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Case Tackles Agreements to Raise Children Under a Defined Religion: Part I

Martin E. Friedlander reviews the decision in and legal context of 'Weisberger v. Weisberger', in which the Appellate Division modified a religious observance provision arising out of a Stipulation of Settlement and subsequent motion practice.

By **Martin E. Friedlander** | January 10, 2018

In a decision issued by the Second Department in August 2017 in the case of *Weisberger v. Weisberger*, 2017 NY Slip Op. 06212, the Appellate Division modified the religious observance provision arising out of a Stipulation of Settlement and subsequent motion practice. The decision was initiated by a motion to the Kings County Supreme Court: Both parties moved for a change to the custody and visitation provision of the parties' underlying agreement. This two-part article reviews the decision in the broader legal context, coupled with the perspective provided by a forensic psychologist.

In this case, the father moved for the enforcement of the religious terms of the agreement which provided "that the parents would give a Hassidic upbringing to the children."

A review of the facts indicates that at the beginning of the post-stipulation period, the father was not deeply involved in the children's upbringing, nor did he exercise his rights to parental access. The father moved for an enforcement of the provisions of the agreement only after the mother openly changed her lifestyle.



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Conflicts of this nature arise in many cases, in communities on the full spectrum of Orthodox Judaism, and are also relevant in cases of religiously observant Christian, Muslim, and Mormon parents. Parents may choose to exercise their first amendment right to religious freedom. Their choices may directly contradict the religious way of life taught to the children in the schools, which both parents agreed they would attend. The circumstances which lead to these conflicts are cases in which the parties have a shared past history of religious observance or the parties contractually obligated themselves to an agreement to maintain religious observance in their children's upbringing.

The stipulation in *Weisberger* provided for "the Hassidic upbringing." The opinion indicates that there were no specific terms to define "Hassidic upbringing." The court cites *Lee v. Weissman*, 505 U.S. 577, 587 and *Lawrence v. Texas*, 539 U.S. 558, 574, to indicate that a court cannot enforce religious observance on an individual, but does not address the case when the parties agree to abide by said terms.

The question to be addressed is whether a contract is enforceable if it obligates a person to religious conduct required by the school the children attend, even under circumstances in which such requirements interfere with an individual's religious freedoms.

Contracts are enforceable, yet at the same time the circumstances of an individual's life may change. But if that individual contractually obligated himself or herself to observe religious conduct in the presence of the children during the period of time that the child is unemancipated, do the individual's rights trump his or her legal contractually obligations?

In other words, can one contractually obligate himself or herself to religious conduct with religious implications required by the children's school or lifestyle (as agreed by the parties jointly in the past), even if that contractual obligation interferes with one's individual rights? Is it possible for a person to waive his or her constitutional rights? The establishment clause deals with the legality of imposing religious observance, but does not address the case when an individual has contractually waived those rights. The Appellate Court in Illinois in the matter of *Schneider v. Schneider*, 945 N.E.2d 650, a case in which a religious divorce (a Get) was ordered, stated that it did not violate the husband's constitutional rights. "The order ha[d] [a] secular purpose of enforcing a contract between the parties." *Id.* The court based its decision on the parties' marriage contract. Similarly, in cases such as *Weisberger*, if the parties enter into an enforceable contract, it should be enforced and should not be held in violation of one's constitutional rights.

The Appellate Division, First Department, in the case of *Pearlstein*, 76 A.D.2d 49 (1980), indicated that parents may contract to have their children brought up in compliance of a certain religious lifestyle and this has been established in the state. See *Weinberger v. Van Hessen*, 260 N.Y. 294 and *Kananack*, 272 App. Div. 783. We also know that religious observance was a factor taken into consideration in awarding custody in the similar case of *Friedwitzer*, in which "the best interest" standard was preeminent.

The Appellate Division in *Weisberger* indicates that in the event that either parent changes his or her lifestyle, the fact that the contract provided that the parents “shall be free from interference, authority and control directly or indirectly from the other” affirms that the parent’s right to change his or her lifestyle trumps the contractual agreement they had made. If that clause was not in the agreement, would the decision have been different in light of the fact that the only term referred to was “Hassidic lifestyle”? I think *Weisberger’s* constitutional issue is case specific.

Practitioners must seriously examine the precise definitions that are utilized in a stipulation of settlements. In the matter of considering the best interest standard of the children: if a child was brought up in a certain lifestyle and both parents have agreed to raise the child in compliance with that lifestyle, what happens when one parent changes their beliefs and level of observance? Given that change would interfere with the religious teachings that the child is being taught in school, would it be considered the child’s best interest to be exposed to a contradictory lifestyle? Although an individual’s personal and religious beliefs cannot be regulated by the court, the case to be made for requiring compliance is not similar to the case of *Lawrence v. Texas*, 539 U.S. 558, where the public was subjected to listening to a religious speech.

Rather, in the case at bar, and many cases before the court, the stipulation calls for the children to maintain a determined mode of observance. If one parent’s conduct contradicts the school policies or religious upbringing of the children, and conflicts with the teachings that have been observed to date, one would question how it could be in the best interest to allow the parent to subject a young child or teenager to a conflict between his or her way of life and a parent’s alternative lifestyle. For example, this might include watching movies or mode of dress when it is in clear contradiction to the schooling and tradition which is the child’s way of life.

An obvious conflict arises when the agreement calls for a clause in which neither party shall disparage the other. The child attends a parochial school, be it a Yeshiva, Catholic, or Muslim school whose teachings mandate that alternative lifestyles are not accepted by his or her religion. In that case, how would the non-disparage clause be honored?

While the separation of church and state is paramount, it must be viewed in the context of circumstances in which parents have voluntarily entered into a contract that requires the children to be brought up in a mode of religious observance which imposes requirements on the conduct of the parents. The role of the court is to adjudicate the enforcement of the contract. A forensic evaluation that utilizes a best interest analysis must also give weight to the issue of the enforcement of the contract.

The involvement of a forensic psychologist would assist to apply “the best interest analysis” to gain insight into the effect of the conflict on the children. Although a forensic evaluation was ordered, it is not referenced in the Appellate Division’s decision. This issue will be further explored by Dr. Alberto Yohanoff in the next installment of this article.

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