

# Decisions of Interest

MONDAY, JUNE 15, 2009

NEW YORK | FAMILY LAW

## Mother Awarded Legal, Physical Custody; Shows She Is and Should Be Child's Primary Caregiver

**Justice Emily Jane Goodman**

SS v. GS, 350516/06, Decided 05/29/09—

Attorney for Plaintiff: Judith Richman, Esq.  
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Attorney for Child: Frederic P. Schneider, Esq.  
Attorney for Defendant: Jason Advocate, Esq.  
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### DECISION

Each of the parties to the underlying action for divorce would be happy to be rid of the other and out of the other's life. But that is not to be because they have a 7-year old child, (who turned eight during these proceedings) a little boy named "A," who is in the second grade at a Manhattan private school. A decision must now be made by the Court regarding his custody.<sup>1</sup>

### OVERVIEW<sup>2</sup>

SS, the mother, (Mother, Plaintiff, Wife) and GS, the father, (Father, Defendant, Husband) are each self-designated as the primary caregiver and as the more appropriate custodial parent. The father's parenting plan is that "A" shall spend two nights per week with each parent and alternate Fridays and weekends, while the mother submits that the child should live with her full time with liberal access granted to the father. As

to decision making, the Father amends his complaint to seek zones or spheres of authority for each parent. Education and camp decisions would be his (after consultation with the Mother), and medical or health decisions as well as religion would ultimately be the Mother's (after consultation with the Father). The Mother seeks the authority to make overall major decisions for the child who, under her plan, would be residing with her.

As in all cases concerning children, the question is not who is the better or more affable person, but what is in the best interests of the child (Domestic Relations Law §70, Friederwitzer v. Friederwitzer, 55 NY2d 89 [1982]). To find that answer, the Court has scrupulously evaluated all admissible evidence as to its content and weight and has considered credibility, interest and demeanor of witnesses.

The Court had ample opportunity to observe the Mother and Father during this (unnecessarily) protracted

trial. Not once did they speak, look at each other or relate or communicate on any level whatsoever. The chill is apparent to anyone, including the child. The mental health professional and others who appeared as witnesses made the same observation, as did the lawyers.

The positions of Mother and Father can best be described as follows. She considers herself the most involved, dedicated and appropriate parent, as well as the primary caregiver, and regards her husband as a largely absentee parent either in his office or on spontaneous and unexplained trips out of the state and country. He, on the other hand, sought to develop his unsupported theory that his wife is mentally fragile and unsuitable for the role she seeks, while he is the stable parent.

Plaintiff has earned a Master's degree in career counseling, and has worked in executive positions at several major financial institutions. However, last year, her job ended when she was laid off. Defendant is in the real estate business and works in an office in the apartment building in which he also resides (formerly the marital home).

### THE TRIAL

The testimony can be summarized simply. Following the court-appointed neutral psychiatrist, plaintiff's witnesses, including several nannies, friends and co-workers described her as a loving, dedicated, conscientious mother who's highest priority is her son. They described the father differently. That is, they described him as aloof, uninvolved. There was credible testimony from at least one of the post-college women caring for "A," that Mr. S had made them uncomfortable, speaking to them in inappropriately personal ways, including in the presence of "A." Ms. S's friends, as expected, emphasized that she was the primary caregiver, and that Mr. S appreciated the fun parts of parenthood, but not the responsibilities. They described him variously as a "drive-by father," or as demanding "his way or no way." According to testimony, the Court credited, particularly as it was not contested on this point, one nanny had to sue defendant in Small Claims Court in an effort to recover approximately \$300 that he owed her for overtime babysitting.

Mr. S called as witnesses friends and a business employee who have observed him with "A" in a variety of settings, and deemed him a loving, involved parent, especially at the Hampton's abode where he swam, bicycled and undertook other similar activities with the boy. (Ex. FF) He also called one expert, and the head of "A's" school. His friends called as witnesses (like Wife's) were negative about the adversary partner; this was especially clear in the testimony of his Mother, further discussed below.



### SUPREME COURT

Justice  
**Goodman**

## WITNESSES

### William H. Kaplan, M.D.

The first and most powerful witness was Dr. William H. Kaplan, M.D., a board-certified psychiatrist, who was appointed by Justice Jacqueline Silbermann to investigate and prepare a report on his findings concerning the family. He conducted interviews with the principals and spoke with others about them. He had startlingly contrasting impressions of each of the parents qua parents. According to Dr. Kaplan, Mr. S has an "idealized" relationship with the child, thinking the relationship is as he might wish it to be. (Mr. S's own parents separated when he was a boy.) Dr. Kaplan reliably emphasized that Mr. S does not see how to work together with his wife for the benefit of the child because his personality and his views of her create impasses to conflict resolution. In calling Mr. S "narcissistic, self-absorbed and acting counterproductive to conflict resolution," the doctor described him as lacking the ability to put aside his inflated self-image for the benefit of "A." He is, said the doctor, "insensitive to the best interest of the child," and shows an unwillingness to work with the mother for the benefit of the child, creating situations where "A" is caught in the middle. He is, in short, "not child sensitive." Dr. Kaplan, who was on the witness stand for parts of three days, found Mr. S to be uncooperative with his wife and condescending toward her, concluding that the way he talks about her inflames the situation. While the doctor found Mr. S to lack sensitivity to the child's mental state, he saw Ms. S as the person "A" looks to as child-centered, more psychologically adept, aware and empathetic; in other words, the psychological parent. He recognized that although both parents might come to similar decisions, they lack mutual respect which would be a barrier to communication. He emphasized "A's" need for consistency in environment and policies.