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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CIVIL TERM, PART 19MM

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SANDRA PARKER,

Plaintiff,

Index No.: 7044/94

-against-

Calender No.: 36764

VINCENT MALFETANO,

DECISION AFTER TRIAL

Defendant.
-----X

Appearances:

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Patricia P. Satterfield, J.:

This is a matrimonial action commenced by Sandra Parker (“plaintiff”) against Vincent Malfetano (“defendant”) for an absolute divorce on the ground of cruel and inhuman treatment and ancillary relief. A jury trial on the issue of fault was held November 5, 9, 10 and 12, 1998, resulting in a unanimous verdict that the conduct of defendant so endangered the physical or mental well being of plaintiff as to render it unsafe or improper for plaintiff to cohabit with defendant. Reserved for a bench trial were the issues of custody and visitation, child support, equitable distribution, maintenance and counsel fees. The bench trial of this action was held on November 16, 1998; March 16, 17 and 18, June 11, October 13 and December 16, 1999; and

February 2 and March 21, 2000. During the bench trial, the issues of equitable distribution, counsel fees and maintenance were mutually waived by the parties.¹ The Court conducted an *in-camera* interview of the three children of this marriage on August 18, 2000. Those *in-camera* proceedings were conducted on the record with the law guardian present. The record was ordered sealed, except for purposes of appellate review. Plaintiff was represented by Adam J. Edelstein, Esq.; defendant represented himself; and Larry S. Bachner, Esq., was the fully appointed law guardian, who made a written recommendation to the Court. Proposed findings and final submissions from counsel were received through August 18, 2000.

The Court has had a full opportunity to consider the evidence presented with respect to the issues in this proceeding, including the testimony offered and the exhibits received. The Court further has had an opportunity to observe the demeanor of the witnesses called to testify and has made determinations on issues of credibility with respect to these witnesses. The Court now makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Background

This matrimonial action was commenced on April 4, 1994; issue was joined October 3, 1994. Plaintiff was born on December 18, 1949, and currently is 50 years of age; defendant was born on December 30, 1949, and currently also is 50 years of age. The parties were married June 14, 1986, in the State of New York. There are three issue of the marriage: Justin, born August 12, 1987, and Iris and Evan, born May 19, 1991. Both parties are employees of the Board of Education of the City of New York, are law school graduates, and are in good health. At the time of the commencement of this action, both parties were residents of the State of New York, and had continuously resided in the State of New York for a period in excess of one (1) year. Neither plaintiff nor defendant is in the military service of the United States, and there is no judgment or decree of divorce, separation or annulment granted with respect to this marriage by this Court or any other court of competent jurisdiction and no other actions are pending at the present time. There exists no barrier, religious or otherwise, affecting the ability of either party to remarry subsequent to a divorce being granted by this Court. Both parties agree to take prior to the entry of final judgment, all steps solely within their power to remove any barrier to the other's remarriage following the divorce.

¹On October 13, 1999, the parties entered into a stipulation on the record that all issues of equitable distribution were settled, with anything held in sole title or ownership were deemed to be separate property, all claims and issues involving pension, retirement, investments, were waived and resolved, and that all claims involving expert witness fees and attorneys' fees were resolved. It was further stipulated that defendant would pay to plaintiff the sum of \$500.00, and plaintiff would then sign over to defendant the time share owned by the parties on Fire Island, and that any cost and debts in connection with that time share shall be defendant's responsibility and his obligation to pay.

A. The Divorce

Following a four day jury trial, held November 5, 9, 10 and 12, 1998, the jury rendered a verdict, answering in the affirmative the question: "Did the conduct of defendant Vincent Malfetano so endanger the physical or mental well being of plaintiff Sandra Parker as to render it unsafe or improper for plaintiff to cohabit with defendant.?" The affirmative answer to this interrogatory established plaintiff's cause of action for a divorce on the ground of cruel and inhuman treatment. Accordingly, based upon the jury verdict, plaintiff is granted an absolute divorce against defendant on the ground of cruel and inhuman treatment. See, Tongue v. Tongue, 61 N.Y.2d 809, affirming 97 A.D.2d 638; Lischynsky v. Lischynsky, 95 A.D.2d 111; Vail-Berserini v. Berserini, 237 A.D.2d 658.

B. Custody and Visitation

i. Custody

The most contentious issue during the course of this matrimonial proceeding and trial was the issue of custody. There are as previously noted three children of this marriage, Justin, Evan and Iris. The children are in good health with no identifiable special needs, except the need for continued therapeutic intervention and academic remediation. The children were interviewed by the Court *in-camera* with the law guardian present on August 18, 2000. In all child custody determinations, the best interests of the child remain the absolute, paramount consideration of the Court. Friederwitzer v. Friederwitzer, 55 N.Y.2d 89 (1982); Eschbach v. Eschbach, 56 N.Y.2d 167 (1982). The testimony at trial established and the Court finds that during the children's upbringing and through the date of trial, plaintiff was the primary caretaker, with defendant taking a very prominent and significant role at all time. The parties do not enjoy an extended family. Defendant was raised in the Catholic faith and has exposed the children to mass, confirmation classes and religious instruction; plaintiff was raised a Protestant and regularly attends services with the children at a Presbyterian church, where the children attend Sunday school and are members of the youth choir.

The Court agrees with the law guardian's conclusion and so finds that both plaintiff and defendant truly care about their children and that each has developed a strong love and emotional bond. The children likewise expressed a deep love and respect for each parent during the *in-camera* interview conducted by the Court. Justin and Evan expressed a strong desire to reside primarily with their mother, plaintiff; Iris expressed a strong desire to primarily reside with her father, whom she wants to take of because he is sad. Given the age of the children, this is a factor which the Court does consider together with all of the other factors in this case. It is not singularly determinative of the question. In determining the best interests of the children, other factors to be considered include a party's ability to provide for the child's emotional and intellectual development, the quality of the home environment, parental guidance, and stability of the respective proposed home. See Milton v. Dennis, 96 A.D.2d 628; Cornelius C. v. Linda C., 123 A.D.2d 536.

Both residences would adequately meet the residential needs of the children. However, the evidence, and the Law Guardian's report, show that plaintiff needs to pay greater attention to cleanliness in the home, to the upkeep of the property and to providing an adequate cooling system during periods of high climatic temperatures. The mother has been the children's primary caretaker notwithstanding the father's obvious commitment and involvement with the lives of his children. The *in-camera* interview with the children supports the finding of this Court that the mother has remained the primary caretaker of the children which in turn has resulted in strong emotional bonding. The evidence also showed that plaintiff defers to Mr. Stroud, her paramour, as the disciplinarian for the children and the provider of academic structure for Justin. She appears to be overwhelmed by her financial difficulties, the demands of her employment and the stresses of parenting, all in a hostile and antagonistic climate fostered by defendant. Defendant can provide a home for the children in suburban New Rochelle, that is spacious and well-maintained. He also expresses deep concern for the deteriorating academic performance of the children, and can provide needed support for them in aiding them with their homework.

Defendant is desirous of a joint custodial arrangement, that will involve him in major decisions involving the children. The Law Guardian recommends that the Court award joint legal custody to the parties for major decision making purposes only, with final decision making authority to the parent with primary physical custody. This Court, however, cannot concur in that request and recommendation. Indeed, this Court, at the outset, rules out any consideration of a joint or shared custodial arrangement, which pre-supposes a civilized level of communication and discourse which would allow both parents to engage in the decision making process for the benefit of their children. Joint custody is appropriate in those instances in which both parents are relatively stable and amicable and behave in a mature, civilized fashion. Venable v. Venable, 122 A.D.2d 374. Such is inappropriate where, as here, the parties have demonstrated an inability or unwillingness to cooperate in making decisions on matters relating to the care and welfare of the children. Bliss v. Ach, 56 N.Y.2d 995; Braiman v. Braiman, 44 N.Y.2d 584; Foranzo v. Scuderi, 224 A.D.2d 385. The shared parenting plan, which was in effect during the pendency of this action, did not work because of the substantial acrimony that exists between the parties, and the total lack of trust that the parties exhibited between each other. During the pendency of this action, the parents have done battle in the Family and Criminal Courts, and because of orders of protection, constantly have relied upon their respective attorneys and the Law Guardian as the mode of communication with each other. The level of animosity between the parties, the level of distrust between the parties and the adverse effect their interactions have upon the child all militate against joint or shared custody. See, Braiman v. Braiman, supra. There is nothing in this record to suggest that these parties are even minimally capable of making joint decisions with respect to their children, notwithstanding this Court's finding that both parties are loving parents.

Both parties seek custody; both parties love their children, and both parties have serious, personal issues that impact upon their respective parenting abilities. Not surprisingly, both parties see themselves as the fit custodial parent, and view each other as being unsuitable. Neither party, notwithstanding the numerous attempts to resolve the issue of custody, have demonstrated flexibility. In the process, the three children have been caught in the quagmire, exhibiting emotional difficulties, poor academic performance and an attempt to please and be

loyal to both parents.

Proceeding from the premise, established by both case and statutory law, that neither party has a prima facie right to custody (Nehra v. Uhlar, 43 NY2d 242; Domestic Relations ("DRL"), section 240), this Court has pondered the well-established factors to be considered in determining the best interests of the child, which include "the parental guidance the custodian provides for the child; the ability of each parent to provide for the emotional and intellectual development; the financial status and ability of each parent to provide for the child; [and] the overall relative fitness of the parties." Eschbach v. Eschbach, *supra*, Friederwitzer v. Friederwitzer, *supra*,; Vogel v. Vogel, 149 A.D.2d 501; Notley v. Schmeid, 220 A.D.2d 509, 511; Matter of Rosiana C. v. Pierre S., 191 A.D.2d 432, 434. This Court also has considered the issue of domestic violence, which it is statutorily mandated to consider. Section 240 of the DRL provides that the court "must consider the effect of such domestic violence upon the best interests of the child" in instances in which allegations of domestic violence made by one spouse against the other are "proven by a preponderance of the evidence." After consideration of these factors,, the testimony of the children's therapists, the recommendation and views of the Law Guardian, and this Court's own observations of the parties during trial, this Court finds that the best interests of the three children will be served by awarding sole custody to plaintiff with liberal rights of visitation as hereinafter set forth.

The most troubling aspect of this case has been the issue of domestic violence. Prior proceedings, as well as testimony given during the jury and bench trials, establish that defendant, notwithstanding his attempts to impress upon this Court that he has been victimized and falsely accused with respect to his alleged violent propensity, establish that defendant is prone to violent eruptions, aggressiveness and barely controlled rage. During the jury trial, plaintiff testified to various acts of verbal and physical abuse, resulting, in one instance, in a Family Court finding after trial, that defendant had committed a family offense, "namely in an act of harassment and menacing and trying to push [plaintiff] out of the window." Other testimony adduced during the jury trial showed other evidence of physical abuse. Defendant's witnesses during the bench trial were called to show that the academic performance of the children was deteriorating under plaintiff's care. Much of the testimony of those witnesses, however, further highlighted defendant's volatility.²

²It is undisputed, and conceded by plaintiff, that Justin continuously fails to perform well in school; he has attended five different schools in the last two years. Plaintiff also has been unsuccessful in providing the academic support that may have helped him, deferring instead to the aid of Mr. Stroud. Defendant called to testify several of the children's teachers, who all testified with respect to Justin and Evan being unprepared for school, not doing their homework or completing their class work Ms. Dawn Perez, Justin's fourth grade teacher at P.S.98 in Queens; Ms. Sandy Gregory, Justin's fifth grade teacher at P.S. 118; Ms. Sheila Temchin, Evan's third grade teacher at P.S. 131; and Ms. Linda Keppel, Justin's seventh grade teacher at American Martyrs School in Bayside from the beginning of September until October 4, 1999, all testified as to the children's failure to do homework, their lack of preparedness for class, their difficulties in reaching plaintiff.

Ms. Sheila Huggins, the Principal at P.S. 98 was called to testify. She testified that Justin had attended her school beginning in Kindergarten, until the withdrawal of him from the school while he was in the fifth grade. She recall having conferences with the parents concerning Justin's progress in school, his failure to complete his class work and his home work, and his failure to fulfill his potential. She also testified that consideration had been given to placing Justin in a Special Education program; however, the determination was made that he did not need Special Education services. According to her testimony, Justin, was transferred from P.S.98 in Douglaston, which is in School District 26, to P.S. 118 in Hollis, Queens, which is in School District 29; his younger siblings were transferred to Buckley Day Country School, a private school on Long Island. She further testified that there were concerns among the staff about Mr. Malfetano's behavior when he came to the school, and that she issued a directive that they were not to see him alone, that she should be with them. Similarly, Ms. Adele Armstrong, Principal of P.S. 118, testified that she spoke to defendant on the day that Justin was transferred to her school, and voiced his objection to the child attending that school, an objection that she referred to the District Office. She described defendant's demeanor as aggressive, "kind of frightening to be approached like that."

The testimony elicited from employees of the New York City Administration for Children's Services, whom defendant called to testify, was as illuminating as to defendant as it was to plaintiff. Early in the proceeding, defendant filed a report charging that plaintiff was neglecting the children. This complaint was based upon Justin, now thirteen, being left at home alone at the time he was ten years old. Shante Chunn, a case worker for Administration for Children's Services, testified that she is a child protective specialist for the agency and investigates allegations of child abuse, neglect and maltreatment. She was assigned the Parker case in March 1997 based upon a complaint based upon Justin being left home alone. She testified that after a few home visits, plaintiff refused to allow her to enter, stating that "she felt like she was being harassed by her ex-husband . . . and that children weren't in danger." Plaintiff permitted her entry, after the witness filed a petition in the Family Court. She recalled finding that "the home was in disarray." She further recalled that defendant persistently called her, about "fourteen" or "fifteen" times, to inquire about the investigation. The matter ultimately was adjourned for six months in contemplation of dismissal; David Tunnell, a case worker for the Administration for Children's Services, testified that the matter involving the Parker family was assigned to him for supervision upon its transfer from the Protective Diagnostic Unit. The proceeding was dismissed after six months.

The thrust of defendant's contention that plaintiff is unfit to have custody was threefold: (1) her failure to adequately supervise the educational development of the children; (2) her failure to maintain a clean home; and (3) her use of corporal punishment in her disciplining of the children, and permitting her paramour to impose discipline in the same fashion. To her credit, plaintiff acknowledged that the children were experiencing difficulties, and detailed the steps she took with respect to the problems. With respect to their homework habits, she testified that she enrolled Justin in Poponock, an after school program designed to help the children in the upper grades with academic work for three nights a week. She further testified that Mr. Stroud

helps Justin with his Spanish and math homework, and she helps him with writing, taking him to the library when he has book reports. She further testified that she had enrolled the three children in an after school program called Sharp, which is an "afternoon supervisory visit activity where they get an opportunity to do their homework with their classmates," followed by "recreation recess activity."

Plaintiff also was sensitive to Justin's emotional needs. She arranged for him to see a therapist, whose testimony was telling.³ Dr. Michael Steinberg, a Clinical Psychologist specializing in psychological therapy and evaluating children, adolescents and adults, began seeing Justin in April 1998, and continues to see him weekly. Dr. Steinberg testified that Ms. Parker called him in January 1998 to arrange for him to provide therapy for Justin, and that he had two initial sessions with Ms. Parker in March 1998 to obtain a family history. Dr. Steinberg testified that Justin's "academic work is suffering because of the burden of having to withhold and retain information that children, I believe, need to reveal. I think because of that adaptation, he doesn't get adequate soothing or comfort for his fears and his worries. I think that's changing. I think he is improving. In April he won the student of the month award, which was unthinkable a year ago." Dr. Steinberg further testified that Ms. Parker is a "competent parent," that she is "attuned to Justin," and that "she is quite sensitive to what goes on with Justin, despite his resistance to provide information." Dr. Steinberg stated that "[o]ne of the things we've been working on is her tendency to remain passive in the face of being very overwhelmed and I have encouraged and advised her to take more vigorous action, particularly with the teacher and the school so that we can better monitor Justin's progress in school since he has a tendency to split"

Dr. Steinberg also testified with respect to his meetings with Mr. Malfetano. He testified that at their first meeting, "Mr. Malfetano's mood and effect changed at a time precipitously and abruptly from being what I thought was common composed and truly concerned about his son to when speaking about Ms. Parker becoming enraged, intensely accusatory." Dr. Steinberg further testified that he found Mr. Malfetano to be "emotionally unstable," and conceded that "[h]e scared me."⁴ He was of the opinion that both parents have a genuine interest in Justin's welfare,

³Dr. Klee, the court appointed neutral evaluator, was not called to testify, and his report was not admitted into evidence.

⁴In describing his last encounter with Mr. Malfetano, Dr. Steinberg testified:

And his voice became very loud. He had a look of rage in his face and I was so scared and I didn't meet the – I needed to preface the fact I've been in practice for 12 years and I worked with a variety of dysfunctions and violent dysfunctions and I really haven't felt as frightened as I did last night to the point of my rushing to lock the door as soon as he left, to the point of thinking perhaps he was waiting for me to follow me home, since my car was the only one in the parking lot behind the office. Once I got to my block and

but that "Ms. Parker isn't equally interested in disparaging Mr. Malfetano as I believe he is interested in disparaging her. I find her reasonable. She takes him every week to a 6:45 appointment in the morning from Queens. I believe she is interested in his welfare and I believe that again she's acted on many of my recommendations." The doctor's office is located in Syosset, Long Island, New York.

Dr. Steinberg also testified with respect to his meetings with Mr. Stroud, defendant's boyfriend, whom Dr. Steinberg describes as "having a significant role in the household," and that he "assumes a role of structuring at the very least Justin academically insofar as communicating with teachers, checking his homework and giving him rewards." He concluded that he thinks Mr. Stroud "is a very decent and well-meaning man. I think he has a very accurate assessment of what Justin needs regarding structure and direction and the inability to dupe somebody. I think he provides Justin with potential opportunities for success." Dr. Steinberg denied knowing anything about Mr. Stroud hitting the children, other than what defendant had told him. He testified that the relationship with Mr. Stroud is "a warm relationship and a good relationship and a relationship from which Justin profits." In response to questioning by the Law Guardian, Dr. Steinberg opined that removal of Justin from plaintiff's home would "be detrimental to Justin's mental health." He further opined, in response to the effect on Justin's mental health should he be separated from his siblings: "I think it would have a negative result for the reasons I have stated that I think it results in divided loyalty. I think it would be a irreversible lapse. The children end up warring with each other."

In an apparent reaction to plaintiff taking Justin to see Dr. Steinberg, defendant took the three children to see Dr. Thomas Cullinan, a psychologist, who testified on behalf of defendant. He testified that he had been seeing the children in therapy for "three to four times a month" since June 1999. He also testified that defendant had brought the children to see him because he was "concerned about how the children were reacting to the custody issues." He further testified that in his professional opinion, "Mr. Malfetano would be a perfectly adequate father," and that based upon his observations, the children and their father "get along very well together."

The problems associated with plaintiff being a poor housekeeper and her spanking of the children, determined by this Court to be sporadic, persist. The Law Guardian, in recommending that plaintiff be the primary physical custodian, also recommended that conditions be imposed, including that plaintiff maintain her home in a clean and neat fashion and install air conditioning; that she see to it that the children's school work be done consistently and that she respond immediately to any requests by school officials for contact; that plaintiff engage in individual counseling and continue Justin's counseling, and accept and comply with referrals for parenting

arrived home, I was scared that he my have followed me. So I circled my block to ensure no one was following me. One could say I am paranoid. I don't think that's the case. That's never happened to me before in 12 years. So he certainly elicited some anxiety in me that I thought was quite legitimate.

skills, budget counseling and time management skills; that plaintiff not interfere with defendant's access to school records and consult with defendant on all major issues concerning the welfare of the children; and that she insure that there be no corporal discipline of the children by any person residing in her home. The Law Guardian also recommends that defendant engage in individual counseling, and that he not interfere with plaintiff's role as primary physical custodian.

As set forth above, in adjudicating custody and visitation rights, the most important factor for the court to consider is the best interests of the child (see, Eschbach v. Eschbach, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260; Matter of Schmidt v. Schmidt, 234 A.D.2d 465, 650 N.Y.S.2d 809), which requires an evaluation of the "totality of the circumstances" (Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 95, 447 N.Y.S.2d 893, 432 N.E.2d 765)." Coakley v. Goins 240 A.D.2d 573. Here, the totality of the circumstances, including the fact that plaintiff has been the children's primary caretaker since birth, establishes that the best interests of the children compel the award of custody to plaintiff. In so doing, this Court does not take lightly plaintiff's flaws, her passivity, and her use of "hitting" as a form of discipline. Nor does this Court minimize the adverse effects that her relationship with Mr. Stroud may have on the children.⁵ The testimony showed that he sought to bring structure to the children, and to provide discipline.

Defendant, on the other hand, is very skilled at manipulation. He consistently has demonstrated his volatility in his interactions with the children's teachers, therapist and even in the court room. Moreover, this Court questions defendant's motivations. This Court is of the opinion that defendant has been more intent upon discrediting and punishing plaintiff, and fulfilling his need to win than bring to closure this battle for custody that clearly has not been in the best interests of the children. There is an indication that he has involved the children in the court proceeding, relating to them what has transpired, and that he has sought to undermine plaintiff's relationship with the children. This Court does not doubt that both parents love their children, and that the children will benefit greatly from sustained interactions with both parents, notwithstanding that neither parent is free of imperfections. Thus, after consideration of all relevant factors, the totality of the circumstances, and an assessment of the credibility of the witnesses and upon the character, temperament, and sincerity of the parents, this Court finds that it is in the best interests of the child that sole custody be awarded to plaintiff, with liberal visitation for defendant. As sole custodial parent, plaintiff shall have the right to make decisions with respect to the religious, educational and cultural upbringing of the child. See, De Luca v. De Luca, 202 A.D.2d 580; Stevenot v. Stevenot, 133 A.D.2d 820; Parrinelli v. Parrinelli, 138 Misc.2d 49; Matter of Paoletta v. Phillips, 27 Misc.2d 763.

This Court encourages the parties to seek counseling, and to continue the children in therapy. Plaintiff, as the custodial parent, should keep defendant fully informed of religious, educational and other activities of the children, and to afford him an opportunity to participate,

⁵Defendant also has a significant other, Supreme Simpson, who works as a school aid at defendant's school and apparently spends significant periods of time with the children during visitation.

particularly with respect to aiding them with their school work. The children shall have daily access to defendant, by telephone, to enable him to monitor, and to afford them his assistance in completing, homework assignments.

Plaintiff is placed on notice with respect to the concerns of this Court and the Law Guardian as to the need for her to improve her parenting skills in the areas of assisting them with their educational needs and her obligation to provide a comfortable living environment. If plaintiff's passivity precludes her from fighting for the well-being of her children, she can be assured that defendant will continue to fight to gain custody, although his motivation might be questionable. Defendant successfully has prolonged this custody battle for six years, and successfully has caused plaintiff significant financial and emotional hardships. Hopefully, the battle is now over, and the parents can now focus upon working together to insure that their children have the happy, secure and peaceful upbringing that they deserve. What is critical is that the parents join forces to achieve this end and utilize every resource available to enable them to positively interact with each other. Each parent has much to contribute to the children and the children certainly will benefit from the positive attributes of each parent.

ii. Visitation

It clearly is in the best interest of the children that they have frequent and liberal visitation with their father, who has the capacity to provide them enriching and enjoyable experiences. Such visitation, however, must be structured to minimize undue conflict and discord. At present, defendant has picked up the children for visitation at the local police precinct, pursuant to a Family Court order of protection.⁶ Pending before this Court is a determination of that branch of defendant's motion, returnable June 26, 2000, in which he seeks an order directing that each party share more equitably the "pick-up" and "drop-off" of the children. Defendant proposes that he continue to pick up the children at the 103rd Police Precinct on every Tuesday and that plaintiff pick up the children for return at the New Rochelle Police Department, and that the parties alternate responsibility for weekend visitation, with pick-up and drop-off being alternated between the 103rd Police Precinct and the New Rochelle Police Department. Plaintiff interposed no opposition to this request. Accordingly, unless the party otherwise agree, the pick-up and drop-off for the midweek and weekend visitations shall be as proposed by defendant.

This Court adopts the recommendation of the Law Guardian that plaintiff have primary physical custody of the children during the school year, and that defendant have primary physical custody during the summer vacation. Unless otherwise mutually agreed upon by the parties, defendant shall have additional visitation, as follows:

⁶On January 11, 1999, the Family Court, Queens County, issued an Order of Protection that is effective until January 11, 2001, which directs defendant to stay away from plaintiff and children, when children are with plaintiff, except for court ordered visitation or custody. The order further directs defendant to refrain from assaulting, harassing, menacing. . . intimidation, threats or any criminal offense against plaintiff.

a. Defendant shall have liberal visitation on alternating weekends, with such visitation commencing after school on Friday and ending on Sunday at 7:30 p.m., and on Tuesdays and Thursdays, from 4:00 p.m. to 8:00 p.m.

b. Each party shall have visitation with the child on holidays and vacations as follows:

Plaintiff:

In even numbered years on Christmas recess from school (excluding New Year's Eve and New Year's Day), Easter Sunday, Independence Day and Columbus Day, between the hours of 9:00 a.m. and 6:00 p.m. on one day holidays or between 9:00 a.m. on the first day and 6:00 p.m. on the last day of multiple day holidays; in odd numbered years on New Year's Eve and New Year's Day, spring school recess (excluding Easter Sunday), Martin Luther King Day, Memorial Day, Labor Day and Thanksgiving school recess, between the hours of 9:00 a.m. and 6:00 p.m. on one day holidays or between 9:00 a.m. on the first day and 6:00 p.m. on the last day of multiple day holidays; on the Husband's birthday and on Father's Day (and similarly, there shall be no visitation rights hereunder on the wife's birthday or on Mother's day).

Defendant:

In odd numbered years on Christmas recess from school (excluding New Year's Eve and New Year's Day), Easter Sunday, Independence Day and Columbus Day, between the hours of 9:00 a.m. and 6:00 p.m. on one day holidays or between 9:00 a.m. on the first day and 6:00 p.m. on the last day of multiple day holidays; in odd numbered years on New Year's Eve and New Year's Day, spring school recess (excluding Easter Sunday), Martin Luther King Day, Memorial Day, Labor Day and Thanksgiving school recess, between the hours of 9:00a.m. and 6:00 p.m. on one day holidays or between 9:00 a.m. on the first day and 6:00 p.m. on the last day of multiple day holidays; on the Wife's birthday and on Mother's Day (and similarly, there shall be no visitation rights hereunder on the Husband's birthday or on Father's day).

c. The children shall spend no less than two hours with either plaintiff or defendant on that parent's birthday and the parties shall share the children's birthdays, if practicable, otherwise the children's birthday shall be alternated each year with plaintiff having the next birthday.

d. Defendant shall have the children for the summer vacation, defined as the end of school in June to the beginning of school in September, except that plaintiff shall have the children for two consecutive weeks during that period. Plaintiff shall have the right to determine her two weeks of vacation on even numbered years; defendant shall have the right to make that decision on odd numbered years. Each party shall notify the other party of the weeks selected no later than Memorial Day. The parties, by mutual agreement, may deviate from this vacation schedule.

e. Each party shall have reasonable, daily telephone access to the children when they are with the other parent. Each parent shall advise the other of his or her up-to-date telephone number and address, as well as any telephone number and address of where he or she is taking the child for a trip of more than one day in duration.

f. Plaintiff shall inform defendant of all school activities, including parent-teacher conferences, and shall provide him with copies of school records. She also shall notify defendant of any medical emergencies, and shall authorize his access to the children's medical and educational records.

C. Child Support

The Child Support Standards Act ("CSSA") [Domestic Relations Law, section 240] sets forth a three step method for determining the basic child support obligation. Cassano v. Cassano, 85 N.Y.2d 649. Domestic Relations Law 240(1-b)(c) provides, inter alia, that in determining the amount of the basic child support obligation, the court shall: (1) determine the combined parental income, (2) multiply the combined parental income up to \$80,000 by the appropriate child support percentage, and prorate that amount in the same proportion as each parent's income to the combined parental income, and (3) where the combined income exceeds \$80,000, determine the amount of child support by considering facts set forth in Domestic Relations Law 240(1-b)(f) and/or the appropriate child support percentage. Cassano v. Cassano, *supra*; Bast v. Rossoff, 91 N.Y.2d 723. Pursuant to Cassano, the court has "discretion to apply the 'paragraph (f)' factors, or to apply the statutory percentages, or to apply both in fixing the basic child support obligation on parental income over \$80,000." *Id.* at p. 655. The Cassano decision further holds that "[g]iven that the statute explicitly vests discretion in the court and that the exercise of discretion is subject to review for abuse, some record articulation of the reasons for the court's choice to apply the percentage is necessary to facilitate that review." *Id.* Similarly, if the court rejects the amount derived from the statutory formula, "it must set forth in a written order 'the amount of each party's pro rata share of the basic child support obligation' and the reasons the court did not order payment of that amount (Domestic Relations Law 240[1-b][g])." Bast v. Rossoff, *supra*, 91 N.Y.2d at 727. Both parties provided some evidence tending to show their present income or lack thereof.

A "court is not bound by a party's account of his finances, and when a party's account of his finances is not believable, the court is justified in finding an actual or potential income greater than that claimed (see, Matter of Vetrano v. Calvey, 102 A.D.2d 932, 933, 477 N.Y.S.2d 522; Felton v. Felton, 175 A.D.2d 794, 572 N.Y.S.2d 926; Rosenberg v. Rosenberg, 155 A.D.2d 428, 547 N.Y.S.2d 90)." Mobley-Jennings v. Dare, 226 A.D.2d 730; Mellen v. Mellen, 260 A.D.2d 609. "Child support is determined by the parents' ability to provide for their child rather than their current economic situation * * * An imputed income amount is based, in part, upon a parent's past earnings, actual earning capacity, and educational background." Zwick v. Kulhan, 226 A.D.2d 734; Morrissey v. Morrissey, 259 A.D.2d 472; 226 A.D.2d 734. The award of child

support, made in accordance with Domestic Relations Law §240 (1-b) and guided by decisional law, is based upon the following findings:

- (a) The children of the marriage entitled to receive parental support are Justin, born August 12, 1987, and Evan and Iris, born May 19, 1991.
- (b) The gross income of plaintiff, the custodial parent, as a school administrator, based upon her most recent payroll stub is \$2,686.63 bi-weekly, or \$69,852.38 annually. Her adjusted income, after deduction of \$5,343.70 for Social Security and Medicare taxes (7.65%) and \$2,263.22 for New York City taxes (3.24%), is \$62,245.46. Plaintiff also receives \$850.00 in monthly or \$10,200.00 in annual rental income from the home she owns in Sag Harbor. Her total adjusted income for child support purposes is \$72,445.46.
- (c) The gross income of defendant, who is the noncustodial parent, as a school administrator, based upon his most recent payroll stub is \$2,489.29 bi-weekly or \$64,721.54 annually. His adjusted income, after deduction of \$4,951.20 for Social Security and Medicare taxes (7.65%) and \$2,096.98 for New York City taxes (3.24%), is \$57,673.56. Defendant also receives \$1,650.00 in monthly or \$19,800.00 in annual rental of a house in Yorktown Heights that he purchased during the trial of this action for cash at a purchase price of \$115,000.00. His total adjusted income for child support purposes is \$77,473.56.
- (d) The combined adjusted income of the parties is \$149,912.00. Plaintiff's proportionate share of the combined adjusted income is 48.32%; defendant's proportionate share of the combined adjusted income is 51.68%. The applicable child support percentage is 29%; basic child support on the first \$80,000.00 of the combined adjusted income of the parties is \$23,200.00. Defendant's child support obligation based upon the first \$80,000.00 is \$11,989.76, annually, or \$461.14, bi-weekly.
- (e) Pursuant to subsection (1-b)(b)-(c) of section 240 of the Domestic Relations Law, this Court explicitly is vested with the discretion to apply the stated percentage, or 29%, to the income over \$80,000, which in this case is \$69,912.00, 29% of which is \$20,274.48. As set forth above, defendant's proportionate share of the first \$80,000 of the combined income is \$11,989.76, annually or \$461.14, bi-weekly; defendant's proportionate share of the combined income over \$80,000 is \$10,477.85, annually or \$402.99, bi-weekly, which would result in a total annual child support obligation of \$22,467.61, and a total bi-weekly child support obligation of \$864.14.

- (f) This Court has considered carefully the parties' circumstances, including that both parties earn substantially the same income; that the physical and emotional health of the children requires that they have continued therapeutic intervention and their education needs require that they have extensive academic remediation; the non-monetary contributions that the parents will make toward the care and well-being of the children, including the extra-curricular activities; and the clear indication that plaintiff's home needs significant upgrading to provide a healthier living environment for the children. Moreover, the record is clear that the children would have enjoyed a higher standard of living had the marriage not ended. Thus, after consideration of the statutory factors, the court finds no reason "why there should be a departure from the prescribed percentage." Cassano v. Cassano, *supra*, at p. 655. See, also, Matter of Bill v. Bill, 214 A.D. 2d 84. The court finds that based on the facts and circumstances of this particular case, setting child support at \$864.14 bi-weekly or \$22,467.61, annually, consistent with the statutory percentage set forth in Domestic Relations Law §240(1-b)(3), would result in a just and appropriate award for child support. Matter of Cassano v. Cassano, *supra*.
- (g) Defendant's pro rata share of the basic child support obligation, effective February 22, 1995, the date of entry of the temporary order of support, is calculated as follows:
1. \$864.14 bi-weekly or \$22,467.61, annually.
 2. 51.68% of child care costs, if any.
 3. 51.68% of future reasonable health care expenses, including unreimbursed medical and dental expenses. See, Domestic Relations Law § 240[1-b][c][5]; McNally v. McNally, 251 A.D.2d 302; Junkins v. Junkins, 238 A.D.2d 480.
 4. 51.68% of the educational costs, including tuition and other educational related expenses. Pursuant to Domestic Relations Law § 240(1-b)(c)(7),⁷ the court may direct a parent to contribute to a child's education, even in the absence of special circumstances or a voluntary

⁷Section 240(1-b)(c)(7) reads: "Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider."

agreement of the parties, as long as the court's discretion is not improvidently exercised in that regard. See, Matter of Cassano v. Cassano, 203 A.D.2d 563, , affd 85 N.Y.2d 649; Allen L. v. Myrna L., 224 A.D.2d 495 Cohen v. Cohen, 203 A.D.2d 411; Manno v. Manno, 196 A.D.2d 488. "In determining whether to award educational expenses, the court must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the children, and the requirements of justice." Manno v. Manno, *supra*, at 491.

5. Child support arrears, after credit for child support paid, shall be paid at the rate of \$50.00 bi-weekly until fully paid. Plaintiff contends that defendant owes \$21,000.00 in arrears under the temporary child support order for the period June 1995 through May 15, 1998, based upon \$700.00 per month for 30 months. Reserved for determination after trial was defendant's claim that he and plaintiff had executed agreements, whereby plaintiff acknowledged receipt on March 31, 1996, of two thousand (\$2,000.00) dollars, and receipt on November 21, 1996 of six thousand and two hundred (\$6,200.00) in September 1996, for tuition, nursery school, and four thousand and nine hundred (\$4,900.00) for child support for the next seven months. No additional testimony was proffered at trial as to these payments; however, the credible testimony adduced and the evidence admitted at the hearing on May 18, 1998, establish to the satisfaction of this Court, that the child support arrears allegedly due shall be reduced by thirteen thousand and one hundred (\$13,100.00) dollars, to seven thousand and nine hundred (\$7,900.00) dollars. Additional arrears are payable, effective February 22, 1995, based upon the \$864.14 bi-weekly child support obligation established by this decision. By order of this Court dated July 15, 1999, plaintiff's application for upward modification of defendant's child support obligation was granted, and defendant was directed to pay plaintiff \$548.58 bi-weekly, retroactive to March 17, 1999. As child support payments have been paid through income execution since May 1998, and child support arrears have accrued since that date, the parties are directed to submit with the proposed Judgment of Divorce, affidavits setting forth the total amount of child support arrears calculated in accordance with this decision.

- (g) The child support shall not be deductible by the payor spouse or taxable to the payee spouse. Plaintiff shall take Justin and Evan as tax exemptions and defendant shall take Iris as a tax exemption on even numbered years; defendant shall take Justin and Evan as tax exemptions and plaintiff shall take Iris as a tax exemption on numbered years. Both parties shall fully cooperate with the other by executing all necessary papers and forms to permit the filing of these claims exemptions, including without limitation IRS Form 8332.

- (h) Defendant further is directed to purchase and maintain until the children are emancipated a life insurance policy naming each child as beneficiary and plaintiff as trustee in an amount sufficient to meet his child support obligations in the event of his demise.
- (i) Should defendant fail to timely pay child support for three consecutive pay periods, plaintiff may proceed to seek all child support payments by way of Income Execution.

D. Child Care and Education Expenses

At trial, plaintiff testified that she was seeking reimbursement for child care and education expenses that she incurred during the pendency of this action. At trial, it was stipulated that the only such expenses to be considered by this Court were those expenses for which she had canceled checks and bore an asterisk on the bank copies of the checks admitted into evidence. Plaintiff offered evidence showing that in 1999 she paid for the children's summer camp programs at Incarnation Camp in Connecticut in the amount of \$1,240.00; public school expenses, including lunches, in the amount of \$274.44; and payment to Mrs. Alston of \$120.00 for the children's transportation to school. Other expenses for which she seeks reimbursement are related to Harlem School of the Arts, and to several other schools, the names of which are illegible. Defendant is directed to reimburse plaintiff for fifty (50%) of the payments made for camp, public school expenses and Mrs. Alston, which totals \$1,634.44, defendant's share of which is \$817.22.

E. Law Guardian Fees

By order of this Court dated May 20, 1998, Larry Bachner, Esq., was appointed as Law Guardian for the children. Pursuant to that order, his fee "shall be shared equally by the plaintiff/wife and defendant/husband." Plaintiff has failed to pay her share of these fees, and hereby is directed to remit payment to the Law Guardian, forthwith, upon his submission of an updated bill.

II. CONCLUSIONS OF LAW

- A. That jurisdiction as required by §230 of the Domestic Relations Law has been obtained and the requirements of Domestic Relations Law have been met.
- B. The plaintiff is entitled to a judgment of absolute divorce against the defendant herein upon the ground of cruel and inhuman treatment.
- C. Both plaintiff and defendant have taken or will take all steps solely within their power to remove all barriers to defendant's or plaintiff's remarriage following the divorce.
- D. Each party shall be permitted to resume the use of any pre-marriage surname.

- E. Plaintiff shall be awarded sole custody of the three infant children of this marriage.
- F. Defendant shall be granted liberal visitation with the three children, as set forth above.
- G. Defendant shall be provided reasonable access to all of the children's health, dental and education records.
- H. Defendant shall have daily telephone access to the children.
- I. Defendant shall pay to defendant child support in the amount of \$ \$864.14 bi-weekly or \$22,467.61, annually; 51.68% of child care costs, if any, 51.68% of all uninsured medical and dental expenses of the three children; 51.68% of the educational costs, including tuition and other educational related expenses. Defendant shall continue to maintain all existing medical, hospitalization and dental insurance for the benefit of defendant and the children until such time as a Judgment or Decree of Divorce is signed and entered and thereafter for the benefit of the children. Defendant shall pay arrears in child support, the amount to be set forth in the Judgment of Divorce, at the rate of \$50.00 bi-weekly.
- J. Plaintiff shall be entitled to claim Justin and Evan as dependency exemptions for federal and state income tax purposes and defendant shall be entitled to claim Iris as a dependency exemption for federal and state income tax purposes in even numbered years; defendant shall be entitled to claim Justin and Evan as dependency exemptions for federal and state income tax purposes and plaintiff shall be entitled to claim Iris as a dependency exemption for federal and state income tax purposes in odd numbered years, until such time as Justin is no longer eligible to be claimed and thereafter the parties shall each be entitled to claim one dependency exemption. Both parties shall fully cooperate with the other by executing all necessary papers and forms to permit the filing of these claims exemptions, including without limitation IRS Form 8332.
- K. Neither party is entitled to an award of maintenance or equitable distribution as against the other.
- L. Defendant shall maintain a minimum of \$300,000 life insurance on his life naming the three children as irrevocable beneficiaries, decreased to \$200,000 upon Justin becoming emancipated, and the unemancipated children continuing as co-equal beneficiaries under the reduced coverage.
- M. Each party shall be solely responsible for their own counsel fees.
- N. The law guardian, Larry Bachner, Esq., shall be compensated by the parties for legal services rendered on behalf of the children. The law guardian shall submit an affirmation of services upon notice to plaintiff's counsel and defendant. The Court shall thereafter fix the award. Each party shall be equally responsible for payment of the Law Guardian.

- O. Defendant shall reimburse plaintiff \$817.22, representing his share of payments made for camp, public school expenses and to Mrs. Alston for 1999.

This constitutes the decision and order of the Court. Let Judgment enter accordingly.

Dated: August 21, 2000

J.S.C.