Religious Decision Making: Georgia Courts' Willingness and Ability to Enforce

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Marriage and divorce between those of differing religious backgrounds is more common, because our Nation and our State have enjoyed an increase in cultural diversity. When divorce or other child custody disputes arise between those of diverse religious backgrounds, questions often arise, such as: "Whose religion should the children practice?" and "How can such a determination be practically enforced?" The issue of religion is deeply personal. For that reason, parties should seek agreement regarding the religious upbringing of their children. If such agreement is not possible, Georgia case law provides some indication on how this issue may be resolved by a court. Once determined, whether by agreement or court order, recent case law reveals that Georgia courts not only have the ability to enforce their orders regarding religious decision making, but they are willing to take the steps necessary to do so.

Unless otherwise ordered by the court, in all actions involving the determination of child custody, a parenting plan shall include "an allocation of decision-making authority to one or both of the parents with regard to the child's education, health, extracurricular activities, and religious upbringing, and if the parents agree the matters should be jointly decided, how to resolve a situation in which the parents disagree on resolution[…]." O.C.G.A. § 19-9-1(b)(2)(E); O.C.G.A. § 19-9-3 (a)(8). In cases where the parties are in agreement on the issue of religious upbringing, or cases where the parties share the same religion, there is often little to no conflict about which parent will be awarded the authority to make decisions as to the children's religious upbringing. But, in matters where the parties disagree, especially in matters where the parties espouse different faiths, this issue can be fraught with conflict, thus necessitating determination by a court.

Although pursuant to O.C.G.A. § 19-9-3(a)(2) judges are required to analyze the specific facts of each case to determine which physical and legal custodial arrangement would best serve the interests of the children involved, a 1981 Georgia Court of Appeals decision indicates that Georgia courts are hesitant to award religious decision making authority to non-custodial parents. In *Applebaum v. Hames*, 159 Ga. App. 552 (1981), Mother was awarded primary physical custody of the parties' younger son, and Father was awarded primary physical custody of the older son upon the parties' divorce. *Id.* at 552. One year later, on Mother's petition for modification of custody, the trial court awarded Father custody of both minor children. *Id*. Four months later, Mother again petitioned the court for a modification of child custody. Specifically, Mother sought custody of both children due to Father's failure to provide them with adequate Jewish religious instruction. *Id*. The trial court denied Mother's petition, and the Georgia Court of Appeals affirmed holding: "[s]ince the boys were not brought up in the Jewish faith, [Father's] failure to educate them presently in that religion is not a changed condition upon which a modification of the custody award could be based, but a preexisting condition." *Id*. at 553. The Georgia Court of Appeals went on to note that:

> "[i]n the absence of an agreement to the contrary, it is up to the custodial parent to determine the religious training the children receive. Once custody has been awarded, courts should be loath to interfere with the religious training sanctioned by the custodian, since no end of difficulties would arise if judges sought to prescribe or proscribe the selection of a religious faith made by a custodial parent."

Id. at 553-554. This dictum suggests that if contested, custodial parents should be endowed with the authority to determine religious training.

But, what is to stop a non-custodial parent from seeking to undermine the religious decision making authority of a custodial parent by exposing the children to alternative beliefs systems or indoctrinating the children against the custodial parent's chosen religion? In *Greene v. Greene*, 306 Ga. App. 296 (2010), the Court of Appeals of Georgia provides some guidance. In

Greene, the Mother, who espoused the Jewish faith, was named final decision maker as to the minor child's religion upon the parties' divorce. *Id*. at 297. On the Mother's petition for contempt, Judge Robert Walker of the Gwinnett County Superior Court found that during his parenting time, Father exposed the children to the Christian faith in such a way that indoctrinated the child against the Jewish faith, caused the child emotional trauma, and in so doing violated the trial court's order as to legal custody. *Id*. at 297-298. As such, Judge Walker found Father in contempt and ordered Father to take certain actions, or refrain from certain conduct in order to abide by the trial court's decision. Specifically, Judge Walker ordered the following:

> (a) Mr. Greene may not indoctrinate the child in a manner which promotes the child's alienation from Judaism. (b) Mr. Greene shall not take the child to church (whether to church services or Sunday School or church education programs); nor engage the child in prayer or Bible study if it promotes rejection rather than acceptance, of the child's . . . Jewish [299] self-identity. (c) Mr. Greene shall not share his religious beliefs with the child if those beliefs cause the child emotional distress or worry about the child's mother or the child herself. Thus, for example, Mr. Greene may have pictures of Jesus Christ hanging on the walls of his residence. But, Mr. Greene may not take the child to religious services where they receive the message that adults or children who do not accept Jesus Christ as their Lord and Savior are destined to burn in hell. Further, he may not pray Christian prayers with the child, play Christian songs with the child present, read the Bible to the child or in any way attempt to indoctrinate the child into the Christian Faith. (d) Neither party is to talk negatively or derogatory about the other party's religion in the presence of the child, and there shall be no derogatory comments that could be construed as anti-Semitic of any nature, meaning Mr. Greene shall no longer refer to Ms. Greene's parents, who are Jewish, by any numbers or anything similar to that. Mr. Greene shall ensure that these rules are followed by persons whom he allows the child to be in the presence of or have contact with. No secondary person shall teach or read the Bible to the child, or pray any Christian prayers, or otherwise attempt to indoctrinate the child into the Christian faith.

Id. at 298-299. Father appealed, and Judge Walker's order was upheld on appeal. In affirming the trial court's citation of contempt against Father, and the mandates placed on Father by the trial court, the Georgia Court of Appeals affirmed a trial court's ability to enforce an award of final decision making authority as to the issue of religion. *Id*. at 299.

Not only may a court proscribe certain conduct to enforce its order regarding an award of religious decision making authority, but a court may also take more drastic steps, such as modifying physical custody, due to a party's failure to respect the court's order on legal custody. A recent Georgia Court of Appeals decision specifically supports this assertion. In *Lowry v. Winenger*, A16A2133 (decided February 23, 2017), the judgment of the Forsyth County Superior Court modifying custody in favor of Father, based in part on Mother's refusal to respect Father's religious decision making authority, was affirmed by the Georgia Court of Appeals. In *Lowry*, Mother and Father were awarded joint physical custody upon their divorce in 2013. *Id*. at 1. Although Mother was named primary physical custodian, the parties shared approximately equal parenting time. *Id*. at 1-2. With regard to legal custody, Father was awarded final decision making authority as to the child's religious upbringing. *Id*. at 2. Shortly after the divorce, Mother remarried, converted to the Mormon faith, changed residence on several occasions, and ultimately settled in Hall County, approximately an hour away from Father's residence. *Id*.

As a result, Father filed a petition to modify custody such that he would be deemed primary physical custodian. *Id*. A guardian at litem was appointed, and the matter was ultimately heard by Judge Dickinson. *Id*. Based on the evidence presented and the report of the guardian ad litem, Judge Dickinson found that the child had been negatively impacted due to Mother's behavior. *Id*. at 4. Most notably, the evidence revealed that Mother took the child to a Mormon church and encouraged the child to participate in church related activities, without the consent of Father. *Id*. at 2. Further, in her report, the guardian ad litem recommended an award of primary physical custody to Father due to Mother's refusal to respect Father's authority regarding religious decision making. *Id*. at 4. Among other things, the trial court found that "by taking the child to activities at her church, the mother had not respected the father's final decision-making

authority with regard to the child's religious upbringing, in contravention of the divorce decree, and that this decision created confusion for the child." *Id*. at 5. Consequently, the trial court found Mother in contempt, and also found a sufficient and material change in circumstance had occurred necessitating modification of custody in favor of Father. *Id*. Mother appealed. The Court of Appeals affirmed the trial court's ruling and found that:

> "the record reflects sufficient evidence of both material changes in the child's circumstances and adverse affects due to such changes. The record reflects numerous changes in the child's living, extracurricular, and school arrangements since the parties' divorce. As to the impact of those changes on the child, the father's statements regarding the child's apathy toward schoolwork are evidence of an adverse effect on the child. Likewise, the father presented evidence as to difference between the father's church and the Mormon church attended by the mother and the confusion that the child suffered as a result of his exposure to both systems of belief."

Id. at 7-8. (Internal citations omitted). Therefore, the Court held that "it was sufficient for the trial court to determine that a material change in circumstance adversely affecting the child had occurred." *Id*. at 8.

It is important to note that in *Lowry*, unlike in *Greene* and *Applebaum*, the non-custodial parent was authorized to make final decisions as to the child's religious upbringing. Nonetheless, the trial court still took steps to enforce its order regarding legal custody, because the court found such steps necessary to benefit the best interest of the child. Therefore, read together, *Lowry*, *Greene* and *Applebaum* enforce the notion that above all else, Georgia courts will look to what best promotes the health, welfare and emotional wellbeing of children, not the desires of parents, when issuing orders; and if appropriate, courts can and will take the necessary steps to enforce their orders.