

STATE OF NEW HAMPSHIRE

BELKNAP, SS.

JUDICIAL BRANCH-FAMILY DIVISION
LACONIA LOCATION

IN THE MATTER OF
MARTIN F. KUROWSKI
And
BRENDA A. KUROWSKI
2006-M-0669

MOTION FOR RECONSIDERATION AND MOTION TO STAY

NOW COMES the Respondent, Brenda Voydatch, by and through her Legal Counsel, John Anthony Simmons, Sr., Esq., under RSA 461-A:6 and other applicable rules of procedure, and respectfully requests that this Honorable Court reconsider certain aspects of its July 14, 2009 Orders (“Order”), and in support thereof states as follows:

MOTION FOR RECONSIDERATION:

Background:

1. The Parties are the parents of Amanda Kurowski, their ten-year old daughter. The Parties were divorced when Amanda was a newborn. Brenda (“Mother”) has been the custodial parent for nearly all of Amanda’s life. The Father chose not to be actively involved in Amanda’s life for quite some time.
2. Mother started home educating Amanda in first grade and has successfully done so through the present.
3. The Father has once suggested again that homeschooling deprives Amanda of the socialization that she needs. However, the evidence supports otherwise. This is the same issue that was raised by the Father and rejected by the Court in 2006. There is no dispute that Amanda is excelling in her academic coursework and is “generally likeable and well liked, social and interactive with her peers, academically promising and intellectually at or superior to grade level.” (Order, at p. 6)
4. In an effort to acknowledge Father’s concerns, Mother enrolled Amanda in three public school courses as part of the enrichment curricula for the homeschooling of Amanda. Amanda has excelled in those courses, as she always has in all of her homeschooling. Amanda has also been involved in a variety of extra-curricular activities including gymnastics, horseback riding, softball and basketball.
5. There are, in fact, two Orders which are the subject of this Motion. The Court issued two separate Orders on July 14, 2009. One was entitled “Decree on Pending Motions,” which dealt with the contested issues of where the child was to be educated, a Parenting Plan, chiropractic care for the child, etc. The other Order dealt

with certain financial issues and was entitled “Order on Life Insurance and Associated Issues. The Court has already ordered a hearing to be held on those matters, at which each party is to submit a Memorandum of Law. Respondent will do so, but also provides here her requests for reconsideration on certain aspects of the financial order. Since both Orders start with page 1, this Motion for Reconsideration is divided into sections that make it obvious to which Order reference is being made.

6. The most urgent issue is the issue of Amanda’s schooling as the school year has begun and Amanda is being impacted by the Court’s decision daily. Serious state statutory and federal constitutional concerns are implicated by the Court’s ruling and which need to be remedied without delay.

Legal Standard:

7. The court correctly acknowledged that when considering any modification to a parenting plan the legal standard is that a modification is only justified “if the court finds by **clear and convincing evidence** that the child's present environment is **detrimental** to the child's physical, mental, or emotional health, and the advantage to the child of modifying the order outweighs the **harm** likely to be caused by a change in environment.” NH RSA 461-A:11 (c). (Emphasis added.) (See also, adopted Findings (Respondent) , para. 53). This statutory framework does not permit the court to second guess the decisions made by fit parents and to impose its own preferences absent clear and convincing evidence of harm. There is no suggestion that Mother is unfit. There is no evidence of harm.
8. NH RSA 461-A:1, Definitions, defines “Parental rights and responsibilities” as “all rights and responsibilities parents have concerning their child.”
9. The homeschooling issue has already been raised by the Father in 2006, the Court adjudicated this issue and denied the request for modification. This issue cannot be considered by the Court under the doctrine of Issue Preclusion.
10. Mother is a fit parent with primary residential responsibility. As such, the court should not “second guess” the decision making of a fit parent. A “best interest” analysis does not apply when there is a fit parent nor in the context of these facts. (See separate supporting Memorandum of Law.)
11. Mother has a constitutionally protected right under the First and Fourteenth Amendment to make decisions regarding Amanda’s schooling, religious training, and other parenting issues without interference by the Court. (See attached Memorandum of Law.)
12. It is not the proper role of the court to insist that Amanda be “exposed to different points of view” if the primary residential parent has determined that it is in Amanda’s best interest not to be exposed to secular influences that would undermine Amanda’s faith, schooling, social development, etc. The Court is not permitted to demonstrate hostility toward religion, and particularly the faith of Amanda and Mother, by

removing Amanda from the home and thrusting her into an environment that the custodial parent deems detrimental to Amanda.

13. Without a finding “by clear and convincing evidence” that permitting Amanda’s continued home education is “detrimental” and that a modification would not do greater harm, the Court is not permitted to modify the parenting plan. The Court’s adoption of Respondent’s Proposed Findings would suggest that no such evidence exists and that such a modification is not only unwarranted, but would likely cause harm by the “change in environment”. The Court’s ruling acknowledges that it applied a lesser preponderance standard and a “best interests” standard to conclude that the parenting plan be modified and to order Amanda to attend public school. (Order, p. 7)
14. Since the Court failed to address the constitutional issues and did not apply the proper legal standard, its order cannot stand.
15. Even under a “best interests” analysis, there is not sufficient evidence, under applicable law, to support the changes the Court has ordered.

School:

16. The Order purports to follow the legal standard of “best interests of the child” by weighing a preponderance of the evidence. (Ruling, p. 7) This is error.
17. In addition, the Court created, *sua sponte*, its own definition of what the purpose of education is:

“...the Court is guided by the premise that education is by its nature an exploration and examination of new things, and by the premise that a child requires academic, social, cultural, and physical interaction with a variety of experiences, people, concepts, and surroundings in order to grow to an adult who can make intelligent decisions about how to achieve a productive and satisfying life.” (Order at 7)

The Court cites no authority for this definition. It is also at variance with what the State of New Hampshire cites as the purpose and goal of education (for public schools). (N.H. Rev. Stat. § 193-E:2) The Court’s definition also fails to take into consideration the embraced requirements of the State’s Home Schooling program.

“Instruction shall be deemed home education if it consists of instruction in science, mathematics, language, government, history, health, reading, writing, spelling, the history of the constitutions of New Hampshire and the United States, and an exposure to and appreciation of art and music. Home education shall be provided by a parent for his own child, unless the provider is as otherwise agreed upon by the appropriate parties named in paragraph II. (N.H. Rev. Stat. § 193-A:4)

18. Respondent meets or exceeds the educational objectives set out by the New Hampshire Statutes and argues it is error for the Court to impose its own definition to justify the outcome it demands.
19. Respondent is mindful of, and states for the Court's consideration, that it is the parents who decide the purpose of education for their children, not a Court of law. At the very least, parents have a protected right to determine how best to achieve the minimum educational requirements set out by the state. Those objectives were being achieved and exceeded in the home school environment that Amanda has enjoyed from the beginning of her education. The only complaint by the Father is with regard to "socialization" – a component not required by State standards, nor a proper element for the State to be involved.
20. Even if the Court were justified in including "socialization" in the legitimate objectives of education, this cannot be used as a rationale for ordering Amanda to be removed from homeschooling for several reasons.

First, it is not a proper part of any standard of review. The Court has cited no authority for its inclusion in its consideration.

Second, the Court's own Order admits that the child is well-socialized.

*"... the evidence support a finding that Amanda is generally **likeable and well liked, social and interactive with her peers, academically promising, and intellectually at or superior to grade level.**" (Order at 6; Emphasis added.)*

Third, the Court failed to consider a myriad of alternatives that could address this concern in a "less intrusive manner".

The evidence is undisputed that Mother (while not agreeing a problem existed or exists) made attempts to acknowledge and alleviate Father's concerns about socialization by enrolling Amanda in three public school courses. Amanda is also involved in a variety of extra-curricular activities.

Amanda spends time with her step-sister and her Father's family and friends. Father bears responsibility for his concern too and has plenty of opportunities to involve Amanda in other social environments that would address his concerns.

Therefore, the solution (if one is even needed) is not to yank Amanda out of her present schooling situation. The Court's own order admits the record is clear that the child is well socialized. This harsh result is not supported by the facts or the law.

21. It is significant to point out, and worth restating, that nobody has challenged the academic achievements of Amanda as a result of being homeschooled by the Respondent. In fact, the Court notes:

*“... the evidence support a finding that **Amanda is generally likeable and well liked, social and interactive with her peers, academically promising, and intellectually at or superior to grade level.**”* (Order at 6; Emphasis added.)

*“The parties do not debate the relative academic merits of home schooling and public school: it is clear that the home schooling Ms. Voydatch has provided has **more than kept up with the academic requirements of the Meredith public school system.**”* (Order at 7; Emphasis added.)

22. Respondent is concerned that Court has adopted the GAL’s bias against Mother’s and Amanda religious beliefs. The repeated theme throughout the Court’s Order centers around the religious views of Mother and Amanda and the need to “expose” Amanda to “a variety of points of view”. The Court even goes so far as to suggest that is improper for the Mother to encourage Amanda to adopt her mother’s religious beliefs. (“ . . .it would be remarkable if a ten year old child who spends her school time with her mother and the vast majority of all her other time with her mother would seriously consider adopting any other religious point of view. Amanda’s vigorous defense of her religious beliefs to the counselors suggests strongly that she has not had the opportunity to seriously consider any other points of view.” (Order p. 6) The Order assumes that because Amanda has sincerely held Christian beliefs, there must be a problem that needs solving. It is a parent’s constitutionally protected right to train up their children in the religious beliefs that they hold. It is not up to the Court to suggest that a ten year old should be “exposed” to other religious views contrary to the faith traditions of her parents. Could it not be that this sharp ten year old “vigorously” believes what she does because she knows it to be true? The Courts narrative suggests that 10-year olds are too young to form opinions and that they are not yet allowed to have sincerely held Christian beliefs.
23. The Court makes no mention of the fact that Father had taken Amanda to church until age 7, when he ceased doing so because, as he testified, it was “starting to have an effect on her” and “she was starting to believe this stuff.”
24. Thus, Mother’s exposure of the child to Christianity is consistent with Father’s past actions. The Father has changed his mind about religion and now seeks to interfere with his daughters beliefs. The Court’s assistance in accomplishing this does nothing more than favor one parent’s religious views with those of the other. The Court correctly noted “its obligation not to consider the specific tenets of any religious system unless there is evidence that those tenets have been applied in such a way as to cause actual harm to the child.” The Court then acknowledges that “[t]he evidence in this case does not rise to that level . . .” (Order, p7-8) However, absent any other clear and convincing evidence justifying the Court’s decision, it would appear that the Court has indeed taken sides with regard to the issue of religion and has preferred one religious view over another (or the absence of religion). This is impermissible.

25. Even if the Court could articulate some legally cognizable concerns regarding the religious upbringing of Amanda and the lack of “exposure to other views”, one would assume the Court is not expecting the public school system to be the source of other religious views. Therefore, the remedy is not to remove Amanda from homeschooling. It was an abuse of discretion to not consider other options. There were other less intrusive means to address the Court’s concerns.
26. Mother provided GAL with documentation, and testified under oath at trial, regarding the fact that Amanda has in fact, been exposed to the origins of many other religious worldviews, including but not limited to: Catholics, Mormons, Jehovah’s Witnesses, Hindus, Buddhists and Judaism, as well as the evolution and creationism arguments. However, Mother **does not** concede that she is required to adopt the Court’s view that Amanda be introduced to a variety of competing world views. Mother possesses a constitutional right to determine what, if any, religious views she introduces Amanda to regardless of the Court’s preferences.
27. It is a fundamental right of a parent to raise their child according the holdings of the parent’s religion and beliefs. To be compelled otherwise by Court orders puts the Courts (the “State”) in the business of determining children’s religious upbringing. This is unconstitutional. (See supplemental Memorandum of Law). Mother and Amanda should not have to choose between their faith and their schooling choices. The Court has no business interfering with either.

GAL Bias:

28. The GAL had an acknowledged bias against the religious beliefs shared by Amanda and her mother and therefore all or most of the GAL’s testimony should have been disregarded for lack of objectivity. The GAL disregarded relevant evidence and refused to consider the testimony and evidence of key witnesses solely due to the fact that they were connected with Christianity.
29. All of the personal references for the Mother who had superior knowledge of Amanda’s relationship with Mother, who were familiar with Mother’s/Amanda’s religious beliefs, and about Amanda as a person in general were not interviewed by the GAL despite the fact that Mother requested that she do so **when asked by the GAL** to provide a list of people for the GAL to interview. Unbelievably, the GAL even refused to interview Amanda’s step-father.
30. As Mother testified at trial, the GAL literally crossed people off the list if they were Christians. The GAL did not deny doing so.
31. Mother gave the GAL some research concerning homeschooling and asked if the GAL had read it. The GAL refused to read it or even consider it because, as she said, **“I don’t want to hear it. It’s all Christian based.”** This apparent hostility is disqualifying for someone whose charge is to objectively report to the court relevant facts bearing on the appropriateness of Amanda’s homeschooling environment and/or curriculum.

32. The GAL also revealed her bias to Mother when she said to her “If I want her in public school, she’ll be in public school.”
33. Mother testified to the GAL’s bias under oath at trial. The GAL’s response was to raise both of her fists and elevate her voice, exclaiming that if Mother felt this way she should have taken the matter to Court. Then, the GAL put her head in her hands, looked up, and testified directly that: a) she has not known Mother to lie; b) that she could see why Mother would mention those things, and; c) that it was not her intention to be biased. Intent or not, the bias existed.
34. This lack of denial by the GAL as to her bias is extraordinary testimony and extremely uncommon. No weight should be afforded the GAL’s testimony or recommendations. The GAL’s hostility toward Amanda’s and Mother’s religious beliefs should not be rewarded by the court.

Parenting Plan:

35. Mother incorporates by reference herein all arguments made in paragraphs 1-34, above. Because of the flawed reasoning and bias issues raised above, Mother challenges the modification of the Parenting Plan as ordered in the July 14, 2009 Order and requests the Court return to the 2003 Permanent Parenting Plan where Amanda was happy, healthy and thriving. By the time of the GAL’s March 2009 Motion, Amanda had already had six months to adjust to more time with father. As the GAL recognized in her motion, the child did not respond well and one of the problems was that Father was not taking the child’s feelings into account. It stands to reason, then, that an Order increasing her time with father is not warranted. No evidence was presented at the June 2, 2009 trial that Amanda’s distress has been alleviated since the time of the GAL’s March 6, 2009 Motion.
36. In the alternative, if there is to be a permanent modification of the 2003 Permanent Parenting Plan (Mother recognizes that certain temporary orders were made during the most recent litigation), Mother suggests that the following aspects of the July 14, 2009 Order are not in Amanda’s best interests.
37. Weekends: The Court’s July 14, 2009 Order at pp.10-11 (see Paragraph 2A, which gives Father 1st, 3rd and 5th weekends, and Paragraph 4, referring to the September 2008 Order which defines “weekend” as Thursday at 3:30 PM through Monday at 3:30) puts Amanda on the road from Meredith to Portsmouth (107 minutes, 66.71 miles) and back the next morning before attending school. This would be significant stress on an adult, let alone being too much stress on a child of Amanda’s age. She needs to be home with Mother on Thursday evenings in order to get ready to attend school.
38. Additionally, Amanda will have extracurricular commitments on Thursdays. In the past, Father has refused to take Amanda to these, despite his claim that his interest is in seeing Amanda socialized with other non-church children.

39. Thus, the Order is unreasonable and should eliminate the alternate Thursday overnight time with Father. The weekend start time should be “Friday at 6:00 PM or after extracurricular activities, whichever is later” since 6:00 PM is the time the Parties use for other weekend start times.
40. Likewise, the definition of the end of the weekend needs to be clarified. The July 14, 2009 Order states: “*When the Monday after such a weekend is a school day, Mr. Kurowski shall return Amanda to Ms. Voydatch on Sunday evening at 5:00 pm.*” There are several reasons why there may not be school on a Monday, including if it is Mother’s scheduled holiday. Additionally, Amanda has other interests on Sunday nights which would require her being back at home in Meredith with Mother, including Patch Club once a month, church services, Christmas play practices, and other events that are a reflection of Amanda’s extracurricular commitments. For these reasons, Mother asks that the Court implore more precise language such as: “Father shall return Amanda to Mother on Sunday at 5:00 PM unless the next day is one of his scheduled holidays.”
41. Also, Amanda has church commitments on Wednesdays, as well as Patch Club every Wednesday, which are very important to her. Under oath and on the stand, the GAL was asked if, for these reasons, she wouldn’t mind recommending that the mid-week visit during vacation actually be Tuesday (the mid-point between Fridays). She testified that would be fine. As such, Mother asks that the mid-week vacation visit time be on Tuesdays, not Wednesdays.
42. Other problems in the father-daughter relationship include Father forbidding Amanda from even mentioning her step-father’s name, something the GAL has noted is a serious problem. Father is so oblivious to his negative impact on Amanda that he testified that he wasn’t even aware there was a problem until the GAL called to tell him. Yet Father’s shortcomings somehow are not even a minor part of the Court’s analysis.
43. Additionally, Father testified that Amanda does not have any friends her age at Father’s and that he cannot offer Amanda anything that Mother can’t except that “it’s different.” If socialization is the problem, then Mother points out that it is unreasonable and an abuse of discretion to increase time with Father, where Amanda is more isolated and away from her peers.
44. Consistent with the reasoning of paragraphs 35-43, above, Mother asks that the Winter Vacation end on the Friday before school starts again, in order to allow the child to readjust and be well rested for resuming her routine schedule.
45. Consistent with the reasoning of paragraphs 35-43, above, Mother asks that there be no unequal division of weekends and that it simply alternate between parents. There was not testimony that more time with Father has gone well and Father’s

history of not respecting Amanda's church involvement and social activities does not bode well for giving him more weekends in which to continue the problem.

46. Consistent with the reasoning of paragraphs 35-43, above, Mother requests that the summer vacation grant Father 3 weeks in the summer, so as to minimize the current father-daughter acrimony.

Financial Issues:

47. The order recognizes that the existing life insurance policies ("policies") would remain in effect. The Petitioner has paid for the policies since the parties were divorced in 1999. For the existing policies to remain in full force and effect the Petitioner must continue to pay for them.
48. The Petitioner made his last payment on the policies in September 2008, which are \$260 quarterly (\$1,040 / year). The Petitioner missed the December 1st, March 1st, and June 1st payments putting him \$780 behind. As of September 1st Petitioner will be \$1,040 behind.
49. The allowance for the cash value of the existing policies against the ordered savings account goes beyond the scope of the 2003 agreement since the savings account was in lieu of obtaining additional life insurance (the 2003 agreement separately acknowledged the existing policies and did not give this allowance):
 "... Mr. Kurowski could create the Roth IRA "in lieu of obtaining an **additional** life insurance policy" " (Order at 3; Emphasis added.)
50. The life insurance issue has been litigated 4 times (2003, 2006 – found in contempt, September 2008, and July 7, 2009). Each of these litigations has been costly for the Respondent. The September 29th hearing would be the 5th time this has been litigated because the Petitioner has refused at each juncture to follow the courts orders. The court should let its financial order stand (with amendments per the prior 3 paragraphs) and cancel the September 29th hearing.

MOTION TO STAY:

51. Paragraph 7 of the July 14, 2009 Order at page 12, paragraph 7, states "In the event either party appeals this Decree to the New Hampshire Supreme Court, the terms of this Decree shall remain in effect as a further Temporary Order during the appeal."
52. For the reasons stated in the Motion for Reconsideration, Respondent states that the order is unconstitutional and not sustainable. As such, she should not be required even on a temporary basis to comply with it. As such, she requests the Court to stay its order pending the outcome of her appeal to the New Hampshire Supreme Court.
53. Family Court Rule 2.29,B states, in relevant part: "Contested and Defaulted Matters...If a timely appeal is filed, the decree will not become final until the

expiration of the appeal period pursuant to Supreme Court Rule 7. If a timely post-decree motion is filed, and there is no appeal taken, the decree becomes final thirty (30) days from the Court's action on the post-decree motion." As such, the Court's order is not "final" yet.

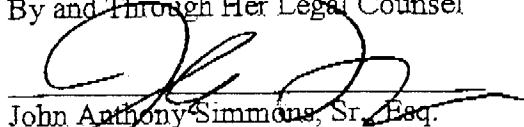
54. Since Respondent intends to go to the Supreme Court on the issues raised herein, she respectfully requests that the Court issue a clarification staying the part of the order which purports to require her to enroll Amanda in public school while an appeal is pending.

WHEREFORE, Respondent respectfully request that the Honorable Court:

- A. Reconsider its July 14, 2009 Order;
- B. Vacate that part of the Order which purports to order that the Parties' child attend public school;
- C. Order that the Parties' child shall continue to be homeschooled by the Mother;
- D. Return to the 2003 Permanent Parenting Plan;
- E. In the alternative, Amend the Parenting Plan consistent with the requests at paragraphs 37, 39, 40, 41, 44, 45, and 46 in this Motion.
- F. Amend those parts of the Order with regard to financial matters consistent with the requests at paragraphs 47-50 in this Motion.
- G. Order a hearing on this matter, given the very important state law and Constitutional principles involved.
- H. Stay that part of the Order which purports to require Amanda be enrolled in public school pending the outcome of an appeal.
- I. Grant such further relief as the Court deems just and equitable.

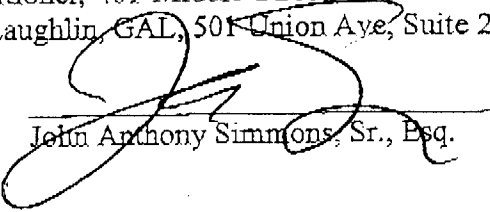
Respectfully submitted,
Brenda Voydatch, Respondent
By and Through Her Legal Counsel

Dated: August 24, 2009


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CERTIFICATE

I hereby certify that a copy of the foregoing was mailed this 24th day of August, 2009, to Attorney Elizabeth Donovan, counsel for the Petitioner, 461 Middle Street, Portsmouth, New Hampshire 03801, and mailed to Janice McLaughlin, GAL, 501 Union Aye, Suite 2, Laconia, NH 03247.


John Anthony Simmons, Sr., Esq.