading up to the hearing both parents filed proposed parenting plans and proposed orders. Ms. Voydatch's requested that the child "continue being educated via home schooling." RESPONDENT'S PROPOSED ORDER ¶¶ 4, 5 (June 2, 2009), KUR.APPX. at 54; RESPONDENT'S PROPOSED PARENTING PLAN ¶ C (June 2, 2009), KUR.APPX. at 47. Mr. Kurowski's suggested that "it is in [the child's] best interests to matriculate to public school," and "request[ed] that the minor child commence attending public school as a full time student in the fall of 2009." PETITIONER'S PROPOSED ORDERS ON PENDING MOTIONS ¶¶ 1, 2 (June 2, 2009), KUR.APPX. at 56.

After long delay the court (*Michael H. Garner*, M.M.) finally held its hearing on the

education issue on June 2, 2009. On July 15 the court ordered the child be educated in the public school beginning with her then-upcoming fifth grade year. 2009 TRN. *passim*; DECREE ON PENDING MOTION (July 15, 2009), VOY.APPX. at 126. The court also ruled on Ms. Voydatch's proposed findings and rulings, denying that "[t]he issue of home schooling … was fully litigated in … 2006." *Id*.; RESPONDENT'S PROPOSED FINDINGS OF FACT & RULINGS OF LAW ¶¶ 24, 37, VOY.APPX. at 99.

D. Best Interest Standard Applies Where Court for First Time Issued Orders on Where Child Goes to School

As noted by the appellant, the statutory standard the family court applies to an initial parenting plan is different than a modification. For an initial parenting plan, "the court shall be guided by the best interests of the child," RSA 461-A:6, but when modifying, one must show harm. RSA 461-A:11, I; *In re Muchmore*, 159 N.H. 470 (2009).

Ms. Voydatch argues that the most recent proceeding is a modification of an earlier order and thus the higher standard must be met. To make the argument Ms. Voydatch must necessarily identify the earlier order which she now claims is being modified.

In her pleadings she identified the earlier order as both the 2006 proceedings, and as the 2008 approved agreement. *Compare e.g.*, MOTION FOR RECONSIDERATION AND MOTION TO STAY (Aug. 24, 2009), VOY.APPX. at 139; REPLY TO PETITIONER'S OBJECTION TO RESPONDENT'S MOTION FOR RECONSIDERATION ¶¶ 4, 5 (Sept. 16, 2009), VOY.APPX. at 169 *with e.g.*, MOTION FOR CLARIFICATION, MOTION TO STRIKE AND REQUEST FOR HEARING (Sept. 24, 2009), VOY.APPX. at 187. In her brief Ms. Voydatch has abandoned her claim regarding the 2006 proceeding, and instead asserts that the only order allegedly being modified is "[t]he September 2008 Parenting Plan." VOYDATCH BRF. at 8.

It is clear from the record, however, that neither the 2006 proceeding nor the 2008 approved

stipulation ever determined where the child would go to school. The 2006 order explicitly sidestepped the issue, and the family court recognized this in its findings. The 2008 order also did not determine where the child would go to school – it required only "a meeting." Ms. Voydatch herself understood this, admitting that the purpose of the hearing was "Homeschooling v. Public Schooling for the Minor Child."

Thus the first time the court ever determined where the child would go to school was in its 2009 order, from which this appeal was taken. DECREE ON PENDING MOTION (July 15, 2009), VOY.APPX. at 126; ORDER ON MOTION FOR RECONSIDERATION (Sept. 17, 2009), VOY.APPX. at 175. Accordingly, on the issue of schooling, the 2009 order was an initial order under RSA 461-A:6, and not a modification under RSA 461-A:11, I. On the record here, the court was correct in applying the "best interest" standard to the issue of where the child would go to school.

E. Court Has Constitutional Obligation to Resolve Dispute

If the court finds that the 2009 order is a modification, however, it is nonetheless obligated to make a decision regarding education in the best interest of the child. Until the recent order, the issue of where the child was going to school remained simmering between the parties. To the extent it was resolved, the decision was made unilaterally by Ms. Voydatch because she has residential responsibility of the child during most of the time generally associated with school hours. As the court said, although its order "modifies the recent practice, it does not modify the existing orders." ORDER ON MOTION FOR RECONSIDERATION (Sept. 17, 2009), VOY.APPX. at 175.

Even if there is no statutory language giving the court authority to resolve the continuing dispute, the issue has to be decided. N.H. CONST., pt. I, art. 14 ("Every subject of this state is entitled to a certain remedy, by having recourse to the laws, … to obtain right and justice freely …; completely, and without any denial; promptly, and without delay; conformably to the laws.").

VIII. Objective GAL Investigation

In her brief Ms. Voydatch suggests that the GAL is biased against religion and thus the result should be reversed.

Bias is measured in the context of the record as a whole. *State v. Aubert*, 118 N.H. 739, 742 (1978). The solution to a perceived GAL bias is to present additional evidence and cross- examine, not a reversal, *In re Choy*, 154 N.H. 707, 714 (2007), and Ms. Voydatch was free to call the witnesses she alleges the GAL disregarded. Even if there is bias, "[t]he recommendations of the guardian ad litem do not, and should not, carry any greater presumptive weight than the other evidence in the case." *Richelson v. Richelson*, 130 N.H. 137, 143 (1987).

Ms. Voydatch's allegations of bias are nothing more than individual statements lifted out of their context. The GAL, however, appears to have investigated the case and given an objective recitation of her impressions. In fact the GAL was kind to Ms. Voydatch:

> [T]he concerns that Ms. Voydatch has for her daughter of modesty, of politeness, of caution, all of those are very valid concerns, and I think that sometimes they are maybe given short shrift because they accompany the other sets of beliefs which Mr. Kurowski objects so strongly. But there's a great deal that goes on in Ms. Voydatch's parenting of this child that's very positive.

2009 Trn. at 82. Mr. Kurowski urges that upon a review of the record, GAL REPORT, VOY.APPX. at 53; GAL's FURTHER REPORT, VOY.APPX. at 95; *2009 Trn*. at 12-83 (initial testimony of GAL); *2009 Trn*. at 202-210 (follow-up testimony of GAL), it will show no bias. If bias can be discerned, it was harmless.

Finally, there is nothing in the record or the court's orders suggesting it gave undue reliance to the GAL's allegedly biased reports. The court heard a day of comprehensive testimony from the parties on the single issue of educational placement, and its orders reflect a deep understanding of the parties' positions, the limited options available, and the unenviable need to resolve the dispute.

Choy, 154 N.H. at 714 ("Given the trial court's discussion and analysis of a range of evidence, we cannot say that it gave unreasonable weight to the GAL's recommendations."). Nothing in the record suggests the result should be reversed.

CONCLUSION

For the foregoing reasons, this Court should affirm the result below.

Respectfully submitted,

Martin F. Kurowski
By his Attorney,

Law Office of Joshua L. Gordon

Dated: July 1, 2010

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ORAL ARGUMENT AND CERTIFICATION

Counsel for Martin Kurowski notifies the Court that if there is oral argument, it will be conducted by Attorney Joshua L. Gordon.

I hereby certify that on July 1, 2010, copies of the foregoing will be forwarded to John Simmons, Esq.; Lisa Biron, Esq.; Michael Donnelly, Esq.; and Janice McLaughlin, Esq., GAL.

Dated: July 1, 2010

Joshua L. Gordon, Esq.

APPENDIX

1. PARTIAL STIPULATION (Oct. 9, 2002) *1*

2. ORDER (Oct. 15, 2002) *4*

3. MOTION TO BRING FORWARD AND FIND IN CONTEMPT (Aug. 19, 2005) *5*

4. RESPONDENT'S ANSWER TO PETITIONER'S MOTION TO BRING FORWARD AND FIND IN CONTEMPT (Oct. 11, 2005) *8*

5. ORDER (Dec. 19, 2007) *13*

6. PETITIONER'S PROPOSED PARENTING PLAN (Sept. 24, 2008) *14*

7. RESPONDENT'S PROPOSED PARENTING PLAN (Sept. 24, 2008) *23*

8. GAL's PROPOSED PARENTING PLAN (Sept. 17, 2008) *31*

9. MOTION FOR CONTEMPT AND TO CLARIFY (May 20, 2009) *42*

10. RESPONDENT'S PROPOSED PARENTING PLAN (June 2, 2009) *47*

11. RESPONDENT'S PROPOSED ORDER (June 2, 2009) *54*

12. PETITIONER'S PROPOSED ORDERS ON PENDING MOTIONS (June 2, 2009) *56*

13. Transcript of Hearing before Martha W. Copithorne, Marital Master (April 19, 2006) *58*