

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

-----X

Plaintiff,

Index No.: _____

-against-

DECISION AFTER TRIAL

(# 1)

Defendant.

-----X

Appearances:

Attorney for Plaintiff

Attorney for Defendant

Law Guardian

_____, J.:

This is an action for absolute divorce commenced by Plaintiff, _____, against defendant, _____. Defendant interposed a counterclaim for divorce. The trial was held before this Court on the following date(s): _____.

The Court conducted an *in-camera* interview of the three children of this marriage on _____.

Those *in-camera* proceedings were conducted on the record with law guardian present. The record was ordered sealed except for purposes of appellate review. The Plaintiff was represented by _____

_____. The Defendant was represented by _____.

_____ was the fully appointed law guardian, who made a written recommendation to the Court following the close of proofs. Proposed findings and final submissions from counsel were received through _____. 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:

I. FINDINGS OF FACT

A. Grounds:

1. The parties were married on _____, in _____.
2. The action was commenced on _____.
3. The plaintiff is presently ____ years old, born on _____. The defendant is ____ years old, born on _____. Both parties appear to be in good health.
4. There are _____ child(ren) born of this marriage, to-wit: _____

5. At the time of the commencement of this action, both plaintiff and defendant were residents of the State of _____, and both had continuously resided in the State of _____ for a period in excess of one (1) year. Neither the plaintiff nor the defendant are in the military service of the United States, and there is no judgment or decree of divorce, separation or annulment granted with respect to this marriage by this Court or any other court of competent jurisdiction and no other actions are pending at the present time.
6. There exists no barrier, religious or otherwise, affecting the ability of either party to remarry

subsequent to a divorce being granted by this Court.

7. Both parties agree to take prior to the entry of final judgment, all steps solely within their power to remove any barrier to the other's remarriage following the divorce.
8. The Court finds that the defendant knowingly, intelligently and voluntarily defaulted with respect to the grounds alleged by the plaintiff in his/her complaint. The Court further finds that the plaintiff knowingly, intelligently and voluntarily defaulted with respect to the grounds alleged by the defendant in his/her counterclaim. Consequently, the plaintiff proved and the Court finds as fact those allegations set forth by plaintiff in paragraphs _____ of his/her complaint dated _____ to be filed herewith as part of the Judgment Roll. The Court further finds that the defendant proved and the Court finds as fact those allegations set forth by the defendant in paragraphs _____ of his/her counterclaim dated _____ to be filed herewith as part of the Judgment Roll.

B. Disposition of Property

9. The parties have resided at _____ since _____. This real property is the marital residence and is a marital asset. The parties continued to reside at the marital residence through trial.
10. The fair market value of the marital residence is \$ _____ which is an agreed value by stipulation of the parties. The marital residence is encumbered by a note and mortgage in the approximate amount of \$ _____, which constitutes marital debt.
11. The parties also own _____

12. The parties own: _____

13. The Court finds the following to be additional marital assets:

- (a)
- (b)
- (c)
- (d)
- (e)

14. Plaintiff has vested pension rights with _____.
Plaintiff has unvested rights with his/her present employer _____

15. Defendant has unvested pension rights through his/her employer _____

16. There was no evidence presented as to the value of these pensions.

C. Spousal Maintenance, Child Custody and Child Support

17. Plaintiff's gross income for _____ from his employment with _____ was \$_____. Defendant's gross income for 1995 from his/her employment with _____ was \$_____.

18. Immediately prior to the commencement of trial, both parties through their attorneys

voluntarily, affirmatively, and permanently waived any claim of maintenance or other spousal support as against the other.

19. The most contentious issue during the course of this matrimonial proceeding and trial was the issue of custody. There are as previously noted _____ child(ren) of this marriage, _____ . The child(ren) are in good health with no identifiable special needs. The children were interviewed by the Court *in-camera* with the law guardian present on _____ .

20. In all child custody determinations, the best interests of the child remain the absolute, paramount consideration of the Court. *Friderwitzer v. Friderwitzer*, 55 N.Y.2d 89 (1982); *Eschbach v. Eschbach*, 56 N.Y.2d 167 (1982). The testimony at trial established and the Court finds that during the children’s upbringing and through the date of trial, _____ .

21. Both parties enjoy an extended family, to wit: _____ .

22. Both parties were raised in the _____ faith and practice _____ .

23. The Court agrees with the law guardian’s conclusion and so finds that both plaintiff and defendant truly care about their children and that each has developed a strong love and emotional bond. The children likewise expressed a deep love and respect for each parent during the *in-camera* interview conducted by the Court. Each child also expressed a strong desire to primarily reside with _____. Given the age of the children, this is a factor which the Court does consider together with all of the other factors in this case. It

is not singularly determinative of the question. In determining the best interests of the children, other factors to be considered include a party's ability to provide for the child's emotional and intellectual development, the quality of the home environment, parental guidance, and stability of the respective proposed home. *See Milton v. Dennis*, 96 A.D.2d 628 (3rd Dept. 1983); *Cornelius C. v. Linda C.*, 123 A.D.2d 536 (1st Dept. 1986).

24. Both residences would adequately meet the residential needs of the children.
25. The mother has been the children's primary caretaker notwithstanding the father's obvious commitment and involvement with the lives of his/her children. The *in-camera* interview with the children supports the finding of this Court that the mother has remained the primary caretaker of the children which in turn has resulted in strong emotional bonding.
26. Both the Court appointed law guardian and mother have urged this Court to make a finding that joint custody with primary physical residency to mother would be in the best interests of the children. The Court does not concur in that recommendation. Joint custody is primarily encouraged "as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion". *Braiman v. Braiman*, 44 N.Y.2d 584 (1978). It necessarily pre-supposes a civilized level of communication and discourse which would allow both parents to engage in the decision making process for the benefit of their children. Joint custody should not be judicially imposed on embattled parents who appear either unable to unwilling to put aside their differences in making decisions relating to their children. *Matter of Buffy E. v. Lance C.*, 643 N.Y.S.2d 280 (4th Dept. 1996). There is nothing in this record to suggest that these parties are even minimally capable of making joint decisions with respect to their children notwithstanding this Court's finding that both

parties are otherwise fit and loving parents. The Court finds that the best interests of the three children will be served by awarding sole custody to the plaintiff / defendant with liberal rights of visitation as hereinafter set forth to the plaintiff / defendant.

27. The award of child support is made in accordance with Domestic Relations Law §240(1-b) and is based upon the following findings:

- (a) The children of the marriage entitled to receive parental support are _____

- (b) The gross income of the plaintiff who is the non-custodial parent is \$_____ per year. Social Security and Medicare taxes are 7.65% of gross income.
- (c) The gross income of the defendant who is the custodial parent is \$_____ per year. Social Security and Medicare taxes are 7.65% of gross income.
- (d) The applicable child support percentage is 29%.
- (e) The basic child support obligation is \$_____ per week.
- (f) The non-custodial parent's pro rata share of the basic child support obligation is calculated as follows:
 - (i) \$_____ per week;
 - (ii) _____% of future reasonable health care expenses not covered by _____
_____ insurance.
- (g) The non-custodial parent's pro rata share of the basic child support obligation is neither unjust nor inappropriate.

D. Defendant's Application for Counsel Fees

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28. The Court finds both parties to have limited to moderate financial resources. The Court further finds that although application for counsel fees was made in defendant's *ad damnum* clause in her Answer and Counterclaim, she offered no testimony at trial in support of that application and in her Statement of Net Worth (Defendant's Exhibit G) she lists "no counsel fee requirement". Finally, the Court finds that defendant has or will have sufficient financial resources to pay her own counsel fees.

II. CONCLUSIONS OF LAW

- A. That jurisdiction as required by §230 of the Domestic Relations Law has been obtained and the requirements of Domestic Relations Law have been met.
- B. The plaintiff is entitled to a judgment of absolute divorce against the defendant herein upon the grounds of _____.
- C. The defendant is entitled to a judgment of absolute divorce against the plaintiff upon the grounds of _____.
- D. Both plaintiff and defendant have taken or will take all steps solely within their power to remove all barriers to defendant's or plaintiff's remarriage following the divorce.
- E. Each party shall be permitted to resume the use of any pre-marriage surname.
- F. Defendant shall be awarded sole custody of the _____ infant children of this marriage.
- G. Plaintiff shall be granted liberal visitation with the _____ children upon mutual agreement of the parties, but not less than the following periods of time:
1. Alternate weekends from Friday at 6:00 p.m. through Sunday at 8:00 p.m.

2. During the week immediately prior to plaintiff's weekend visitation, one evening to be agreed upon by the parties with due regard to their respective work schedules and the schedules of the children. Weekday visitation shall commence immediately following school through 8:30 p.m. that evening.
3. During the week immediately preceding a non-weekend visitation, plaintiff shall have two evenings per week as agreed upon by the parties with due regard to their respective work schedules and the schedules of the children. The visitation shall commence immediately following school until 8:30 p.m.
4. Plaintiff shall have four (4) weeks (not more than two (2) weeks consecutively) visitation during the summer months and shall notify defendant not later than May 1st of each year as to which weeks he has selected.
5. The parties shall alternate Christmas Eve and Christmas Day such that in the odd numbered years plaintiff shall have the children from Christmas Eve at 12:00 noon through Christmas Day at 12:00 noon and in the even numbered years defendant shall have the children from Christmas Day at 12:00 noon through December 26th at 8:00 p.m.
6. Plaintiff and defendant shall alternate the Thanksgiving holiday with plaintiff being entitled to the children in the even numbered years and defendant being entitled to the children in the odd numbered years.
7. All other major holidays which shall include New Year's Day, Easter, Memorial Day, Fourth of July, and Labor Day shall be alternated between the parties.
8. Holiday visitation shall take priority over other regular scheduled visitation.

9. Summer visitation period shall not be scheduled so as to interfere with the other party's scheduled holidays.
 10. The plaintiff shall have the children on each and every Father's Day and the defendant shall have the children on each and every Mother's Day. Plaintiff shall have the children on his birthday. Defendant shall have the children on her birthday.
 11. Plaintiff and defendant shall alternate the February/Winter school recess and the Spring/Easter school recess. Plaintiff shall be entitled to the February/Winter recess in the even numbered years and defendant in the odd numbered years. Defendant shall be entitled to the Spring/Easter recess with the children in the even numbered years and plaintiff shall have the children in the odd numbered years.
 12. The parties shall alternate the children on the children's actual birthdays. Defendant shall have the children on each child's next immediate birthday following this decision and to be alternated with plaintiff thereafter.
- H. Plaintiff shall be provided reasonable access to all of the children's health, dental and education records.
- I. Plaintiff is to have continuous reasonable telephone access to the children.
- J. Plaintiff shall pay to defendant child support in the amount of \$_____ per week. Child support shall commence upon defendant vacating the marital residence and establishing her new residence as custodial parent. Plaintiff shall pay _____ percent (___%) of all uninsured medical and dental expenses of the three children. Defendant shall pay _____ percent (___%) of all uninsured medical and dental expenses of the three children. Plaintiff shall continue to maintain all existing medical, hospitalization and dental insurance for the benefit of defendant and

the children until such time as a Judgment or Decree of Divorce is signed and entered and thereafter for the benefit of the children.

- K. Pursuant to DRL §240(2)(b)(2), plaintiff shall pay child support to defendant by income deduction order through the _____ County Support Collection Unit, located at _____
_____. Each party shall furnish to counsel their respective social security numbers which shall be included in the Divorce Judgment.
- L. Plaintiff shall be entitled to claim the two older children as dependency exemptions for federal and state income tax purposes. Defendant shall be entitled to claim the youngest child as a dependency exemption for federal and state income tax purposes until such time as both of the two oldest children are no longer eligible to be claimed and thereafter the parties shall alternate the youngest child as a claimed exemption. Defendant shall be entitled to claim head of household filing status. Both parties shall fully cooperate with the other by executing all necessary papers and forms to permit the filing of these claims exemptions, including without limitation IRS Form 8332.
- M. Neither party is entitled to an award of maintenance as against the other.
- N. Defendant shall be paid a distributive award in the amount of \$_____ representing _____
_____. The award shall be paid to defendant by plaintiff within _____ days from the date of this decision.
- O. There having been no evidence introduced regarding the value of the parties' pensions, each party shall be entitled to a Majauskas award as against the other with an appropriate QDRO to be entered.
- P. Defendant shall maintain a minimum of \$_____ life insurance on his life naming the three children as irrevocable beneficiaries, decreased to \$_____ upon on child becoming emancipated

and \$_____ upon two children becoming emancipated, the unemancipated child(ren) continuing as co-equal beneficiaries under the reduced coverage.

Q. Each party shall be solely responsible for their own counsel fees.

R. The law guardian, _____, shall be compensated by the parties for legal services rendered on behalf of the children. The law guardian shall submit an affirmation of services upon notice to plaintiff's defendant's counsel. The Court shall thereafter fix the award and allocate payment between plaintiff and defendant.

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

Dated: _____

J.S.C.