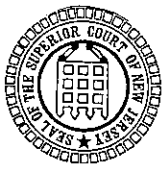
SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
FRANCIS B. SCHULTZ
JUDGE



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A.G.R., Plaintiff, V D.R.H. & S. H., Defendants.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
CHANCERY DIVISION- FAMILY PART
DOCKET # FD-09-001838-07

LETTER OPINION

December 13, 2011

Harold J. Cassidy, Esq. on behalf of the Plaintiff (The Cassidy Law Firm).

Karim G. Kaspar, Esq., Natalie J. Kraner, Esq., Jennifer L. Fiorica on behalf of the Defendants (Lowenstein Sandler PC).

FRANCIS B. SCHULTZ, J.S.C.

Dear Counselors:

Please allow this opinion to serve as the findings of the court in the above captioned matter.

This is a custody dispute over twin girls born on October 4, 2006. The plaintiff served as a gestational carrier, the eggs having been provided by an unknown female and having been fertilized by defendant S.H. Defendant D.R.H. is plaintiff's brother and is in a same sex relationship with S.H. In this court's opinion dated December 23, 2009 this court ruled that the plaintiff is the mother of the twins, therefore, has standing to seek custody.

The instant complaint was filed on March 19, 2007; testimony began on June 28, 2010 and concluded on July 19, 2011. Defendants timely filed their proposed findings of fact and conclusions of law on August 1, 2011. Plaintiff was given until August 6, 2011 and up until this date, December 13, 2011, has still not filed her proposed findings of fact and conclusions of law, in spite of numerous requests by the court as well as the imposition of significant financial sanctions. A great deal of testimony was taken, much of it relevant to this best interests analysis and much of it not. Essential to this analysis is an understanding of the background of the parties as well as their viewpoints on those issues which pertain to the welfare of these two children. This analysis will omit much of the sniping that took place during the trial unless it was actually relevant.

The plaintiff is currently forty-nine (49) years old and was born and raised in Texas. Her family was Baptist and she was initially raised in the Baptist religion. She has a sister and two brothers, one of whom is the defendant D.R.H. She graduated from Baylor University in 1984 intending to become a teacher. She left the Baptist church shortly after college graduation because it did not accept the gay lifestyle into which she was then entering. She found employment as a teacher after graduating college and was also employed at a Home Depot in Texas for ten (10) years. Her employment at Home Depot was eventually terminated. Plaintiff testified that it was due to her having made pro-union comments. In 2001 plaintiff started her own landscaping business, however, that enterprise was dissolved after a few years.

Plaintiff developed a same sex relationship with P.O. in 2000 and remained in that relationship until July 2005. In March 2004 she first spoke to the defendants about carrying children for them and it was understood at that time that she would use her own eggs. The plaintiff broke up with P.O. in July of 2005 and moved to New Jersey the following August. In September 2005 she invested $78,000 (the proceeds of the sale of her Texas home) in a bed and breakfast enterprise with the defendants. The total initial investment was over $500,000 with the defendants contributing the balance. In 2005 she agreed to work for her brother who has an accounting firm in New York at the rate of $60,000 a year and would live in the carriage house which was part of a home owned by the defendants in Jersey City. The plaintiff sought counseling in late 2005 as a result of her depression over the breakup with P.O. In December of 2005 plaintiff learned that her ova could not be used and she agreed to be a gestational carrier using the ova donated by an unknown female. The plaintiff started taking hormone injections in January 2006, signed a surrogacy contract on February 28, 2006 and received the embryos which were implanted on March 1, 2006. She moved from the defendants Jersey City home to their home in Asbury Park in June of 2006. At about that same time plaintiff again became depressed and her relationship with her brother and his partner began to deteriorate.

Plaintiff felt isolated and actually "disappeared" for three days having made a statement to the effect of "you may not see the girls again" before living in her car for three days and not being in contact with the defendants. Defendant S.H. subsequently met plaintiff at Deal Lake at which time S.H. indicated that the plaintiff had options, including an abortion. While there are different versions of what S.H. was implying by that statement the court is satisfied that it was not a cavalier dismissal of the plaintiff or of her unborn children but rather a sincere effort to comfort a very depressed plaintiff whose mental health and stability S.H. was truly concerned about.

The girls were born on October 4, 2006 but it did not go smoothly. The plaintiff suffered from pre-eclampsia and unquestionably came close to expiring but eventually did recover and the births were otherwise uneventful. There was a slight improvement in the relationship between plaintiff and defendants immediately following the births, however it did not last very long. Litigation had not yet commenced, the surrogacy agreements were presumably still binding and the defendants had custody of the children. The defendants did permit the plaintiff to have access to the children but arguments soon developed and the complaint was filed on March 19, 2007.

In January 2007 plaintiff was terminated from her employment at her brother's office in New York. Prior to her being terminated plaintiff was visibly upset with her brother, wore earphones to the office so she would not have to hear his voice and sometimes expressed her dissatisfaction about him to other employees. One day shortly after Christmas 2006 when the infants were unexpectantly brought to the office plaintiff stormed out slamming a door behind her. Plaintiff's reasons for this are not clear, however, plaintiff may have felt that this was being done at her expense. There was also an incident at a party shortly after the births during which S.H. referred to the plaintiff as a "vessel" to which the plaintiff took great offense feeling that she was being insulted. As with S.H.'s earlier comment about abortion being an option, the court is satisfied that the "vessel" comment was not meant as a dismissive insult of the plaintiff, but actually was intended, and by most people present, understood as a compliment, the term "vessel" being used in an old fashioned and reverent religious manner. It should be noted that a great deal of the testimony and tension between the parties grows out of the plaintiff's interpretation of comments or acts attributed to the defendants. Another incident occurred as the girls were somewhat older which involved an apple picking excursion. The girls were with their mother picking apples and the girls each retained an apple at the time of the exchange with the defendants. The girls apparently ate the apples while in the custody of the defendants and were unable to sleep properly. The defendants complained to the plaintiff about her giving the girls apples and the plaintiff contended that the defendants overreacted, since the apples were simply souvenirs and were meant to be given by the girls to the defendants. The plaintiff points to this as an example of spite and overreaction on the part of the defendants. There was however, credible testimony that blame for this misunderstanding does not rest with the defendants.

After litigation was filed, Judge Mantineo ordered that plaintiff be allowed significant parenting time, however the exchanges have been very "tense". On occasions the police were called, certifications were filed with the court based upon one party

accusing the other of something improper and the relationship between the plaintiff and the defendants remains tense and hostile up until the present.

In 2008 the plaintiff returned to the Baptist faith and now maintains a negative view of homosexuality. She also filed a lawsuit in Monmouth County alleging malpractice by an attorney and others involved in the surrogacy arrangement and now maintains a negative attitude toward surrogacy. Plaintiff believes that surrogacy is unnatural, that it is harmful to women and families and acknowledges she would have difficulty explaining the girls' unique origin to them. She would, however, consult with an expert before doing this. Of great significance is the plaintiff's belief that the girls do not have special needs other than their need for a mother and a father. Plaintiff believes that the defendants are on a gay rights agenda and are using this lawsuit and the attendant publicity for that purpose.

The plaintiff testified that she originally wanted the girls to attend the public schools in Middletown but lately indicated that, if granted primary custody, they would attend the Mother Theresa Regional School, a parochial school in nearby Atlantic Highlands. She earns $35,000 a year plus bonuses working at a Chico's woman's store and receives financial support from her parents.

S.R., a retired teacher now seventy-six (76) years old, is the mother of plaintiff and defendant D.R.H. Her views on homosexuality are religious based; she is against surrogacy and believes it is sinful to be in a same sex relationship. She apparently was a strict disciplinarian when raising her children and acknowledges "paddling" all of her children, but points out that such a method of discipline was accepted at the time even in the Texas public schools system.

There is significance to an incident that took place in 1977 in Texas. Apparently S.R. was having an argument due to the fact that her other daughter C.R. was staying out late at night and she felt that her husband wasn't being supportive. She then went to a gun cabinet, removed a loaded gun, which subsequently discharged blowing a hole in the wall. Her exact thoughts and motivations at the time are not clear; however she spent several days following the incident in a hospital. Nobody was physically injured by the gunshot. When S.R. learned that her son D.H.R. was gay she offered him "Exodus International" which is a program that tries to convert gay people out of the gay lifestyle. S.R. and defendant D.R.H. have a poor and even somewhat hostile relationship with one another up until the present. S.R. believes a female is better suited to raise female children. She believes that God did not intend two gay men to raise children but says that she will not discuss her views on homosexuality in front of the girls. Her husband R.R. is several years older and lives with her and the plaintiff in the rented Middletown home.

D.R.H. was born and lived in Texas for twenty-six (26) years, attended local schools, was a football captain and class president. He graduated high school in Texas in 1978. He briefly attended the University of Texas but then transferred to Baylor University from which he graduated. He obtained a Master's Degree from the University of Texas. At one time he aspired to be an actor, had early relationships with women but

then began developing same sex relationships. He worked as an accountant in Texas but also had some experience in dinner theatre. He renovated a factory in Pennsylvania and turned it into a theatre. This endeavor lasted for several years. He first met defendant S.H. on January 1, 2001, entered into a commitment ceremony with him, married him in California and entered into a civil union with him in New Jersey. He currently owns a home in Jersey City and Asbury Park. One of the reasons D.R.H. bought a home in Asbury Park is because he believes that area is gay friendly.

D.R.H. helped plaintiff after plaintiff's breakup with P.O. in August of 2005. He acted as her agent regarding the disposition of her property with P.O. He joined the plaintiff along with S.H. in the investment into the B&B.

It was clearly intended by all three parties that the B&B would be the endeavor of the plaintiff other than the fact that the defendants contributed financially to it and would obviously play some role in support of the plaintiff. The plaintiff felt that the B&B should attract gay women and that the plaintiff would be the manager. It was agreed by all three parties that the renovated home in Asbury Park that was to be used would be designed in such a way that if for any reason the B&B was not a success the structure could easily be converted into a large one family house. The court is satisfied that when relations between the plaintiff and the defendants broke down to the point of litigation that the development of the B&B ceased after only some early renovations had taken place. The property is currently still in a dilapidated state and worth several hundred thousand dollars less than the initial investment. By letter opinion dated September 13, 2011 this court ruled that plaintiff's claim for breach of fiduciary duty and other claims related to the B&B could not be heard in this action.

Defendant D.R.H. belongs to the Unity Church which is gay friendly, still loves his mother, but is still scared of her and clearly does not get along with her.

Defendant S.H. is currently forty-five (45) years old and was born in California. His mother is white, his father African-American. They were divorced when defendant was three and one-half (3-1/2) years old. He lived at times with his father and at different times with his mother. His father is a minister. His father was involved in the Civil Rights Movement, is proud of his African-American heritage and helped S.H. deal with the problems that S.H. did encounter due to his bi-racial heritage. Since S.H.'s father was a Baptist, religion presented a problem due to S.H. being gay. His father was not happy about his being gay.

S.H. did not graduate college but spent significant time in other endeavors. He was a backup singer for Jim and Tammy Faye Baker's ministry until he realized they were fraudulently selling undeveloped real estate and became disillusioned with them. He was involved in commercial theatre and at various times lived in London, Paris and had a gay partner when he lived in Europe. He promoted theatrical events and met D.R.H. ten (10) years ago in Mexico. S.H. moved to New York in 2001 entered into a domestic partnership with D.R.H. in 2006, joined him in a civil union in 2007 and was married to him in California in September 2009. Both defendants wanted children which

they acknowledge is unusual for gay men. Both S.H. and D.R.H. met with an agency to have children and at one point a cousin of S.H. offered to be a surrogate. Today S.H. gets along well with both of his parents.

S.H. testified credibly about the difficulties he encountered as the young child of divorced parents. He recalls the exchanges not always being pleasant and he did not like the way his mother said bad things to him about his father. Along with D.R.H., S.H. attends the Unity Church which believes God is in each individual and follows the teachings of Jesus Christ. There are other same sex couples with children in that church. Regarding the plaintiff, S.H. testified that she always was meant to be a "special aunt." Notwithstanding the surrogacy agreement, S.H. acknowledges that the plaintiff was expected to play a large role in the life of the children. As plaintiff's pregnancy wore on S.H. felt the plaintiff was becoming dangerously depressed and was concerned about her three (3) day disappearance which culminated with his discussion with her at Deal Lake. S.H. credibly testified that the reference to an abortion was the result of his concern over plaintiff being depressed, having disappeared for three (3) days and living in a car. S.H. testified that shortly after the birth the plaintiff was given access to the children and at first there were no problems. Regarding the Christmas tree photo incident S.H. credibly testified that plaintiff's request for the children came at the last moment and that his cousin was in town and he could not make the girls' available on the day requested. He was, however, willing to do it on another date.

Regarding the incident at the office S.H. credibly testified that he brought the girls to the office because the plaintiff had not seen them recently and that it was not intended to humiliate the plaintiff as plaintiff seemed to have believed. The plaintiff had gone to Texas during Christmas 2006 and was very unhappy. S.H. was concerned and was willing to see a therapist along with the plaintiff to help resolve any difficulties. Apparently the plaintiff went from not wanting to see the girls at about this time, to suddenly wanting to see them four days in a row, as of January 2007. Documentary evidence (D-184-3, P-6) did indicate that about this time the plaintiff did not want to see the girls but then suddenly changed her mind. Because of S.H.'s concern over plaintiff's emotional zigzagging he insisted that plaintiff see a therapist before visitations with the children could resume.

S.H. testified that exchanges were tense and difficult and expressed his concern over the malpractice suit in Monmouth County. S.H. understood the plaintiff to claim in that suit that the girls' were the result of "trickery" or a "conspiracy" and that there was something negative about their conception. On the religious issue S.H. credibly testified that he heard one of the girl's express her concern that D.R.H. was going to burn in hell.

Because the exchanges were tense, verbal communication did not work well. While there initially was verbal communication, defendants felt that plaintiff was twisting what was said and placing it in certifications submitted to the court. As a result defendants felt that communication by way of email would be more productive; however, plaintiff only reluctantly, if at all, was willing to communicate that way. Defendants offered a program known as "Family Wizard", which was designed for parents involved

in custody disputes, to allow them to communicate with each other and store and forward information relevant to the children, such as medical information, school data, etc. They even set up an account at their expense for the plaintiff, however, the plaintiff refused to avail herself of this opportunity. Regarding the apple tree incident S.H. testified that since the plaintiff did not email them (and there was no real verbal communication) defendants had no context for the girls eating the apples and not being able to sleep. Had plaintiff emailed defendants telling them what the apples were all about (as recommended by the court appointed guardian ad litem) this misunderstanding would never had occurred.

S.H. credibly testified that he definitely believes it is positive for the girls to be with the plaintiff as plaintiff is and always was part of the entire experience. He testified that if he were to obtain sole custody, he would take the girls to the Unity Church but would not oppose plaintiff taking them to a Baptist Church. His one concern is that the girls are not exposed to antigay sentiments which would cause concern on the part of the girls regarding the salvation of the defendants. S.H. credibly testified that he believes S.R. to be homophobic.

S.H. was recently appointed executive director of Pro Arts of Jersey City, a nonprofit entity and that he works eight (8) hours a week and is paid $12,000 by that employer. He still owns "D&S Endeavors" along with D.R.H. which owns property and rental units. He works part time with D.R.H. in "D&R Tax Guys" and is paid $500 a week and works five to six hours a week from his home in that regard. He also owns some property in Mexico and time shares in Florida and Mexico. His income for the year 2011 will be about $37,000. His incomes in previous years averaged out at about $20,000 a year.

He testified that he is now a stay at home dad and has a woman who helps in the house six (6) hours a day but she only does household chores and is not really involved in parenting. He says that with him the girls attend ballet, school and swimming. He testified that diversity is important and that different perspectives cause people to see the same event differently. He gave as an example the fact that news reported in London is different than the manner in which that very same news is reported in New York. On the issue of religion he wants the children to question and think and then choose what works for them. Several times S.H. expressed his concern that the girls should not be concerned about their fathers going to hell. He testified that the girls have plenty of friends in Jersey City and Asbury Park. He prefers the Montessori School since he himself attended it when he was young. He says that it teaches children how things work and how things come together. It teaches courtesy, sharing and respect. The Montessori School does not celebrate particular holidays but the children are allowed to share and discuss any holiday. He testified that the Montessori School is diverse and that there are children there of same sex couples. The Montessori School is somewhat unique in that it keeps the children in small groups for several years which allows them to learn from each other. The older children learn leadership skills and the younger children learn from them. Of course, this process reverses as the children get older. He testified that he believes the girls need consistency and that sometimes they wake up in the morning and don't know

which home they are in, that of the defendants or of the plaintiff. He expressed shock when the lawsuit was filed against him because all along the plaintiff only wanted to be a special aunt.

S.H. testified that the girls are special needs children, however not due to any physical or learning disability. He says that because they were the product of surrogacy and are biracial it is important that they not be brought up to be ashamed of themselves. They need diversity and only the defendants can provide it. He acknowledges that the girls do relate to the plaintiff as a parent and S.H. credibly testified that he views the plaintiff as a parent, as the mother and is willing to abide by this court's earlier decision to that affect. He testified that the exchanges are still difficult and that the relationship between defendants and the plaintiff remains very poor. He testified that D.R.H. is no longer involved in the exchanges with plaintiff and as a result there seems to be somewhat less drama.

Dr. David Brodzinsky, a psychologist testified for the defendants. He specializes in nontraditional children, including children with gay and lesbian parents. He said that surrogacy is not traditional and pointed out that biracial children have special needs. He recommended sole legal and primary residential custody be granted to S.H. He said that the current arrangement is no good as there is too much back and forth and no continuity for the children. He testified that there are significant issues between the plaintiff and the defendants over religion, origin, surrogacy and same sex households. He testified that the defendants have a strong relationship with each other and have a strong support network. While testing of all three parties was conducted by Dr. Brodzinsky and elevations were noted in certain indexes they were of no great significance. Dr. Brodzinsky found no clinical psychopathology in any of the three parties and acknowledged that the girls bond well to all three parties. He was concerned that the plaintiff indicated to him that surrogacy is unnatural, harmful to women and families and that she admitted difficulty in explaining to the girls their origin. He also indicated that S.R.'s views on homosexuality were religious based. He conducted a best interest analysis and concluded that there can be no co-parenting, since the parties cannot agree on anything and there is far too much hostility here. He felt that S.H. should get sole custody because a proactive role has to be taken regarding many of the issues these girls will have to deal with. He was concerned about racism and felt that S.H. was best equipped to deal with that issue. Also, because S.H. approves of surrogacy he is best equipped to discuss it in a supportive manner with the girls. When it comes to children with these types of special needs a proactive approach is necessary and he testified that research supports this. He said the same concept applies to a same sex household. He testified that no study has ever shown that children in a gay or lesbian household are worse off. He testified that S.H. is positive about his biracial heritage, that he has experienced racism and now he is better equipped to parent the children on these issues. He testified that the defendants have a two parent household and that A.G.R. is alone, however, it should be noted that her father and mother are now living with her. He recommended that plaintiff receive significant visitation every other weekend from Thursday evening until Sunday evening and that holidays and vacations be split equally. He also testified that being genetically related gives S.H. an advantage over plaintiff because children relate better to genetic parents.

He indicated that the Baptist Church is negative towards gays and was concerned that the plaintiff did not understand that race is an issue here and that it must be dealt with.

Dr. Mathias Hagovsky, a psychologist testified for the plaintiff. He felt that joint legal and physical custody should be ordered until the children reach school age at which time a reassessment should be made. He testified that his interview with D.R.H. indicated D.R.H. was irritable and could interfere with collaboration. He further testified that S.H. was narcissistic. He agreed however, that the girls bonded well with all three parties. He was afraid that if the defendants got sole or primary custody they would marginalize the plaintiff from the children. The court disagrees with this conclusion based on its evaluation of the evidence. Dr. Hagovsky testified that the plaintiff demonstrated more willingness to cooperate with the defendants than the defendants did with her. Again this judge disagrees with this finding. Dr. Hagovsky recommended a parent coordinator along with joint legal custody. He disagreed that the fact that the defendants support surrogacy makes the defendants better parents regarding this issue. He testified that the plaintiff could also indicate that "it's the best thing" and thus support the unique origin of the children. He admitted that if plaintiff's mainstream church denigrates homosexuality then that would be bad for the children. He urged the "tender years doctrine" as a counterbalance to S.H.'s advantage on the biracial issue. Dr. Hagovsky admits that this is indeed a high conflict case but says that alone does not mandate sole custody. He cited "moral welfare" as important and gave as an example the standard that a parent should not expose a child to sex or pornography. The court notes that other than the plaintiff's testimony concerning the defendants taking the girls to a gay pride parade there has been no evidence suggesting the defendants would expose the girls to sex or pornography. Dr. Hagovsky dismissed the obvious conflict between the parties holding that so long as the children were not exposed to it, it would not be a difficulty. The court finds it difficult to imagine that the children would not notice these things. Dr. Hagovsky testified that sole legal custody is a last resort and gave as an example a situation in which a parent suffered from a severe mental disorder. He did acknowledge that his evaluation of the plaintiff indicated that she "needs" the children. He acknowledged that the defendants do make a good team for parenting and also agreed that the plaintiff should not say that homosexuality is a sin in front of the girls as it might cause them to doubt their fathers. The girls refer to both defendants as father. He also acknowledges that the girls should not be sent to a school that believes homosexuality is a sin. He also acknowledged that if the girls were exposed to the plaintiff's allegations in the Monmouth County malpractice case (regarding the negative attitude towards surrogacy) it could be disruptive.

Dr. Alex Weintrob, a psychiatrist testified as the court appointed expert. It should be noted that he was appointed by Judge Mantineo before this judge assumed the matter.

Dr. Weintrob strongly recommended sole custody with the defendants and that it be done as quickly as possible. He was passionate about this. Before arriving at his conclusion he interviewed the girls, the defendants, the plaintiff, and plaintiff's mother.

Dr. Weintrob testified that the plaintiff's true beliefs that the birth was not normal and that surrogacy is unnatural will interfere with the girls' identity. It will negatively impact the girls on the issue of "who am I?" The plaintiff's belief that homosexuality is not normal will eventually be communicated to the girls, to their detriment. Dr. Weintrob testified that the defendants accept that the plaintiff, a female, be in the lives of the girls and he agrees that the plaintiff "needs" the girls for her own purposes. He testified that the girls are the plaintiff's identity and that the plaintiff will have trouble with the autonomy necessary for the girls' development. He testified that the plaintiff's mother is anti-surrogacy, moral and religious and that she would not be able to conceal her anti-surrogacy or anti-gay parenting notions from the girls. He testified that the plaintiff and her mother would render comments that would be less tolerant of the varying issues that come into play here. He did acknowledge there was no evidence of psychopathology on the part of the plaintiff or of any of the other parties. He testified that the defendants have a two parent household which is preferable to the plaintiff's situation because she works during the day. He said that the defendants' community is better tuned to the needs of the girls. He is referring to the fact that the defendants community is more gay friendly and more racially diverse. He said that the defendants are in a better position to explain the girls' origin than the plaintiff or her mother. He said the plaintiff is less supportive regarding "who am I?" than the defendants and that the defendants would allow more autonomy for the girls. He testified that the manner in which the defendants look at the children is superior because defendants are more concerned with what the girls' need, not what they, the adults need. He testified that the defendants have been consistent in that they always wanted the girls. He said the plaintiff is not consistent in that she changed her mind. He testified that the defendants have more flexibility, more thoughtfulness and less emotion in their thinking than the plaintiff. He ruled out joint custody as there are far too many differences here. There is too much animosity and poor communication. He testified that joint custody has failed in cases that were less intense than the instant one. If plaintiff got sole custody he feared that plaintiff and her mother would undercut the gay lifestyle and suggest it is sinful and inappropriate. He testified that "children have antennae and they know what someone means" even if plaintiff tried to say the right things about the gay lifestyle. He said that children take on the values of the parents with whom they live. If with the plaintiff they would become antigay which would only hurt them. He said the defendants do not proselytize the gay lifestyle and they're not anti-female. They have gay and non-gay friends. He testified that plaintiff should have visitation, that it should be flexible and that it should not be cut in stone. He testified that plaintiff's close relationship with her mother is bad for the girls as it pertains to the gay lifestyle. He said that plaintiff thinks that everything will work out fine and that plaintiff does not understand the various complex issues involved here. He testified that children of gay and lesbian parents do best with a parent who supports them and a community that supports them.

The adjudication of child custody issues requires great sensitivity, delicacy and discretion and the properly considered views of professionals Fehnel v. Fehnel, 186 N.J. Super. 209, 215 (App. Div. 1982). The best interests of the child require among other things attaining for the child the love and affection of both parents Turney v. Nooney, 5 N.J. Super. 392, 397 (App. Div. 1949). In determining custody the court should consider

the personal safety, morals, health, general welfare and happiness of the child and satisfy itself as to the character, conditions, habits and surroundings of the respective parents Clemens v. Clemens, 20 N.J. Super. 383, 392 (App. Div. 1952). Each case must rest on it own facts Salmon v. Salmon, 88 N.J. Super. 291, 306 (App. Div. 1965). This court understands that a child has a right to know the non-custodial parent and have such parent's love and guidance through adequate parenting time. A child should have a positive and constructive relationship with both parents who shall not degrade each other in the mind of the child. The court is mindful that sole legal custody is not favored because it isolates the children from the noncustodial parent and sometimes puts a financial and emotional burden on the custodial parent Beck v. Beck, 86 N.J. 480, 486 (1981). However, while joint legal custody is preferred, if a parent cannot put away animosity and communicate with the other parent for the child's benefit than sole legal custody may be necessary Nufrio v. Nufrio, 341 N.J. Super. 548, 550 (App. Div. 2001). The best interests of the child can be paramount to other fundamental rights of the parents Mishlen v. Mishlen, 305 N.J. Super. 643, 649 (App. Div. 1997). The statutory factors enumerated in N.J.S.A. 9:2-4 must be considered.

The parents' ability to agree, communicate and cooperate in matters relating to the children is nonexistent here. They hardly speak verbally to each other and there is little communication in writing. They disagree on what school the children should attend, what religion the children should be brought up in, what they should be told about surrogacy, what they should be told about the gay lifestyle and there is uncertainty as to how the children will be instructed as to their biracial heritage. There can be no joint legal custody in this case.

The parents' willingness to accept custody and any history of unwillingness to allow parenting time, not based on substantiated abuse, is a factor that a court should consider. In the instant matter there has been much testimony about the fact that the plaintiff originally did not want to have custody of the children and that the defendants all along wanted custody of the children. This judge is not impressed by the defendants' arguments that the plaintiff changed her mind sometime shortly after the birth of the children and that this demonstrates a lack of commitment to the children. The court recognizes that the defendants at the custody trial were not trying to re-litigate the plaintiff's status as a "mother." The court recognizes that the defendants' were factually arguing that the plaintiff's changeable nature should mitigate against her. This court, however, understands Matter of Baby M 109 N.J. 396, 437 (1988) to hold that factually as well as legally a mother's pre-birth decision to surrender custody to be of no significance. "Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child." Ibid. As to an unwillingness to allow parenting time this judge did not see any unwillingness on the part of any of the parties.

The interaction and relationship of the children with all three parties is excellent. All three experts agreed that the children bond well with all concerned.

The court is unaware of any history of domestic violence or physical abuse on the part of any of the litigants.

The court notes that in a recent submission plaintiff's counsel wants the court to conduct an in camera interview of the children. While the preference of the children when of sufficient age and capacity so as to inform an intelligent decision is a relevant factor, the girls only recently turned five (5). Since the unique issues in this matter involve surrogacy, the gay lifestyle, religion, biracial heritage and type of school, it is absurd to suggest that these five (5) year olds can render "an intelligent decision" in this matter. That request is DENIED.

The needs of the children are the most important factor in this case. While suffering no learning disability or physical handicap they are indeed special needs children. They are going to have to deal with the fact that they were uniquely conceived through in vitro fertilization, which does not necessarily but in this case also involved a surrogacy arrangement. Then there is the issue of their father S.H. and his partner being in a same sex relationship. There is the issue of religion, the Unity Church versus the Baptist Church. There is also the fact that they are biracial. There is also the rather obvious fact that they're involved in an intensive custody dispute which in itself has a harmful effect on children. These factors weigh mightily in favor of the defendant S.H. It would be simplistic to suggest that because S.H. is gay, in favor of surrogacy, biracial himself and at an early age experienced the unpleasantries of "exchanges" and divorced parents, that he would be better able to explain these things to the children. Such a mechanical approach overlooks the man. This judge was impressed by the testimony of S.H. He always tried to look at things from the perspective of the girls' best interests first. He stayed away from the bickering even when plaintiff's counsel tried to bait him into it. Of the three he is the only one who did not graduate college yet his answers, especially on cross examination, were most thoughtfully given without being self-servingly composed. He did not yield to the "correct" answer simply because most people would think it was the answer the judge wanted. For example, when asked if he would reconsider verbal communication with the plaintiff he testified that he did not think it would work out any better than it did in the past. Under the circumstances this was a daringly honest answer.

The common thread of his testimony was to expose the girls and explain to the girls (when age appropriate) everything necessary for the girls to understand their origin, their heritage, as well as religion and the same sex lifestyle. Nothing negative about these sensitive issues will be brought to bear upon the children by their father.

The court finds the testimony of Dr. Weintrob to be credible including those instances where it conflicts with the testimony of Dr. Hagovsky and this has nothing to do with Judge Mantineo having appointed him. It has to do with common sense. While the plaintiff and her mother mean well and this judge assumes they would sincerely try to modulate their tone in front of the children, the inevitable will occur. Their strong feelings about surrogacy and homosexuality will be understood by the girls and will have a very damaging effect on them. It will make them feel ashamed of themselves and this they do not need. They will have challenges enough as they grow older. The concern of

one of them, that their father (actually defendant D.R.H. whom they regard as a father) might burn in hell is an example.

The stability of the home environment offered and the quality and continuity of the children's education is also an important factor. Defendant D.R.H. has a successful accounting practice, owns a home in Jersey City and Asbury Park and would continue the girls' education in the Montessori School in Jersey City. The plaintiff rents a home, which is rather expensive, in Middletown and relies to some extent on financial support from her parents. The court has no reason to believe that the plaintiff would not be able to maintain a stable home (rented or owned) for the children or provide the girls with a proper education, however, the evidence of stability is greater with the defendants.

Other than the discussion above regarding "the needs of the children" this court does not find that any of the parties lack parental fitness.

The geographical proximity of the parent's home is an issue here. Under the current parenting time arrangement the girls spend up to seven (7) or eight and one half (8-1/2) hours during the week traveling from Jersey City to Middletown. This is clearly not good for the girls and none of the experts disagreed with that proposition. Obviously the girls will have to attend one school in either Jersey City or the Middletown area and exchanges during the week will have to stop. This court is satisfied that the extent and quality of the time the children spent with the parties is not a determinative factor here other than the court's concern that while with the plaintiff or her mother the girls may have been exposed to negative comments about homosexuality, particularly in a religious context.

The employment responsibility of the parties is a factor that weighs in favor of the defendants. S.H. is essentially a stay at home dad even though he does work part time from the home. He will be able to spend a lot of time with his children. The plaintiff on the other hand works full time and the children would be spending time with their grandmother when they're home from school but while their mother is still working. The court recognizes that in any event the children would be in school for most of the day, nonetheless this factor tilts in favor of the defendants.

For the above given reasons this court finds that the best interests of the children are served by awarding sole legal custody to defendant S.H. Primary caretaker responsibility is also awarded to defendant S.H.

The plaintiff's claim seeking a distribution from a forced sale of the bed and breakfast is DENIED. The plaintiff invested approximately $78,000 towards the $525,000 purchase price with the defendants investing the balance. It is not disputed that since then the defendants have advanced an additional $150,000 and the plaintiff has made no such advances. Paragraphs 11 and 12 of the partnership agreement dated November 18, 2005 support defendants contention that defendants are entitled to a payback of that additional $150,000 as a "preference or a priority" over any other payments to the partners. Since the current value of the property, approximately

$110,000 could not possibly yield such a result, this claim of the plaintiff must be DENIED.

The parties' applications to modify the existing *pendente lite* custody schedule is DENIED as moot since those issues are decided in this opinion. The applications for counsel fees are DENIED for the same reason. While it is true that plaintiff's failure to submit her proposed findings of fact and conclusions of law is inexplicable, the court has already sanctioned plaintiff's counsel significantly for that delay and is using its discretion to deny the application by the defendants for counsel fees.

Plaintiff's application for approximately $400,000 in counsel fees is DENIED. This claim is based on plaintiff's alleged fees from March 2007 when litigation commenced until February 2010, shortly after this court's letter opinion granting the plaintiff's motion for summary judgment and denying the defendants motion for summary judgment on the issue of the plaintiff's standing to seek custody. It is obvious that only a small portion of the alleged $400,000 could possibly be attributed to the summary judgment motions. The facts essential to plaintiff's successful summary judgment motion were never in dispute and certainly no significant expense was necessary in order to "discover" those facts. Pursuant to R.4:42-9(a)(1) and N.J.S.A. 2A:34-23 attorneys fees in family actions may be awarded pursuant to R.5:3-5(c). While the plaintiff prevailed, the "reasonableness and good faith" of the non prevailing defendants is so significant that it compels denial of plaintiff's application. While this judge found that the lack of a genetic link between the plaintiff and her daughters to be of no legal significance under current case and statutory law it is certainly a case of first impression. This matter is legitimately being litigated here. In the eyes of society and according to the law in other jurisdictions, same sex relationships are now viewed differently then they were at the time of the Baby M decision. To the extent that plaintiff's claim for counsel fees is based on something other than the summary judgment motion it is not really clear. Plaintiff obtained immediate relief from Judge Mantineo and was granted parenting time early on.

In denying plaintiff's application the court is not ignoring the other factors of R.5:3-5(c), however, factor (3), the reasonableness and good faith of the defendants regarding their legal position on the summary judgment motions, as well as their conduct throughout the trial stands out. Contrast this to plaintiff's failure to submit her proposed findings of fact and conclusions of law intentionally delaying this opinion.

Parenting time will be granted as follows for the remainder of calendar year 2011. The girls shall remain with their father until 8:00 PM Christmas eve at which time the plaintiff shall have parenting time until 7:00 PM December 27, 2011. The court is concerned that the best interests of the girls will be severely compromised if they do not see both parents at Christmas.

Thereafter, the plaintiff shall have parenting time every other weekend starting Friday, January 13, 2012 from 5:00 PM until 7:00 PM on Sunday. If the weekend is a three (3) day weekend or a holiday weekend and that is the weekend due to the plaintiff,

then it shall begin at 5:00 PM on the last day of school and end at 7:00 PM on the evening before school resumes. This court has reviewed the Hamilton Park Montessori School calendar and any Friday or Monday when the school is closed to these girls shall be considered a three (3) day weekend. There will be curbside pickup and the party receiving the children shall provide transportation.

The plaintiff shall have parenting time one (1) day per week for three (3) hours on a day agreed to by the parties, if there is no agreement the day shall be Wednesday at 5:00 PM.

In calendar years ending with an odd number the plaintiff shall have parenting time for the Easter weekend and this shall have priority over the normal alternate weekend/weekday schedule which should thereafter resume as if it had not been interrupted.

On calendar years ending in an even number the plaintiff shall have parenting time for two full days leading up to Christmas eve at 8:00 PM. At that time the defendants shall have parenting time for the next forty-eight (48) hours. This arrangement shall have priority over the regular alternating weekend/weekday schedule which should thereafter resume as if it had not been interrupted.

During the summer recess the plaintiff shall have four (4) weeks of parenting time of which two weeks may be consecutive. The defendants shall declare by May 1st in writing via email what those weeks will be and failing that plaintiff may declare no later that May 10.

The plaintiff shall have parenting time the weekend of Mother's Day and the defendants shall have parenting time on the weekend of Father's Day and this arrangement shall have priority over the regular alternating weekend/weekday schedule which thereafter shall resume as if it had not been interrupted.

Francis B. Schultz

Francis B. Schultz, J.S.C.

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Enc.