

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - PART 50-L**

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C. F.,

**Plaintiff,**

**Index No.**

**-against-**

J. F.,

**Defendant.**

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**Jacqueline W. Silbermann, J:**

Plaintiff-wife seeks an order of custody and proposes a liberal parenting schedule for the defendant-husband. The husband seeks an order of joint custody, joint decision-making and equal time-sharing.

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 has further had an opportunity to observe the demeanor of the various 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:

**FINDINGS OF FACT**

The parties met and began dating while attending the University of Southern California. Upon graduation, the couple relocated to New York, married, and had three children, to wit: ages 11, 9, and 6. They were married for ten years prior to the institution of these divorce proceedings.

In the spring of 2001, the husband began an extramarital affair with Mrs. P., a friend of the family, and the parent of one of their daughter's classmates at the children's private school. Mrs. P., who presently is going through her own divorce, is the mother of four children, all friends and classmates of the parties' children. The P.'s currently are litigating the economic issues arising out of their divorce, but have settled the custody issues, in part by arranging a 50/50 time-sharing plan.

After ten years of what the wife considered to be a happy, healthy marriage, in the summer of 2001, without disclosing his affair, the husband told the wife he did not love her anymore. Despite her efforts to save the marriage through couple's counseling, personal therapy, and her attempts to find an appropriate therapist for the husband, the husband persisted in his assertion the marriage could not be saved. On September 10, 2001, after a session with their marriage counselor, the parties left separately and the husband was hit by a taxi and hospitalized. Although the wife learned of her husband's accident when Mrs. P. called her from the hospital, the husband continued to deny his affair with Mrs. P., claiming she was just a "good friend".

The next day, September 11, 2001, proved to be a difficult one for the family. As a result of the terrorist attacks on the World Trade Center, two of the children were forced to remain at school in the Bronx until the evening. The parties' third child was picked up by the wife at his pre-school in up-town Manhattan. The wife testified the children were distraught, confused and scared. Nevertheless, when the husband was discharged from the hospital two days later on September 13, 2001, he announced he was leaving his wife

and moving into the Stanhope Hotel. At this point, the husband admitted he had been having an affair with Mrs. P. for the previous 5 months.

One month after the husband's departure from the marital home, he returned with the news he wanted to reconcile. Accordingly, the parties told the children their parents were going to stay together, which understandably raised the children's hopes that family-life would return to normal. The wife's only requests in allowing the husband to return were that he continue with individual and couple's therapy, and that he end his affair with Mrs. P. Four days later the husband moved out again, permanently.

The parenting issues in this case have been complicated by the likelihood that the husband will marry Mrs. P. at the conclusion of each of their respective divorce cases, creating an instantaneous blended family of seven children, three of whom (the P. children) have special needs.

As a result of the wife's concerns about the effects of the husband's relationship with Mrs. P. on the parties' children, this Court appointed Dr. K. to opine on that issue, as well as an appropriate access schedule. Despite the clear language of this Court's order, however, Dr. K. failed to address directly the issue of the effects of the husband's relationship on the children, opining instead on the issues of residential custody, decision-making and an access schedule. The report, and Dr. K.'s testimony, will be discussed at length, *infra*.

The wife's testimony at trial revealed she is a 37 year-old stay-at-home-mom raised in a devout Catholic family in southern California, and is one of five children. Despite her relocation to New York, she has remained in close contact with her family. Indeed, each

year it was the husband's family tradition to travel to California to spend the Christmas holiday with the wife's family. The wife has continued this tradition, despite the couple's separation, and sees various members of her family several times throughout the year. This arrangement is now unacceptable to the husband, as the parties' middle child's birthday falls on December 26, and the husband asserts he cannot, and should not, be required to travel to California each year to celebrate his birthday with him.

Upon graduating from college, the wife relocated to New York with the husband and undertook a job at the New York Stock Exchange. The wife stopped working after the couple married, as it was agreed she would stay home to raise the children while the husband worked. Although the wife had been enrolled part-time in a master's level business administration program when the couple's first two children were little, she withdrew from the degree program when their son, was hospitalized with pneumonia and suffered a collapsed lung.

Despite the questionable characterization of the wife as "morally rigid" by Dr. K., the wife agreed to raise the parties' children in the Jewish faith in accordance with her husband's wishes. During the marriage, the wife attended services with the children, arranged for the children to attend Hebrew school and learned to cook traditional holiday meals. The wife's commitment to raise the children in the Jewish faith has not changed as a result of the parties' impending divorce. Indeed, she indicated at trial that she and the children attend services more frequently now that the parties are separated.

The husband was raised in a close-knit Jewish home, and is employed as President of a family-run, direct brokerage firm on Wall Street, earning millions each year. The

husband's family is very wealthy, and the husband took every opportunity to describe at trial his family's "connections" which enable him to obtain the best hotel accommodations in the City as well as virtually instantaneous medical care from top physicians.

Prior to the husband's relationship with Mrs. P., he, like his wife, espoused traditional family values. As a couple, the parties strove to raise (with great success) happy, healthy, respectful and moral "citizens" who complied with household rules and worked hard at school and in their extracurricular pursuits. As a result, the parties often commented on the differences between their parenting style and that of the P.'s, which they characterized as lax and permissive. Since the couple's separation, the wife has described with great distress the husband's gradual espousal of Mrs. P.'s more permissive parenting style, and her fear that the couple's hard work in raising the children with traditional values would be undermined as a result. She further testified to her concern that by combining the P. and the parties' children into one blended family, the P. children, who struggle with special needs<sup>1</sup>, ultimately would have a negative effect on her own children.

The husband clearly is very attached to the children, as they are to him. During the marriage, he spent quality time with them each morning and participated each evening, after work, in many areas of parenting including assisting the wife with diaper changes, bathing, cooking and school related activities. Indeed, the husband testified he arose early in the morning so he could work-out at the gym and return home in time to "cuddle" with the children and see them off to school. Additionally, in the evenings, the husband

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<sup>1</sup> The P.'s daughter, L., has been diagnosed with bipolar disorder and is medicated with Lithium, and the other children suffer from learning disabilities and ADHD, requiring medication.

indicated he often spent time with the children assisting them with their homework and other aspects of family life.

Despite the foregoing, the wife, as stay-at-home-mom, was the primary caretaker of the parties' children and intimately involved in all areas of their lives. She primarily was responsible for feeding the children, shopping for the family, preparing or overseeing the meals, organizing play-dates and scheduling and attending doctor's visits. In addition, she was (and is) actively involved at the children's school and serves as the secretary of the Parent Teacher Association.

Additionally, and to her credit, the wife developed and maintained a close relationship with the husband's family, and remained close with them despite the husband's affair and estrangement from his family during the period of the parties' separation. Indeed, the parties' homes on Park Avenue and in East Hampton are located in close proximity to the husband's family's homes, and they routinely gathered for dinners and holidays.

After the parties' separation, the wife continued to socialize with the husband's brother, with whom she had a close relationship, and ensured the children enjoyed an ongoing relationship with their cousins. Additionally, the wife maintained a close relationship with the husband's parents and provided the children with continuity in that relationship as well. In fact, although much was made of the wife's supposed "rage" at her husband during the trial, it was the husband's anger at his family's failure to accept his relationship with Mrs. P. which may have detrimentally impacted the children. Indeed, the husband refused to allow the children to attend their cousin's bar mitzvah, and had virtually no contact with his family (with whom he previously had been very close) in the children's

presence (or outside their presence) until a reconciliation eventually was forged with the assistance of a family therapist. Although Dr. K. was particularly evasive at trial when asked questions regarding the effect of the husband's estrangement from his family on the children, common sense dictates that the husband's virtual abandonment of his parents and brother because they did not approve of his relationship with Mrs. P. must have had some *in terrorem* effect on the children. Indeed, one wonders whether the children's advocacy for additional time with their father stems, at least in part, from an unspoken fear that he may abandon them if they fail to abide by his wishes.

Throughout the parties' separation, and despite the difficult nature of the proceedings, the wife has demonstrated herself to be a strong woman of exceptional character. Notwithstanding her devastation as a result of the husband's announcement he was having an affair with her friend, and his decision to move out of the marital residence within days of the terrorist attacks on the World Trade Center, the wife continued consistently to parent the children and provide for their needs. She testified to her considerable efforts to keep the children's lives as normal as possible, and saw to it that they attended school, completed their homework, participated in extra-curricular activities and visited with their friends, while she simultaneously dealt with her feelings of devastation and betrayal as a result of the husband's actions. Commendably, the wife also insured the children continued to see their father on a regular basis, even when he was living at the Stanhope hotel in one-bedroom suite and was, by his own admission, acting like a "zombie".

Throughout these proceedings the wife has been unfairly criticized for her attempts to reasonably limit the husband's desire for constant, unrestricted contact with the children.

This behavior, which has amounted to an almost constant intrusion on the wife's parenting time, is evidenced in the husband's desire for unlimited telephone and cell-phone contact with the children, and by his desire to be present at virtually all of the children's non-emergency medical and dental appointments, whether or not the support of two parents (who do not get along!) is necessary. Indeed, the husband's continued requests for unlimited telephone contact eventually resulted in this Court's order limiting his telephone contact with the children to two calls per child, per day. Thereafter, the wife voluntarily agreed to increase the court-ordered limit to three calls per child, per day, and testified at trial that the children ultimately make and receive additional calls to and from their father, which she does not disallow.

In addition to seeking unlimited phone access to the children, the husband inappropriately lobbied the children to seek additional parenting time with him. Together with Mrs. P., he created a chart to demonstrate to the children he was receiving an inadequate share of parenting time. The chart, which was received in evidence, allegedly depicted the parents' proposed schedule for the month of May. The chart is misleading however, in the way the parents' time is depicted. First, the week begins on Monday, instead of Sunday, in order to give the impression the children never are with their father at the beginning of the week. Second, the wife's time with the children is written in large red letters, while the husband's time with the children is written in small, cramped orange letters in the bottom corner of each block of the calendar in which he has parenting time. Furthermore, the calendar fails to reflect that the children are not with the wife all day, but at school each day until mid afternoon. The children were given the chart to take home,

apparently as evidence of the wife's unfairness in providing the husband with adequate time.

The parties eventually enlisted the help of several therapists in order to fashion an appropriate access schedule for the children. Although they tried many schedules, eventually the parties settled on a schedule whereby the husband had parenting time with the children six out of every fourteen days. Although the wife made a motion prior to trial seeking to alter this schedule as she believed it to be burdensome for the children to be switching households midweek, the Court denied the application pending these proceedings, which, unfortunately, were inordinately delayed by Dr. K.'s late submission of her forensic report. As a result, the 6/14 schedule has been in place for some time now, and each party seeks alterations to the schedule.

The wife seeks to reduce the number of midweek transitions for the children, and to prevent the parties' children and the P. children from having simultaneous midweek visitations, as a result of her understandable concern that the parties' children deserve the full attention of their father, and require an atmosphere conducive to studying if they are to continue to succeed in private school. The husband seeks to increase his time with the children to 8 out of every 16 days, and urges the Court to implement a schedule where the parties' children and the P. children would have overlapping time on the weekends, but not midweek.

As mentioned earlier, the wife seeks sole decision-making authority for the children. The wife believes it is in the children's best interests that she be appointed the sole

custodial parent because the parties have an extremely acrimonious relationship, the husband is unwilling to cooperate with her and frequently second guesses her parenting choices, and the husband has displayed poor judgment in choosing to conduct his relationship openly with Mrs. P. in front of the children prior to the parties' divorce.

The husband seeks either joint legal custody or an assignment of zones of responsibility to each parent based upon the husband's view of each party's strengths. Accordingly, the husband submits he should be responsible for medical and religious decisions, and the wife should be responsible for educational decisions. This request is based upon the husband's assertion the wife has failed to inform him of medical issues involving the children, and has failed to provide him with timely notice of doctor's appointments, so that he could make arrangements to attend. He asserts that when the children experienced medical issues while with him, he routinely informed the wife and kept her apprized of all details as they happened. He further asserts that his family's "connections" make him able to arrange for virtually instantaneous medical care for the children with the City's top physicians. With regard to religious decisions, the husband asserts he should be responsible for this area because the children are being raised in the Jewish faith. He seeks to give educational decision-making to the wife, in light of her involvement at the children's school, and probably also as a result of the reality that very little remains to be decided in connection with the children's schooling, as they certainly will continue to attend the same private school until graduation and then attend college.

**Testimony of Mrs. P.**

Mrs. P. testified at trial on behalf of the husband. On direct examination Mrs. P. revealed she married Mr. P. on October 20, 1990 and separated from him in January, 2001. Although they are not yet divorced, the P.'s arranged an access schedule for their children whereby Mr. P. has the children Mondays and Tuesdays and every other weekend and Mrs. P. has the children Wednesdays and Thursdays and every other weekend. Additionally, the P.'s youngest daughter, S., age 4, is with Mrs. P. during the day on Tuesdays. During the summer of 2004, the P. children will alternate weeks between their parents. During the summer of 2005 and thereafter, Mrs. P. will have the children during the month of July and Mr. P. will have the children during the month of August.

Mrs. P. indicated she met the parties approximately 6 years ago through their children's school, and that the families became friendly, often having dinner together, and vacationing together in the Hamptons during the summer.

With regard to her relationship with the husband, Mrs. P. indicated they became romantically involved in the Spring of 2001, and that she hopes they will marry. She indicated that she and the husband consulted a therapist for advice on integrating the two families, and that she hopes the seven children will be able to spend as much time together as possible. With regard to her role in the parties' children's lives, Mrs. P. indicated she wants to be a friend and a confidante, but not a replacement for their mother. She envisions a similar role for the husband with her children.

Mrs. P. testified she suffers from Attention Deficit Disorder which causes her to have problems focusing or completing tasks. She takes Dexedrine daily to help her focus,

which is prescribed by Dr. S., who was called to testify at trial. Although Mrs. P. takes Klonopin for sleep problems, she indicated it does not impair her functioning with the children, and merely assists her in falling asleep. Additionally, Mrs. P. testified she briefly tried a different ADD drug, Adrol, because it had been recommended for her son, who also suffers from ADD, but that she didn't like the drug's effects and returned to using Dexedrine. For a short period of time after the birth of her third child, Mrs. P. also took Welbutrin, an antidepressant.

On cross-examination, Mrs. P. admitted she has changed her opinion about how well the blended families would get along since the time she was interviewed by Dr. K. She indicated however, that she no longer has "trepidations" and that she believes the children will do fine. She further admitted that despite the impact her relationship with the husband might have on the seven children, she made a decision to continue with the relationship.

Mrs. P. further described, on cross-examination, the problems from which her children suffer, as follows: Her daughter, L., who is 11, has been diagnosed with bipolar disorder and suffers from ADD, for which she takes Lithium and Dexedrine. Her son, H., has ADD, for which he takes the medication Concerta. Her son, L., was "situationally depressed" a year and a half ago, and is no longer diagnosed as such, however, he recently was diagnosed with "a very minor ADD issue" and is taking the medication Stratera. The medication, she indicated, makes her children more sedate and focused.

With regard to her plans with the husband for the children, she indicated she would prefer that the seven children spend the majority of their time together on the weekend, as

there is more time to enjoy each other's company without the pressures of extra-curricular activities and homework. However, she believes week-day time together with the parties' children, (who perform well in school and study regularly), would be beneficial to her children, because the parties' children motivate them to study.

### **In Camera Interview With The Parties' Children**

On September 2, 2003, in the presence of their law guardian, the Court interviewed the children individually and as a group. During those interviews, each child indicated his/her desire to spend more time with his/her father. When the Court inquired of the children whether they understood they may have to share their father with the P. children in the event he marries Mrs. P., they indicated they understood and were not bothered by this fact. It is difficult to tell, however, whether the children can possibly have a real understanding of the difference between seeing the P. children as friends, and sharing their father's parenting time with the P. children as step-siblings. It is also impossible to know whether the children unconsciously are motivated by fear that if they do not request to see their father more often, he will leave them, as he "left" his parents and brother for a period of time.

### **Testimony of Dr. S.**

Those portions of Dr. S.'s treatment notes not previously redacted by the Court were admitted in evidence.

Dr. S. is a psychiatrist, epidemiologist and psycho-pharmacologist. He testified he has been treating Mrs. P. since October, 1999 for anxiety and depression stemming from

her relationship with Mr. P., and for ADHD. Although she tried different medications with varying success, Mrs. P. currently is prescribed Dexedrine for ADHD and Klonopin for anxiety. He indicated Mrs. P.'s parenting ability is not effected negatively by the medication she takes, and that, to the contrary, by taking the medication she performs better as a parent.

Dr. S. testified he also has treated the husband since September, 2002 for the management of anxiety, depression and sleep problems. He prescribes Klonopin for anxiety and Ambien for sleep difficulties, and indicated the husband has been using the medication within the prescribed limits. He testified there is nothing about the medications which would negatively impact the husband's parenting abilities. To the contrary, he indicated the medications enhance the husband's ability to be a good parent.

#### **Testimony of Dr. K.**

By Order dated August 16, 2002, this court appointed Dr. K. to conduct a forensic evaluation of the parties and children, and ordered that she focus specifically on "an appropriate access schedule and the effects of the father's new relationship on the children."

Seven months later, on March 19, 2003, Dr. K. issued a forty-six (46) page report detailing her findings and recommendations. Dr. K. was qualified at trial as an expert in the area of forensic psychology and her report was admitted in evidence, in lieu of her direct testimony, as Court's Exhibit II. Dr. K. interviewed the parties alone and with the children, the children individually, as well as Mrs. P. alone and with the parties' children. She also interviewed the children's paternal grandparents.

Despite the acrimonious relationship of the parties and the current state of New York law, Dr. K. recommended that the parties share residential custody and decision-making for the three children, and indicated that “[u]ntil the parties are better able to resolve their conflicts themselves, a mental health professional should assist them in arriving at contested decisions.”

Dr. K. indicated she believed the parties to be “competent, devoted, responsible parents.” Although she acknowledged the wife as the children’s primary care-giver, Dr. K. indicated the husband was involved in day-to-day care-taking of the children, including diapering, bathing, and putting them to sleep. Consequently, she noted, the children are attached to both parents, and, in her opinion, the children’s stated desire to spend additional time with their father is genuine, and not the product of pressure placed on them by him.

Dr. K. failed to make specific findings with respect to the issue of the likely impact of the husband’s relationship with Mrs. P. on the parties’ children, and commented that “the chaos that [the wife] anticipates will ensue when the 7 children are together is an empirical test for Ms. P. and [the husband].” Despite the wife’s understandable concerns about the effects of this “blended” family on her children, Dr. K. did not evaluate all seven children together, reportedly because Mr. P. refused to allow such a meeting. The Court’s intervention never was sought in this regard.

In her report, Dr. K. went to great lengths to attempt to discredit the wife’s fears about the possible negative effects of the husband’s relationship with Mrs. P. on the children, indicating she saw “little basis” for the wife’s claims that Mrs. P. suffers from

mental health problems and would likely be a bad influence on her children. Instead, Dr. K. indicated Mrs. P.'s most severe psychological problem, aside from the stress of her own divorce litigation and custody battle, is attention deficit disorder, which has, in the past, "kept her from being on time to appointments and led to her forgetting and disorganization." This condition, she reports, has improved with medication.

Dr. K. described Mrs. P. as an "open", "self-revealing", "thoughtful, psychologically insightful and empathetic individual" who is "mindful of how her presence impacts the [parties'] children" and "careful not to knowingly place them in an awkward position with their mother." Dr. K. also believed Mrs. P. to be a "moderating influence" on the husband, apparently as a result of her ability to present to him his wife's point of view, when the husband is angry at the wife, or seemingly unable to comprehend her anger at him.

On cross-examination, it was revealed that Dr. K.'s opinions regarding Mrs. P. were formed without receiving and reviewing the notes from Mrs. P.'s treating therapist, Dr. E., and psycho-pharmacologist, Dr. S., and without the knowledge that Dr. E., (in whose opinion she relied in part), is not licensed in New York, and received her degree from an on-line university. Moreover, although Dr. K. requested and reviewed materials submitted by counsel for the husband, she refused to review and consider a submission from the wife's attorneys which included an affidavit from Mrs. P.'s husband containing information about Mrs. P.'s mental health and stability. Whether or not the information ultimately would have proved helpful to Dr. K., her conduct in failing to obtain and review the doctors' notes, and in failing even to consider the affidavit submitted by Mrs. P.'s husband, appears incongruent with her role as "neutral" evaluator.

It became clear upon cross-examination that Dr. K. took an immediate dislike to the wife, as early as the first interview. There are numerous instances in Dr. K.'s notes, as well as her final report, which indicate her negative impression of the wife, who, by all other accounts, (and as observed by this Court), is an intelligent, thoughtful, loving, mother and an upstanding member of the community.

By way of example, in her report of her first interview with the wife, Dr. K. indicated a belief the wife was "coached", apparently by Dr. C., whom Dr. K. erroneously testified the wife saw on numerous occasions. Dr. K.'s opinion remained unchanged when she learned upon cross-examination that the wife only saw Dr. C. on one occasion and refused to hire him.

Additionally, Dr. K. criticized the wife's use of psychological parlance as evidence of her insincerity. One example highlighted on cross-examination was Dr. K.'s indication that the wife's desire to provide her children a "home-base" was "trivial", apparently as a result of Dr. K.'s belief the wife failed to justify her opinion in that regard. Although on re-direct examination Dr. K. explained her opinion that the parties' children don't need a "home-base" with their mother by pointing out the differences in circumstances between the parties' children and the children in other cases, the vehemence with which she objected to the notion appeared defensive and, once again, incongruent with her position as "neutral" evaluator.

Dr. K.'s disdain for the wife is evinced in her notes, where she questioned whether the wife's description of the children as "amazing" was a reflection of her true feelings about her children, or simply a "narcissistic enhancement" of herself. Although Dr. K. attempted

to explain on cross-examination that she makes such inquiries about all parents, no such concern was noted when the husband described the children in effusive terms on his questionnaire. Similarly, in her report, Dr. K. questioned whether the parties' daughter's affection toward her mother was genuine, or merely an attempt to reassure her mother or emphasize to Dr. K. the close bond between them. On the other hand, the child's affectionate behavior with her father is described only in the most glowing, positive terms.

Dr. K.'s attempts to defend her opinions on cross-examination often resulted in her noticeably down-playing troubling behavior by the husband and obvious difficulties which may result from his likely marriage to Mrs. P. For example, when asked on cross-examination if the husband failed to set an appropriate example for the children by openly conducting an affair with Mrs. P. while still married to the children's mother, Dr. K. was reluctant, at best, to respond in the affirmative. Further, and despite the fact she acknowledged in her report that the children's mental health was put at risk by the husband's behavior with Mrs. P., Dr. K. opined that "neither parent has demonstrated any significant ... poor judgment, or irresponsible behavior that has put their children at risk for significant psychological or physical harm."

Most surprisingly, Dr. K. took the position at trial that the husband's affair with his wife's friend did not intensify the wife's feelings of betrayal! She further indicated his choice of partners was *better* for the children than if he were involved with a stranger, because the children already knew and liked Mrs. P. (This opinion apparently was rendered with knowledge that the parties' children and the P. children attend the same school and that word of the affair spread quickly.) Moreover, and despite the reality that the husband left

the marriage and openly conducted an affair with the wife's friend, Dr. K. repeatedly criticized the wife for claiming the supposed "moral high ground" in relation to the break-up.

In viewing Dr. K.'s testimony as a whole, it appears she took every available opportunity to criticize the wife and to praise the husband in a case where the respective behavior of the parties would suggest the focus of her concerns should have been reversed. Perhaps the most troubling aspect of Dr. K.'s conclusions is that she seems to have given little, if any, consideration to the significant adjustments the children will have to make in the event the husband and Mrs. P. marry. Although it is true one can never predict with certainty the outcome when families combine, Dr. K. acknowledged that the situation in this case essentially would amount to an "empirical test" of the husband's parenting abilities. Despite this fact, Dr. K. recommended that the parents share residential custody, when a more cautious approach (i.e., that the children have a home-base with their mother, who has been the consistent care-giver throughout these traumatic events, and liberal access to their father) may be appropriate in this case.

As part of her evaluation of the parties, Dr. K. required them to undergo psychological testing. The results of the parties' MMPI-2, "Child Custody Interpretive Report" were admitted in evidence. Interestingly, while Dr. K. noted in her report that the husband is "optimistic, energetic, outwardly confident, assertive and risk-taking" and that he "uses his good social skills to coax, cajole, and convince others, usually successfully, of his views", she failed to acknowledge other more troubling aspects of his personality, as indicated in the test results. For example, the results indicated the husband is "somewhat

immature and impulsive ...” and “a risk-taker who may do things others do not approve of just for the personal enjoyment of doing so.” Additionally, he “tends to be generally oriented toward pleasure seeking and self-gratification. He may occasionally show bad judgment and tends to be somewhat self-centered, pleasure-oriented, narcissistic, and manipulative. ...”

While these test results are skewed to some extent as a result of the custody litigation, they portray an accurate picture of the husband’s personality when viewed in the context of certain evidence adduced at trial, including, *inter alia*, that he openly conducted an affair with Mrs. P. while still married to his wife; that after a month of living separate and apart, the husband returned to the marital residence and told the children that he and the wife were going to work things out, and then left permanently four days later; that he engaged in sexual relations with Mrs. P. in his children’s bedroom; that he believes he should have unlimited contact with the children despite the change in the family’s circumstances occasioned by his desire to leave the marriage to be with Mrs. P.; and that he fails to understand his wife’s anger at his behavior and fails to understand why she has not accepted his relationship with Mrs. P. with equanimity.

As a result of the foregoing, as well as the Court’s opinion that Dr. K. was biased against the wife (evidenced by the overly-negative comments in her notes and in her report; her selective reporting of the test data; her reluctance at trial to acknowledge the husband’s short-comings, and her over-emphasis of perceived failings on the part of the wife; as well as her failure to conduct a full inquiry into the effects of the husband’s relationship with Mrs. P. on the children as directed by the Court), the Court is not inclined to follow certain of Dr.

K.'s recommendations in rendering its decision.

### **CONCLUSIONS OF LAW**

It is well settled that in making custody determinations, the Court is to give paramount concern to the best interests of the child, although other factors are relevant in making that determination. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982); *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171 (1982). Some factors which have been held to be of particular importance, include the quality of the home environment and the parental guidance the custodial parent provides for the child; the financial status and the ability of each parent to provide for the child; the ability of each parent to provide for the child's emotional and intellectual development; the individual needs of each child and his or her wishes, although the child's wishes are not determinative; and a presumption it is in the children's best interest to keep siblings together. *Eschbach*, at 172-173.

Considering each the aforementioned factors in turn, the Court finds the following:

Quality of Home and Parental Guidance. While both the husband and wife are competent, loving and devoted parents, and would, independent of other factors, provide homes for the children of comparable quality, the Court has little reliable information about the stability of the environment which would ensue if the husband and Mrs. P. marry. As mentioned earlier, Mrs. P. is in the middle of her own litigated divorce, and three of her four children have special needs. Although the parties' children and the P. children have spent considerable time together as friends, it is undisputed they never have attempted to live together as a blended family, and subsequently been required to compete for the attention

of their parents. Accordingly, it is unclear to the Court how this blended family would function, and the Court is not sanguine it should permit the husband to engage in an “empirical test” of his parenting ability with Mrs. P.

On the other hand, the credible evidence establishes the wife consistently has provided a loving, stable home for the children, even throughout these difficult proceedings. Her devotion to the children, and her consistent ability to see that their needs are met is uncontradicted by credible evidence.

Financial Status and Ability to Provide. Although the husband clearly has been the financial provider throughout the marriage, upon the divorce of the parties and the division of the marital assets, as well as an award of support to the wife, either parent will be able to provide adequately for the children.

Children’s Emotional and Intellectual Development. Both parents are competent, loving parents and are able to provide for their children’s emotional and intellectual development. The husband’s conduct, however, in leaving the marital residence immediately following the terrorist attacks on the World Trade Center; in moving back into the marital residence and raising the children’s hopes their parents would reconcile, and moving out four days later; and in openly conducting an affair with his wife’s friend while still married to the wife, *inter alia*, has demonstrated his willingness to put his own needs above those of his children. The husband also inappropriately lobbied for additional time with the children, by creating a misleading chart with Mrs. P and sending it home with the children to the wife, placing the children in the middle of the parent’s dispute. Further, by cutting his parents and his brother out of his life when they failed to condone his

relationship with Mrs. P., the husband unnecessarily put his children's emotional development at risk.

The wife, however, has demonstrated no such conduct, and has seen to it that the children's lives and relationships have remained as normal as possible through these difficult times. Although the husband has made allegations that the wife has attempted to demean him in front of the children and to marginalize him in the children's eyes, the credible evidence establishes the wife has ensured a continued, loving relationship between the husband and the children.

Individual Needs and Desires of Children. The children are attached to both parents and demonstrate no special needs requiring the particular attention of one parent. The children indicated, both to their law guardian and to the Court in an *in camera* interview, their desire to spend more time with their father. Although Dr. K. indicated she believed this represents the children's true feelings and is not the result of pressure placed on the children by the husband, the Court has lingering concerns about the possible effects of the husband's aforementioned behavior on the children's expressed desires.

In considering the best interests of these children in light of the aforementioned factors, it is clear to the Court that the acrimony between the parties prevents an award of joint custody. Indeed, in the seminal case of *Braiman v. Braiman*, 44 N.Y.2d 584 (1978), the Court of Appeals held unequivocally that joint custody arrangements should be imposed only "as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion." *Id.*, at 589-590. In *Braiman*, the Court expressly stated that joint custody should be awarded only in the rare case where it "may approximate the former family

relationships more closely than other custodial arrangements,” and that it “may not ... be indiscriminately substituted for an award of sole custody to one parent.” *Id.*, at 591.

In the case at bar, the parties’ relationship has been acrimonious since the husband left the marital residence and told the wife of his affair. Beyond the feelings of hurt and betrayal caused by these revelations, however, the parties have demonstrated an inability to agree on parenting issues including the circumstances and nature of the father’s parenting time; the number of phone calls to be made each day between the parties’ households; whether the children should be permitted to use cell phones; what clothing is appropriate for the children to wear; which extra-curricular activities the children should join; and what doctors the children should see, to name just a few. Accordingly, although the parties may some day be able to co-parent their children, they clearly cannot do so now, and the Court finds that an award of joint custody is inappropriate.

In light of the aforementioned, and as a result of the court’s belief that no competent parent should be reduced to a mere “pocketbook”, the Court finds it appropriate to designate to each parent zones of responsibility. In this manner, each parent may continue to shape the children’s lives, without subjecting the children to the turmoil of their relationship. See, e.g., *Tran v. Tran*, 277 A.D.2d 49 (1<sup>st</sup> Dept. 2000); *Trapp v. Trapp*, 136 A.D.2d 178 (1<sup>st</sup> Dept. 1988); *Winslow v. Winslow*, 205 A.D.2d 620 (2d Dept. 1994); *Frize v. Frize*, 266 A.D.2d 753 (3d Dept. 1999); *Margorie G. v. Stephen G.*, 156 Misc.2d 198 (Sup. Ct. N.Y. Co. 1992).

In the case at bar, the credible evidence established the wife, as stay-at-home mother, has been intimately involved in all areas of her children’s upbringing. Particularly,

the wife has participated in all aspects of the children's education, including serving as secretary of the Parent Teacher Association at the children's school. Additionally, the wife has provided medical care and treatment for the children since their birth, and has been primarily responsible for arranging and taking the children to their respective doctor's appointments. The Court has considered the husband's allegation that the wife fails to keep him adequately apprized of issues regarding the children's medical care, and finds it to be without merit. Accordingly, it is hereby ordered that the wife, after consultation with the husband, shall have final decision making authority regarding educational and medical decisions.

It is further ordered that the husband shall have final decision making authority, after consultation with the wife, regarding religion and extra-curricular activities. Religion is an appropriate area for the husband to ultimately control, as the children are being raised in the Jewish faith. Further, in light of the husband's involvement in the children's sporting activities, and as a result of his financial responsibility to pay for such activities, it is appropriate that the husband have final decision making authority in this area.

### **Parenting-Time**

The husband proposed three access schedules which provide him with an increase in parenting time to fifty percent of the available time. Upon careful reflection, however, and as a result of the Court's concerns about the uncertainty of the husband's marriage to Mrs. P., and the proposed blending of the two families into one, as well as the Court's belief the children require the kind of stability offered by the wife's home, the Court is not inclined

to increase the husband's parenting time at present.

Accordingly, it is hereby ordered, the husband shall have parenting time with the children on alternate weekends from Friday after school until Tuesday morning, when he shall return the children to school. It is intended that the husband's alternate weekends with the children shall coincide with Mrs. P.'s weekends with her children, so that the families can begin the process of combining as one. Additionally, the husband shall have an overnight with the children on alternate Tuesdays following the weekend he does not have the children.

To the extent the Court previously placed restrictions on the time the husband could spend with Mrs. P. while with the children, those restrictions are hereby lifted. The husband should be guided in making decisions regarding sleeping arrangements for himself and Mrs. P. in accordance with what he believes to be in the best interests of the children, considering their age and maturity.

The Court is of the opinion this schedule is in the best interests of the children for several reasons. First, in light of the reality that the husband will be attempting to combine his family with that of Mrs. P., the Court felt it appropriate to give the seven children time together on the weekends, so that the process of sharing time with their parents can begin. Additionally, the Court is of the opinion that the children should have some time with their father, at least initially, without the added pressure of the P. children. For that reason, the Court extended the husband's weekends with the children to include Monday nights, and alternate Tuesdays, when Mrs. P. does not have parenting time. The Court further attempted to ensure the children's continued success in school by limiting the time the

seven children spend together on week nights. It is the Court's hope that by limiting the transitions between the two households, and providing the children with quality time with their father during the week, as well as time with their new blended family on the weekends, the children will more easily adjust to the significant changes in their family life.

The holidays shall be divided between the parties as follows:

As a result of the parties' different religions, the wife shall be entitled to spend Christmas in California with her family each year. Accordingly, if the children have a two week vacation from school during this time, the wife shall be entitled to the first week and the husband shall be entitled to the second week. However, in recognition that the parties' son, R.'s birthday falls on the day after Christmas, the husband shall be entitled to spend half the day with R. on his birthday, if the husband chooses to travel to California for that purpose.

The husband shall be entitled to celebrate the major Jewish holidays with the children each year, whether or not these holidays fall during his parenting time.

The Thanksgiving holiday shall be divided equally between the parents each year. The wife shall celebrate Thanksgiving day with the children during even numbered years, and the husband shall celebrate Thanksgiving day with the children during odd numbered years.

The children's vacations from school, including their time off each summer, shall be divided equally between the parties in a mutually agreeable fashion. If the parties are unable to agree, however, it is hereby ordered that the children shall spend equal time with

each parent in two week increments. The wife shall have the first two weeks of the summer holiday in even numbered years, and the husband shall have the first two weeks of the summer holiday in odd numbered years.

The children shall spend mother's day each year with the wife, and father's day each year with the husband, regardless of which parent has parenting time that weekend.

Each child shall celebrate his or her birthday with the parent having access time that day. (In the event the husband travels to California for R.'s birthday, however, he shall be permitted to spend half the day with R., as noted above). Furthermore, in the event either parent holds a birthday party for one of the children, the other parent shall be entitled to attend, at his or her option.

Each parent shall be entitled to reasonable telephone contact with the children during the other parent's time, however calls should be limited to three per child, per day, as had been the parties' practice.

This constitutes the decision and order of the Court.

Dated:           New York, New York  
                  January     , 2004

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Jacqueline W. Silbermann, J.S.C.