

and recited many prayers in Hebrew, the couple signed a “Ketubah” [marriage contract] and the groom smashed a glass under his heel. The Plaintiff’s family was not present because Plaintiff did not feel “comfortable with [her] family coming to a Jewish ceremony.” Less than an hour after the religious ceremony, the parties participated in a civil ceremony which the Plaintiff’s parents attended.

Throughout the courtship and after the marriage, Defendant made it clear to Plaintiff that he would only marry a woman who was Jewish, either by birth or conversion and that any children of that union would have to be brought up in the Jewish faith. Plaintiff knew and understood Defendant’s wishes and agreed that she would comply, evidenced by the Plaintiff’s conversion.

When the parties’ first child, a son, was born a ritual circumcision was performed [a Bris]; a second son, had the same ceremony. After the birth of her fourth child, Plaintiff announced to Defendant that “ I don’t think I can be Jewish anymore.”

To such a pronouncement, Defendant stated that he would rather “live with a happy Catholic than a miserable Jew.” Both parties agreed that this was the sentiment expressed by Defendant. In no way, however, did such a statement obviate or eliminate Plaintiff’s agreement about and understanding of the Defendant’s expectation that the children would be brought up in the Jewish faith.

To that end, the two older boys have been enrolled in Hebrew School since they were in first grade, the parties’ daughter was named in a religious ceremony in the Synagogue and the youngest child also had a ritual circumcision. Without informing the Plaintiff, the Defendant registered their daughter in Hebrew school in September of this year. Although the father is not a particularly observant person, he participates in the services on high holy days and enjoys the cultural and religious aspects of other Jewish holidays with members of his family.

Plaintiff testified about an event in the family history which occurred during and after a particularly difficult pregnancy which culminated in the birth of the parties' daughter. At her birth the child was determined to require surgery within a relatively short time. Defendant described the Plaintiff/mother as an "emotional wreck" and testified he was in the same mental condition. Both parents were anxious about their daughter's impending surgery. According to Defendant's testimony, Plaintiff asked him if he would consent to the child receiving a blessing from a priest. Defendant did not object. "Any blessing in a good blessing," he said. He testified that he was clear that it was "only a blessing." However, Plaintiff testified that he had granted her permission to have the child baptized, which in fact she was. The father did not attend the ceremony as he remained home with the two other children.

Plaintiff's parents accompanied Plaintiff to church on that day and upon returning to the marital residence they thanked Defendant. Defendant testified that he had never before seen the child's baptismal certificate, which was offered into evidence by Plaintiff.

Defendant also testified that Plaintiff was not a religious person before their marriage or at any time during their marriage, including the period immediately before and since the commencement of the divorce action. He never saw Plaintiff wear any religious jewelry; the necklace she wore he believed to be a non-denominational object, a good luck charm, although Plaintiff indicated at trial that it had religious significance.

When asked to explain how it was that prior to initiating the divorce action she anticipated that all the children would be raised in the Jewish faith and that the boys would be trained for their bar mitzvah, and that after initiating the divorce she wanted all the children to be raised in the Catholic faith, the Plaintiff stated, in sum and substance that "spirituality is lived and not talked."

She wanted to return to her “roots” of preaching morally and spiritually to children. The children’s father, she stated, does not practice Judaism. “It’s not Christ v Judaism,” she stated. “It’s how you live your life and treat children.” Only “Christ can give children moral support.” The children, she asserted, need spirituality and she has time to give faith to them. It is “in their best interest to change their faith,” she testified. Plaintiff’s belief as she testified to it seems to be that morality and spirituality are restricted solely to those who practice Catholicism.

The Plaintiff testified that she objected to the children attending Hebrew school but would not object to their attending Catholic religious education. She thought there would be no confusion for the children in having previously received Jewish religious education who would then receive education and training in another faith. And, since their daughter had been baptized, it followed that she had to be given religious training in the mother’s restored faith.

With regard to her conversion to Judaism, she was able to “reverse” the conversion after speaking to her priest about it, she did penance, and later received a baptismal blessing. Plaintiff did agree that she had unequivocally stated prior to the marriage that she would raise any children of the marriage, as Jewish. Her mother testified as well to her understanding that the children would be raised in the Jewish faith.

Defendant testified that he attended “shul” when he could, always during the high holidays, sometimes on Purim or Simchat Torah. He spent holidays with his family, observing Passover and Chanukah with them most years. The Plaintiff and Defendant never had Christian artifacts in their home until after G. [their daughter] was born and he consented to a “small” Christmas tree. Plaintiff installed an eight foot tall tree in their home. It was Defendant who saw to it that all four children were registered in Hebrew school. In Defendant’s view, Plaintiff made an agreement with

him that she and her family and Defendant understood clearly: the children would be raised in the Jewish faith. Having been born to a Jewish mother, notwithstanding that she was a convert, and a Jewish father, all the children are considered to be Jewish. The father believes it to be “detrimental and confusing to them and not in the children’s best interest” to participate in two faiths. Religion is important, Defendant stated, the foundation of how to live life and deal with life. Although his preference would have been to have the children attend the Solomon Schechter day school, he did not enroll them. Instead, in order to satisfy Plaintiff, he became a member of a Reform synagogue. He stated that he says the “shema,” a Jewish prayer, with the children at bedtime; the Plaintiff’s prayer with the children at bedtime begins, “Now I lay me down to sleep....”

Each parent expressly stated the outcome each desired after the hearing. Both mother and father wished the children to follow the religion of that parent: Catholic for the mother, Jewish for the father.

Discussion:

It has long been recognized that a parent’s interests in the nurture, upbringing, companionship, care and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment, *Troxel v Granville*, 530 U.S. 57 (2000), Souter, J. *concurring*. “As we first acknowledged in *Meyer* [*Meyer v Nebraska*, 262 U.S. 390 (1923)] the right of parents to ‘bring up children’ and to ‘control the education of their own’ is protected by the Constitution.” These comments although made in the context of a decision related to the determination of a child’s best interests in visitation from third parties, reflect the constitutional doctrines that provide for parents to be the decision makers for their children.

Where religion is considered in custody determinations, cases such as *Wisconsin v Yoder*,

406 U.S. 205 (1972) and *Prince v Massachusetts*, 321 U.S. 158 (1944) offer guidance. A court must presume the primacy of the parental right to raise and educate children and the free exercise of religious beliefs include the right to manage the religious training of one's children. While courts may consider religion as one of the factors in determining the best interests of a child, religion alone may not be the determinative factor. See *Aldous v Aldous*, 99 A.D.2d 197, 473 N.Y.S.2d 60 (3rd Dept.1984), *cert denied*, 469 U.S. 1109. Further, when courts consider the religious affiliations of potential custodians in custody cases, they risk violating the neutrality principle by choosing one parent over another, unless the parents' religious beliefs are exactly alike. The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v Valente*, 456 U.S.228, 244 (1982).

In the case at bar the court has been requested to make a determination that appears to fly in the face of First Amendment jurisprudence, specifically to decide which of the parent's religious preferences shall be followed by the children. It is horn book law that each party has a right to educate a child in their respective religion. *Matter of Bentley v Bentley*, 86 A.D.2d 926, 448 N.Y.S.2d 559 (3rd Dept 1982). In giving up the authority to make this determination themselves, the parties have waived their First Amendment rights as well as any Due Process rights to which they would otherwise be entitled; they have explicitly authorized the court to make its determination relative to each party's religious principles.

By no means does this discussion and this court's decision involve a choice of which religion is inherently better or superior to the other. Further, the decision does not deprive either adult party of the right to pursue any religion or any practices each may choose. The decision is limited by the court's mandate to decide the religious development of the parties' children, not of the parents.

Initially we consider the factor of religious education in which the children have participated, to this point in time. Each of the children has been enrolled in Hebrew School, although it would seem that the two older boys and the younger son are the ones who have attended. The mother refused to permit her daughter to attend, although the father registered her for religious school this past September. None of the children has received religious education in any other faith; only the parties' daughter, G., has been baptized. The children attended church on a few occasions with their mother but none has evidently developed any religious ties to any other faith besides Judaism. *See Gago v Acevedo*, 214 A.D.2d 565, 625 N.Y.S.2d 250 (2nd Dept. 1995).

The agreement into which the parties entered before their marriage which provided that the Plaintiff would convert to Judaism and that any children born to the parties would be raised in that faith, cannot easily be overcome. As the court noted in *Rossner v Rossner*, 202 Misc. 293, 108 N.Y.S.2d 1196 (Queens Cty, 1951),

Differences between married people will arise because of change in attitude toward the religion they espoused at the time they were married. Sometimes the change is radical, a conversion from one to another religion, the substitution of one form of observance for another.

The court added, "Where there was an understanding between the parties that religious observance would be of a particular character, both are bound by that understanding." *Id.*

In a visitation dispute between two parties who could not agree on the level of religious observance for their children, one of whom lived with each of them, the court held that it would follow the principle in which the Court of Appeals asserted: the Establishment Clause is not violated when neutral principles of law can be utilized to resolve a dispute without reference to religious doctrine. *See Park Slope Jewish Ctr. v Congregation B'nai Jacob*, 90 N.Y.2d 517, 664 N.Y.S.2d

236 (1997). Any consideration of the religious principles of the children must therefore be viewed in the context of the best interests of the child. . . [which is the] controlling factor.” *Ervin R. v Phina R*, 186 Misc.2d 384, 717 N.Y.S.2d 849 (Kings Cty. 2000).

The agreement between the parties that the children would be raised in accordance with Judaic principles has been established by the testimony. It provides the court with guidance as to the parties’ intent but is not binding, since it was not “acknowledged or proven in the manner required to entitle a deed to be recorded.” *See Matisoff v Doby*, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997). Nevertheless, coupled with the parties’ testimony, as well as that of Plaintiff’s mother, their intent was clearly asserted. It would appear that it was only after the divorce action was commenced that Plaintiff decided that she no longer wished to follow the agreement made years before and ratified by her throughout the marriage.

Plaintiff’s assertions that hers is the only faith that can provide training in morality or any spirituality is so limited an outlook as to defy comprehension. Plaintiff converted to the very religion she now eschews and while, as noted above, parties can change their views, Plaintiff exhibits hostile concepts relative to Judaism which seem to stem more from her anger over the divorce than from any understanding of either her own or any other religion. To permit her to bring the children up in the manner she describes would provide the opportunity to convince these children that their father’s religion is less important than her own, that their religious training that they have undertaken to this point is false and that the only true view is her view.

It is each parent’s obligation to remember that they are “the adults, the role models, and it is their obligation to conduct themselves in a manner which respects and honors the beliefs and

practices” of the other parent. *Ervin R v Phia R, supra*. It appears to this Court that Plaintiff wishes not only to vitiate the agreement she willingly entered into prior to and during the marriage but also to indoctrinate the children into her view of the Catholic faith, which she sees as the only true faith to the exclusion of all others.

Fostering such views and teaching them cannot be in the best interests of the children. The older boys have already begun their bar mitzvah preparation and are learning Hebrew. The younger children would have been in religious school, but for the mother’s intervention.

While the Plaintiff is free to pursue her religious beliefs to any extent she wishes, she would be improvident to attempt to dissuade the children from their current studies by telling them that they are on the wrong religious path. Such a plan can only prove harmful to the children who should not have to make a choice in their religious upbringing until at least they have reached their maturity.

This court finds that the children’s best interests would not be fostered by changing the religion of the children to gratify the Plaintiff. She has provided no adequate reason or change in circumstances which would permit the court to make such a determination. It is in the children’s best interests to continue their religious training. Plaintiff must accommodate their schedules and see to it that they are transported to their religious studies. The baptism of the parties’ daughter was not done with the full agreement and consent of the father. Born to a Jewish mother and a Jewish father, the child cannot at her age choose to leave that religion and accept another. Both younger children are to be enrolled in religious school in the manner of their older brothers.

Conclusion:

As sought by the parties herein, the court makes the following determination. The children of the parties are to be educated in the Jewish faith. Nothing in New York's statutes prevents a court from making any reasonable allocation of the parental rights and obligations, so long as the determination is in the best interests of the children.

Notwithstanding the controversy over the religious training of the children, the parties were able to negotiate and resolve all other economic and social issues between them, demonstrating an ability to function together in matters regarding the children.

In particular cases, where the parties' views are so diverse that they cannot deal jointly on a particular issue which involves their children, one of them must be determined to be the person who makes the decisions. Such decision-making authority may be granted to one parent in particular matters affecting the welfare of the children. "Mindful that the solution to this dilemma must advance the best interests of the child, the court awards to each parent spheres of legal decision making authority." *Winslow v Winslow*, 205 A.D.2d 620, 615 N.Y.S.2d 216 (2nd Dept. 1994). Such decision making authority also promotes the non-custodial parent's continued involvement in the lives of the children. In *Mars v Mars*, 286 A.D.2d 201, 729 N.Y.S.2d 20 (1st Dept. 2001), the court stated:

It is undisputed that each parent takes an active interest in the children's lives and that it is in the children's best interest that both parents remain involved with them. . . . We are aware of no precedent for completely depriving a non-custodial parent, who is otherwise to remain fully involved with the children's lives, of decision making in all areas.

Accordingly, this Court finds that the most appropriate determination it can make, consistent

with the mandate imposed on it to determine the religious upbringing of the children and finding these parents to be “relatively stable parents, behaving in a mature civilized fashion,” *Braiman v Braiman*, 44 N.Y.2d 584, 407 N.Y.S.2d 449 (1978), determines that the father shall have the responsibility and final decision-making power regarding the religion of the children. The parties each have a distinct responsibility to consult with each other on all issues but the father has the ultimate responsibility to make any and all decisions in the area of religious training and practices. Because the welfare of the children is of paramount importance to both parents, they should be more likely to work together. The mother is free to practice her religion and can speak to the children about the practices she pursues. She should not denigrate their religious training or that of their father, nor should the children and their father be permitted to denigrate hers.

This constitutes the decision and order of this court.

Dated: Mineola, NY
October 31, 2006

Elaine Jackson Stack
J.S.C.