

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS COUNTY,
STATE OF MISSOURI

[REDACTED]

Petitioner

and

[REDACTED]

Respondent.

Cause No. [REDACTED]

Division 37

FILED

AUG 12 2010

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

JUDGMENT

The respective motions to modify filed by each of the parties were heard on April 13th, May 14th and July 8th 2010. Petitioner [REDACTED] (hereinafter referred to as Father) appeared in person and by his attorney, [REDACTED]. Respondent [REDACTED] now known as [REDACTED] (hereinafter referred to as Mother) appeared in person and by her attorney [REDACTED], the Guardian ad Litem (GAL) appeared for the two minor children of the parties. On August 3, 2010 counsel for the parties, including the GAL, filed proposed findings and conclusions and the case was taken under submission by this court.

FINDINGS OF FACT AND CONCLUSIONS

1. The parties were married on August 13, 1995. The parties' son [REDACTED] was born in April 2004 and their daughter [REDACTED] was born in February 2006.

2. The parties separated in January 2007 when Mother left the marital residence. [REDACTED] then 2 years old, and [REDACTED] then 9 months old, remained with Father.

3. On June 8, 2007 Father filed for divorce. The parties utilized a mutual friend, [REDACTED] to help them mediate their issues as they went through the process of separation and divorce. On July 19, 2007 a judgement of dissolution was entered incorporating the agreement of the parties as to all of the issues in their dissolution.

4. In pertinent part the judgement provided that the parties would share joint physical and joint legal custody of their two children. Neither party was to pay child support to the other. Father agreed to maintain health and dental insurance for the children and Mother agreed to pay him one half of the cost of the insurance. The parties also agreed that they would split the educational and extraordinary expenses of their children equally.

5. Among the issues they compromised on was the education of their children. Thus paragraph 10 of the parties Parenting Plan provides as follows:

"Child Care Provider/School Choice: The child care provider(s) shall be selected by the parties. If both parents will need to use a child care provider during periods of custody or visitation they shall use the same child care provider, unless the distances between their residences or places of employment make the use of the same child care provider unreasonable. Both parties agree that it is important to the upbringing of the children that they be placed in a Jewish day care center and school. The parties agree that, at the present time, the children will go to the [REDACTED] Hebrew Academy or such other Jewish day care center and/or school as both parents mutually agree. In the event that there is a

disagreement between the parties regarding this issue, the parties agree to mediate the dispute with the Rabbi of their choice."

6. Following separation Mother had discontinued her attendance at [REDACTED] an Orthodox congregation to which the family belonged during part of the marriage. She did so because of her objections to some portions of the teachings and practices of that congregation. Differences between the parties concerning certain aspects of Orthodox Judaism had contributed to the breakdown of the marriage. She began to attend [REDACTED] Synagogue, an Orthodox synagogue in University City.

7. In 2007 Mother met [REDACTED] at [REDACTED]. Within one month she and Mother had become a lesbian couple. Though Father was aware as far back as their high school years that Mother's preference was for female partners, that preference had not been manifested during the marriage.

8. In May, 2008 Father asked to enroll [REDACTED] at the [REDACTED] Hebrew Academy beginning in the fall 2008 school year. Given the lesbian relationship she was involved in with [REDACTED] Mother was concerned how the school would accept her and her partner. Therefore, in July, 2008 Mother and [REDACTED] met with Rabbi [REDACTED] the [REDACTED] Hebrew Academy and with Rabbi [REDACTED], the Orthodox Rabbi of [REDACTED] Synagogue.

9. At that time of the July 2008 meeting the school did not have a policy with regards to the admittance of students whose parents were of the same sex because the situation had not previously arisen.

10. In order to formulate the school's policy in conformity with Orthodox Jewish tenets, Rabbi [REDACTED] sought input from the Vaad Hachinuch, a rabbinical educational committee consisting of Rabbis from Orthodox Synagogues in St. Louis, as well as seeking guidance [REDACTED] [REDACTED], a Rabbi of prominence in Chicago. Based on these

meetings and conversations, Epstein put in place a same sex policy of acceptance. This was adopted in June, 2009 and provides that regarding same sex marriage and/or relationships that [REDACTED] will accept a child of that relationship the same way it would accept any other child provided four rules are complied with.

Those rules are the following:

- a. The couple cannot act as a couple in the school.
- b. The couple can never hold hands or appear to be a couple at the school.
- c. If both mothers wanted to go to parent/teacher conferences then they would need to go separately.
- d. Similarly if there was a play or fair where parents are invited, both mothers can come but not as a couple.

11. Prior to [REDACTED] admission to [REDACTED] Rabbi [REDACTED] made [REDACTED]'s same sex policy known to Mother and to Ms. Buck. Both women indicated their understanding of the rules as well as their willingness to abide by them. Mother agreed to [REDACTED]'s enrollment and the rules laid out by [REDACTED] on an experimental basis.

12. [REDACTED] began to attend [REDACTED] in the Fall term 2008. [REDACTED] was not old enough to enroll at [REDACTED] so she continued at the [REDACTED] childcare program.

13. Mother testified that the first school function that she and Ms. [REDACTED] attended was "Meet the Teachers" in September, 2008. She said she and [REDACTED] followed the same sex rules but she did not feel welcome by [REDACTED]'s teachers. She also attended a teacher/parent conference where [REDACTED]'s being inattentive in class was discussed and once again felt that her concerns were not being well received. At a second teacher/parent conference in spring, 2009 she discussed with the teachers that [REDACTED] could not write his name and was having social

problems interacting with other children. She perceived that the teachers were not receptive to her concerns.

14. In March, 2009 Mother sent an email to Father about her concerns with ██████████ Hebrew Academy including academic and social issues. Mother also stated that ██████████ was not appropriately dealing with ██████████ ADHD issues.

15. In May of 2009 there was another incident that caused Mother concern about ██████████ continued attendance at ██████████ Ms. ██████████, a teacher at ██████████ testified and described the event. Ms. ██████████ described what she believed to be inappropriate behavior by Ms. ██████████. During ██████████'s part in the program she proceeded to correct him to make a point that he has two mothers. The behavior was inappropriate due to being a violation of the agreement made with the principal not to advertise their lifestyle.

16. On May 27, 2009 Mother filed a motion to modify. On August 26, 2009 she filed an amended motion to modify in which she requested that she be denominated as the sole legal custodian of the children and an order that the children would attend ██████████ Day School or such other school as the Court may deem appropriate. She further requested that a change should be made to the physical custody schedule such that Father be awarded physical custody each Monday and Tuesday, Mother's physical custody be each Wednesday and Thursday and that the parties alternate custody on the Friday through Sunday weekends. Finally, Mother requested that Father be ordered to pay her attorney's fees and costs of litigation. In her amended motion she alleged:

- a. That it is not in the best interest of the children to attend ██████████ Hebrew Academy for the 2009-2010 school year;

- b. That the [REDACTED] Hebrew Academy is unaccredited and in fact has recently lost its accreditation;
- c. That it would be in the best interest of the children to attend [REDACTED] Day School as it is an accredited institution and would serve the educational and social interests of the children;
- d. That [REDACTED] has experienced difficulty at [REDACTED] Hebrew Academy in so far as his academic and social needs are not being met;
- e. That [REDACTED] Hebrew Academy policy is against same sex couples and will prejudice the minor children's views of their mother and mother's companion; and
- f. Mother has been informed by [REDACTED]'s teachers that he may have learning and/or social development issues. [REDACTED] school is not equipped to properly attend to said issues whereas [REDACTED] has the necessary resources to assist [REDACTED].

17. On August 13, 2009 Father filed his cross motion to modify which sought to grant him sole legal and physical custody of the children. He also sought in his cross motion to modify that Mother be ordered to pay his attorney's fees and the costs of litigation. In his motion he alleged:

- a. Since the time of the divorce, Respondent has chosen to live as an open homosexual;
- b. Since the time of the divorce, Respondent has become increasingly involved as an activist in the gay community;
- c. Respondent has begun to involve the children in gay and lesbian activities and groups;
- d. Recently, Respondent, under false pretenses,

convinced Petitioner to allow Respondent to have an additional visitation time period. During that time, without Petitioner's consent, Respondent took the minor children to the Gay Pride Festival;

e. Respondent is trying to change the fundamental principles regarding the children's upbringing;

f. Respondent's continuing homosexual activities are in conflict with Jewish orthodox teachings;

g. Respondent's actions described above are contrary to the parties' agreement regarding the upbringing of the children;

h. Respondent knows that her openly homosexual lifestyle is contrary to the customs and traditions of the Jewish religion, under which the parties agreed to raise their children;

i. Respondent's contradictory teachings and overtly homosexual lifestyle has harmed the children;

j. Respondent has in the past and continues to disregard orthodox teachings and is disrespectful of Petitioner's religion and culture.

18. At trial, Father abandoned his request for sole physical custody.

19. The central and urgent issue presented by the parties is the selection of a Jewish elementary school for the children for the rapidly approaching school year. By the terms of their agreed parenting plan, the parties had agreed to submit this dispute to a mutually selected Rabbi if they reached an impasse in their efforts to resolve this issue. However, the parties advised the court that they could not agree on a particular Rabbi to serve that function. Therefore, they made a request to the court about school selection for the upcoming year. In addition, both parties argued that joint legal custody concerning the issue of choice of school was not workable anymore. Therefore, each argued that they be named as the sole legal custodian for school selection purposes.

20. In his proposed findings and conclusions, Father argued that [REDACTED] should continue at [REDACTED] and that [REDACTED] should join him there this year. Father testified that he wanted the children to attend the [REDACTED] Hebrew Academy, based upon his religious practices, Mother's religious practices for much of her adult life, and the manner by which the children were raised when the parties lived together. He argued that the parties had agreed to raise their children as Orthodox Jews. In addition, he argued that there was no evidence that [REDACTED] was receiving an inadequate education at [REDACTED]. He contended that there had been no change of circumstances that would justify a reexamination of the decision of the parties in the Fall of 2008 to enroll [REDACTED] Hebrew Academy. However, at the same time Father argued that there was a change of circumstances in the ability of the parties to exercise joint legal custody with regard to educational issues.

21. Mother's argument was also a two pronged one. She noted that the language agreed to at paragraph 10 of the original parenting plan did not state that the parties had agreed to raise the children as Orthodox Jews as opposed more generally in the Jewish religion. She argued further that the language of the agreement that references "or such other Jewish day care center and/or school as both parents mutually agree" and the potential mediation of the educational issue in the future indicated that the children's attendance at [REDACTED] was not writ in stone. She argued that the parties were now unable to exercise joint legal custody with regard to educational issues. In addition, she criticized [REDACTED] as an appropriate placement for the children of this family in terms of both academic and social issues.

22. From the evidence at trial it is obvious that there have been a number of changes since the entry of the dissolution that have made the continued exercise of joint legal custody on educational issues not

workable. The changes include a lack of commonality of belief as to the specifics of the religious education of the children; Mother's experiences at [REDACTED] concerning their same sex policy; Mother's entry into a same sex marriage; and [REDACTED] age eligibility to enter the prekindergarten program at [REDACTED]. The resulting impasse between the parties is not in the best interests of the children.

23. Since joint legal custody is no longer workable with regard to educational issues, one of the parties must be designated as the sole legal custodian on such issues. The cause of the breakdown in the ability of the parties to make such decisions jointly does not lie exclusively at the feet of either of the parties.

24. To evaluate which parent should be designated as the sole legal custodian for educational issues, the court must consider the decision which each parent would make if named as the sole legal custodian. Father testified that if he is named as the sole legal custodian, he would enroll both children in [REDACTED] for the upcoming school year. Mother testified that if she is named as the sole legal custodian, she would enroll [REDACTED] Day School and continue with [REDACTED] attendance at the [REDACTED] childcare program until she was old enough to enter [REDACTED] in the Fall of 2011.

25. Mother criticized the academic program at [REDACTED] her original concerns as enunciated in her March 2009 email and her motion to modify included the fact the school was not accredited. In addition, she alleged that [REDACTED] was regressing as evidenced by him not being able to write his name; [REDACTED] did not have sufficient staff to deal with ADHD, the school program of teaching Hebrew was inadequate, concern about the school's curriculum; and the hours the school was available for its students did not work well for working parents.

26. She also presented evidence of the policies, resources and programs at [REDACTED] concerning such issues. Mother stated that she believed [REDACTED] would be a good choice. In her opinion the school had an excellent curriculum, she was impressed by the test scores of its students, she liked the idea of the 8th grade students having a class trip to Israel. She thought the Hebrew language program was better than that offered by [REDACTED] Hebrew Academy, it was accredited, there was religious diversity among the students, she liked the hours the school was available to students for aftercare, and the building was beautiful and clean.

27. Father offered little criticism of [REDACTED] perhaps in part because he had never investigated the program at [REDACTED] until a limited email contact with Rabbi [REDACTED] on the eve of trial. Unfortunately, this failure to investigate options further demonstrates Father's rigid position on this difficult issue.

28. Father testified that he was satisfied with the academic program at [REDACTED]. Father argued that [REDACTED] was also a preferable school for the children because it was effectively a neighborhood school where a large portion of the student body lived in the area immediately surrounding the school. He argued that this was particularly important in this case so that the children would be able to visit with their friends on the weekends even when they could not travel by vehicle due to religious restrictions.

29. Extensive evidence was presented by representatives from both schools over the course of three days. The evidence established that both schools have solid programs of academic instruction with test scores commensurate with public elementary schools in the area. Mother also stated [REDACTED] was not appropriately dealing with [REDACTED] ADHD issues. However, [REDACTED] teachers testified that neither the school nor they had been advised of [REDACTED] ADHD diagnosis until late in [REDACTED]

kindergarten year. The evidence demonstrated that [REDACTED] took appropriate steps to address [REDACTED] ASHD issues once the issues were specifically identified and that [REDACTED] separation issues of his first year at [REDACTED] had improved in his second year at the school. Rabbi [REDACTED] stated [REDACTED] is not currently accredited although it has been in the past. The lack of accreditation is due to [REDACTED] not having adopted the guidelines of ISAACS as to the extent of authority its board of directors delegates to its administrative staff rather than as a result of any academic issues. The GAL carefully considered all of the concerns presented by each of the parties in the course of her protection of the best interests of the children. Based on the evidence at trial, the court joins in the conclusion of the GAL as stated in her proposed findings and conclusions that there was no showing that the secular education of the children would be substantially better at one of the schools than the other school.

30. As to Father's argument about the neighborhood school aspect of [REDACTED] the court notes that Mother's residence is also in the University City area and that she testified that a number of students at [REDACTED] also lived in the University City and Clayton area. Mother testified that she also honors the Orthodox prohibition of travel by vehicle on the Sabbath. Certainly, the children can also visit with their friends on those parts of the weekend that are not restricted.

31. Especially important to Father was the fact the both parties agreed in their parenting plan incorporated into their Judgment of Dissolution of Marriage as well as their agreed upon testimony at the trial of this cause, that they want their children to attend Jewish schools. Father presented evidence that a substantially higher percentage of graduates of [REDACTED] attend a Jewish high school than graduates of [REDACTED] at this time. However, Mother testified that she was still committed to a Jewish education for the children after elementary school and she argued

persuasively that a current decision on the best educational experience for the children should not be premised on their future high school when they are so young.

32. Both [REDACTED] are Jewish private schools in which religion is a very substantial part of the curriculum. At [REDACTED] religious studies are featured for one half of each school day. Rabbi [REDACTED] estimated that religious instruction was the focus for approximately one third of curriculum. Therefore, it is impossible to compare the two schools without consideration of the religious curriculum. Of course, a secular judge is properly prohibited from making determinations about child custody based on approval or disapproval of the beliefs, doctrine, or tenets of the religion of either parent or their interpretation thereof. However, if necessary a secular court may inquire into matters of child development as impinged upon by religious instruction.

33. This case presents difficult issues in that regard that arise from a combination of Mother's lesbian lifestyle and the rigid position taken by Father as part of his Orthodox beliefs that such a lifestyle is an abomination. In Father's proposed findings he argued that the issues of concern Mother has with the [REDACTED] Hebrew Academy are due in large part to the lifestyle she has chosen and that the problems she believes are the school's problems are largely due to her unhappiness with a school that does not accept her lifestyle choice. If the issue was simply Mother's unhappiness with the atmosphere at [REDACTED] this would be a different case. The concern of the court is the effects on the children. It is clear from the evidence at trial that the combination of Mother's lifestyle and the rigid position taken by Father as to the wrongness of such a lifestyle create issues of child development which the court should properly consider in determining what steps serve the overall best interests of the children. On cross-examination Father acknowledged that the friction

between Mother and [REDACTED] would affect the kids and that [REDACTED] was already being affected. This is of great concern when the evidence established that both of the parents are excellent parents who are actively involved in the education of their children. They will continue to serve as joint legal custodians as to all issues other than education. Both parents maintain a continuing commitment to raise their children in the Jewish faith. Further each of the parents will have physical custody of the children on an approximately equal basis.

34. Significant testimony was presented concerning the differences in the substance of the religious education at [REDACTED] an Orthodox Jewish day school, and [REDACTED], a Conservative Jewish day school. [REDACTED] teaches the Orthodox position that the Torah is of divine origin and the laws that came from God are immutable and cannot be changed by men based on the current circumstances. Rabbi [REDACTED] testified that there are differences within the Orthodox Jewish faith as to the impact of that position in certain areas. [REDACTED] teaches very specifically that homosexuality is specifically identified as an abomination. [REDACTED] does not teach any particular philosophy but rather a mix of different beliefs as to the divine origins of the Bible and the law, to accommodate all students.

35. Rabbi [REDACTED] explained that the Orthodox condemnation of homosexuality was a condemnation of the activity not Mother. However, the difficulty which Rabbi [REDACTED] encountered in designing the rules for [REDACTED] attendance at [REDACTED] illustrates the difficulty in making such a distinction every day in an academic situation. Rabbi [REDACTED] testified that both Mother and Ms. [REDACTED] were allowed to attend school functions such as kindergarten plays and a Purim program. Further, he testified that despite the fact that Mother and Ms. [REDACTED] did not completely comply with the rules on certain occasions, [REDACTED] continued attendance at

[REDACTED] had never been threatened. However he did state on cross examination that if Mother continued to violate the rules, the children's continuation at [REDACTED] was not guaranteed.

36. [REDACTED] School is affiliated with the Conservative Jewish movement. Rabbi [REDACTED] stated that if an Orthodox student attended [REDACTED] that child would have the option of utilizing a prayer book different from that utilized by the other students and could have his or her own prayer service apart from the other students.

37. He stated the school currently has 142 students but there are no same sex parents of current students. However the school would allow same gender couples to jointly attend teacher/parent conferences.

38. Upon review of all the evidence the court is left with the conclusion that the best interests of the children will be served by placing them in an academic environment where they are exposed to a spectrum of beliefs within Judaism. In that way they will have the best chance to be able to come to understand how two parents, whom they both love, can have such different positions on the appropriateness of Mother's lifestyle. The children have excellent relationships with both of their parents and the members of the families of both parents. Maintaining the children in a learning environment where their Mother's lifestyle is condemned and the children are unable to acknowledge that they are products of blended families with different approaches to observant Judaism is not in their best interests. Their relationship with each of the parents may be jeopardized if they are not allowed to be exposed to a spectrum of beliefs. This would be a result that neither of the parents wants. Father's statement on cross examination that he didn't know whether it was more important for the children to have a healthy relationship with Mother than that they attend an Orthodox school is troubling.

39. The Parenting Plan agreed to by both parties at the time of the dissolution provided that the parties were to alternate custody on a two-week schedule. During the first week Father was to have custody on Monday and Tuesday, Mother to have custody on Wednesday and Thursday and Father to have custody on Friday, Saturday and Sunday. During the second week, Mother to have custody on Monday and Tuesday, Father to have custody on Wednesday and Thursday and Mother to have custody on Friday, Saturday and Sunday. The Parenting Plan also set forth a vacation as well as a holiday and special day provision for the exercise of custody by the parties.

40. At trial each of the parents offered a proposed parenting plan that enunciated the same plan for sharing of custody time consistent with the agreements and practice of the parents after the dissolution. Father's plan specified time periods for when these custody periods begin and end. This clarification would seem to be helpful though the court hopes that the parties will continue to demonstrate the flexibility in a custody schedule which has prevailed since the dissolution and which is in the best interests of the children.

41. Paragraph 16 of the Parenting Plan agreed to at the time of the dissolution provided as follows:

"Education and Extraordinary Expenses: Unless the parties agree otherwise, they shall each pay fifty percent (50%) of the educational expenses that are incurred by agreement. Both parties shall pay fifty percent (50%) of any additional schooling costs, including school supplies, extracurricular activities, field trips, school lunches, clubs, tutoring, private lessons, musical expenses, sports expenses, and any other extra school expenses or extracurricular expenses."

There was no evidence presented that would indicate that the continuation of this provision is unreasonable. Included in the educational

expenses to be shared by the parents are the cost of attendance at [REDACTED] Day School and the program at the [REDACTED] attends.

42. The parenting plan of the parties' Judgment of Dissolution provides that Father maintain health and dental insurance for the children with Mother to reimburse Father for one half of Father's costs and the uncovered medical, dental and orthodontic expenses to be divided equally between the parents. There was no evidence of substantial and continuing circumstances which would make the continuation of this provision unreasonable.

43. Both parties requested that the Court order the other party to be responsible for attorney's fees. Upon consideration of all relevant factors pursuant to Sect. 452.355, the court finds that neither party should contribute to the payment of the attorney fees of the other party.

44. The guardian ad litem submitted a final bill for her fees and expenses. The unpaid GAL fees and expenses total \$4740. Based on all relevant factors, the court finds that the parties shall split the unpaid fees equally.

JUDGMENT

45. Mother's Amended Motion to Modify is heard and granted in part and denied in part. Mother shall serve as the sole legal custodian of the children as to educational issues. The parties shall continue to serve as joint legal custodians on all other issues.

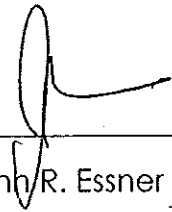
46. Father's motion to modify is granted in part and denied in part. The parties shall comply with the custody schedule which is Attachment A to this judgement.

47. Neither party shall pay any portion of the attorney fees of the other party.

48. Each party shall pay \$2,370 to [REDACTED] as and for guardian ad litem fees. This is in addition to the sums the parties have previously ordered to pay for guardian ad litem fees.

49. Court costs are to be paid from the court cost deposit previously posted.

SO ORDERED: _____

 8/12/00
John R. Essner