THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2010 TERM
MAY SESSION

No. 2009-0751

In the Matter of
MARTIN F. KUROWSKI
Petitioner-Appellee,

and

BRENDA A. KUROWSKI,
Respondent-Appellant.

APPEAL FROM LOWER COURT DECISION ON THE MERITS

BRIEF OF RESPONDENT-APPELLANT, BRENDA A. KUROWSKI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES AND RULES

OTHER AUTHORITIES

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court erred in modifying a parenting plan, to order a home schooled child to attend public school, by considering the "best interests of the child", where none of the statutory circumstances permitting modification, as set forth in RSA 461-A:11, were present, and the court made no such finding. (A. 140 (¶7), 141 (¶¶13, 15, 16), 143 (¶24)).[1]

2. Whether the trial court erroneously concluded that it was in the best interests of a home schooled child to be sent to public school where the court's decision was based on its own definition of the purpose of education that was unsupported by RSA 461-A:6, I, or by any other law. (A. 141 (¶17)).

3. Whether the trial court's decision should be reversed because it committed plain error in relying on the opinion testimony of a guardian ad litem who was not qualified as an expert and who's opinion was not based on a rational perception within the meaning of Rule 701 of the New Hampshire Rules of Evidence. (See N.H. Supreme Court Rule 16-A).

4. Whether the trial court's order that a home schooled child attend public school to expose her to diverse points of view was erroneous because it violated the fundamental parental right to control a child's education guaranteed by the United States Constitution, where the evidence showed that the child was already getting a superior education and the State's purported goal could be achieved by less restrictive means. (A. 144 (¶¶25, 27); T. 252:2-8).

5. Whether the trial court's order that a home schooled child attend public school because she was too rigid in her religious beliefs was erroneous because it inter-

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[1] Citations to the Respondent's Appendix are referenced by the letter "A"; citations to the trial transcript are referenced by the letter "T".

fered with the child's right to the free exercise of religion guaranteed by the First Amendment to the United States Constitution. (A. 105 (¶¶61, 62), 140 (¶¶11, 12)).

6. Whether the trial court's order that a home schooled child attend public school should be reversed because it relied on the testimony of a guardian ad litem who was biased against the religion practiced by the child and her mother. (A. 144 (¶¶28-31), 145 (¶¶32-34)).

STATUTES AND RULES INVOLVED IN THE CASE[2]

A. NEW HAMPSHIRE STATUTES

RSA 193-A:4, I. Home Education; Defined

RSA 461-A:6, I. Determination of Parental Rights and Responsibilities; Best Interest

RSA 461-A:11. Modification of Parental Rights and Responsibilities

B. NEW HAMPSHIRE RULES OF EVIDENCE

Rule 701. Opinion Testimony by Lay Witnesses

Rule 702. Testimony by Experts

C. NEW HAMPSHIRE SUPREME COURT RULES

Rule 16-A. Plain Error

STATEMENT OF THE CASE AND OF THE FACTS

This case arises out of a Petition to Modify the Parenting Plan for ten-year old Amanda Kurowski that would require her to attend public school instead of being home schooled, as she had been for the last five years. Amanda is the daughter of the Petitioner-Appellee, Martin Kurowski, and the Respondent-Appellant, Brenda Kurowski (Voydatch).[3] The parties were divorced when Amanda was a newborn in 1999. (A. 73). The parties have had joint legal custody (now known as joint decision-making authority)

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[2] The text of the statutes and rules listed here appears in the Addendum at the end of this Brief.

[3] The Respondent has remarried and now goes by the name of Voydatch.

since that time. (A. 2). The Respondent has been the custodial parent for all of Amanda's life. The Petitioner chose not to be actively involved in Amanda's life for quite some time. (A. 55-56; T. 86:13-14).

With the Petitioner's full knowledge, the Respondent started home schooling Amanda in 2005 when she was in first grade, and successfully did so through the fourth grade in 2009. (A. 53). The Petitioner later challenged Amanda's home school status, which resulted in a 2006 Order discussed elsewhere in this Brief. (A. 3-4). The Petitioner then brought another action, which is the subject of this appeal, challenging Amanda's home school status. (A. 29). He once again suggested, among other things, that home schooling deprives Amanda of the socialization she needs. (A. 27; T. 12:20-23). However, the evidence supports otherwise. This same issue was raised and rejected by the lower court in 2006. (A. 3). There is also no dispute, as the lower court here found, that Amanda is excelling in her academic coursework and is "generally likeable and well liked, social and interactive with her peers, academically promising and intellectually at or superior to grade level." (A. 132).

In an effort to acknowledge Martin's concerns, Brenda enrolled Amanda in three public school courses as part of the enrichment curricula for Amanda's home schooling. (A. 129). Amanda has excelled in those courses, as she has in all of her home schooling. (A. 111). Amanda has also participated in a variety of extra-curricular activities including gymnastics, horseback riding, softball, basketball, and piano. (A. 58; T. 48:14 to 49:13).

The evidence at trial also showed that Amanda does very well in school. (A. 111-125; T. 48:4-9, 264:8-11). Nonetheless, on July 14, 2009, the court ordered Amanda to stop home schooling and to start attending public school. (A. 136). The court's Order was heavily influenced by the "expert" testimony of the guardian ad litem who was erro-

neously permitted to testify as an expert on Amanda's brain development (T. 15:5) without being qualified to do so.

The court's Order was the subject of a timely Motion for Reconsideration (A. 139) and accompanying Memorandum of Law (A.149), which argued, as is argued here, that the court applied the wrong standard of review in considering the Petition for Modification. Specifically, the court impermissibly considered the "best interests of the child" standard in formulating a modified parenting plan without first finding, or even considering, whether any of the statutory circumstances precedent to permitting modification, as required by RSA 461-A:11, existed. (A. 133). The Motion for Reconsideration also argued that the lower court abused its discretion with regard to several evidentiary matters, in addition to violating the constitutional rights of both Amanda and her mother. (A. 149). That motion was denied on September 17, 2009. (A.185). This timely appeal followed.

SUMMARY OF THE ARGUMENT

1. RSA 461-A:11 permits modification of parenting plans, including those governing a child's education, only upon a finding that one of four listed circumstances exists. Only then may a court consider the "best interests of the child" in formulating a modified plan. In re Muchmore, 159 N.H. 470, 474 (2009). Here, however, the trial court made no finding of a statutory circumstance that would permit modification. Instead, it simply found that "it would be in Amanda's best interests to attend public school." (A. 133). Having failed to make a finding required by RSA 461-A:11, the trial court's decision was erroneous and should be reversed.

The only statutory circumstance that might be remotely relevant here is the one regarding "clear and convincing evidence that the child's present environment is detrimental to the child's physical, mental or emotional health." Id. However, given the

court's finding that Amanda is "well liked, social and interactive, . . . academically promising, and intellectually at or superior to grade level" (A. 132), it is clear that this statutory prerequisite to considering the best interests of the child is absent, such that the lower court's decision should be reversed for that reason also.

2. Even assuming arguendo that it was appropriate to engage in a best interests analysis, that analysis was flawed by the court's adoption of its own definition of the purpose of education. It was "guided", it said, "by the premise that a child['s education] requires academic, social, cultural, and physical interaction with a variety of [factors] in order to grow to an adult . . . ." (A. 133). Nowhere, however, do the statutory criteria for assessing a child's best interests allow for the consideration of the definition of educational purpose adopted by the trial court. Moreover, the court adopted a presumption in favor of public schools when it said Amanda "would benefit from the social interaction and problem solving she will find in public school." (A. 186). Such a presumption contradicts the endorsement of home school education by the Legislature. RSA 193-A:4. In subscribing to its own definition of education, and in demonstrating its bias against home schooling, the lower court engaged in an erroneous best interests analysis, such that its decision should be reversed for that reason also.

3. Rule 702 of the New Hampshire Rules of Evidence requires that witnesses giving "scientific, technical, or other specialized" opinions be qualified as experts. The trial court relied heavily on the testimony of a guardian ad litem who concluded "that Amanda's interests, and particularly her intellectual and emotional development, would be best served by exposure to a public school setting." (A. 131). The GAL, however, was never qualified as an expert. In fact, she testified, she was "not an expert in brain science". (T. 15:5). The trial court's reliance on the "expert" opinion of an unqualified "expert" witness was clearly erroneous and also warrants reversal of its decision.

4. The right of parents to make decisions about the care, custody and control of their children, including educational decisions, is a fundamental right guaranteed by the United States Constitution that is subject to strict judicial scrutiny. For the state to trump such a right, it must advance a compelling interest by the least restrictive means available. Here, the trial court concluded that Amanda would receive a better education in public school than in home school. That conclusion, however, is contradicted by the court's finding that Amanda is "well liked, social and interactive . . . , academically promising, and intellectually at or superior to grade level". (A. 132). Thus, because Amanda's home school education was better than adequate, the State has no compelling interest that would withstand strict scrutiny. Accordingly, the trial court's order should be reversed because it violates a fundamental parental right protected by the United States Constitution.

5. The First Amendment to the United States Constitution protects the right of parents to direct their children's education in accordance with their religious beliefs. That is also a fundamental right subject to strict judicial scrutiny. Here, the trial court ordered Amanda to attend public school in reliance on testimony that she "reflect[ed] her mother's rigidity on questions of faith" (A. 130) and "vigorous[ly] defen[ded] . . . her religious beliefs". (A. 132). The court offered no compelling state interest for interfering with Amanda's religious beliefs. Its order, therefore, does not withstand strict judicial scrutiny and should be reversed.

6. The guardian ad litem, on whom the trial court heavily relied, testified that Amanda "highly identified with . . . the rigidity of her mom's religious beliefs . . . caus[ing her] to believe that Amanda would be best served by starting public school as soon as possible." (T. 16:7-11). When asked to read research on home schooling, the GAL refused, saying "I don't want to hear it. It's all Christian-based." (T. 148:23 to

149:4, 209:11-15). These are just some of the examples of the GAL's bias against Amanda's faith. Notwithstanding the GAL's prejudice, the trial court found her testimony more reliable than that of Amanda's mother (A. 132-33, 184) and adopted the GAL's conclusion that Amanda should attend public school because of her religious beliefs. (A. 131). For that reason too, the court's order that Amanda attend public school was erroneous, was unconstitutional, and should be reversed.

ARGUMENT

This Court will overturn a trial court's modification of a parenting order if the trial court engaged in an unsustainable exercise of discretion. In re Muchmore, 159 N.H. 470, 472 (2009). However, when the resolution of issues on appeal requires statutory interpretation, the Supreme Court "will review a trial court's statutory interpretation *de novo*." Id.

I. THE TRIAL COURT APPLIED AN INCORRECT STANDARD OF REVIEW IN CONSIDERING THE PETITIONER'S REQUEST TO MODIFY THE PARENTING ORDER

A. To Modify a Parenting Plan, the Trial Court Must Consider Whether One of the Circumstances Listed in RSA 461-A: 11, I Exists.

RSA 461-A:11, I provides that the "court may issue an order modifying a permanent order concerning **parental rights and responsibilities** under any of the following circumstances . . . ." (Emphasis added). The statute then lists four circumstances under which an order may be modified, one of which is that there is "clear and convincing evidence that the child's present environment is detrimental to the child's physical, mental, or emotional health, and the advantage to the child of modifying the order outweighs the harm likely to be caused by a change in environment." Id.

This Court recently reviewed the standard of review set forth in RSA 461-A:11 and affirmed that a court may not modify an existing parenting order unless one of the

statutory circumstances exists. Muchmore, 159 N.H. at 474. Only then may the court consider the best interests of the child in drafting a modified parenting plan. Id. The petitioner in Muchmore argued that he was entitled to modification, even though none of the circumstances set forth in RSA 461-A:11 existed, because modification was in the best interests of the child. This Court disagreed, stating that RSA 461-A:11, I does not grant the court discretion to modify an existing plan under any other circumstances. Id. To consider modification absent the prescribed statutory circumstances, the Court continued, would constitute "an invasion of a policy area better decided by the legislature." Id.

"Parental rights and responsibilities" which may be modified under the statute are defined by RSA 461-A:1, IV, as follows: "Parental rights and responsibilities means all rights and responsibilities parents have concerning their child." Since "all rights" include the right to determine where one's child attends school, the lower court was bound to first consider whether any circumstances permitting modification under RSA 461-A:11 existed. Only if such a circumstance did exist could it apply the "best interests of the child" standard in crafting a modification order. Here, however, the court applied the best interests standard even though none of the circumstances prerequisite to permitting modification existed. (A. 133). Indeed, it made no finding whatsoever that such circumstances existed.

The September 2008 Parenting Plan states that it is "[a]greed upon" and that it is "[c]hanging a prior final parenting plan or a prior final custody/visitation order." (A. 84). The court found in its September 17, 2009 Order that the parties had agreed as follows: "Irrespective of any other meetings the parents may hold, there shall be a meeting in January, 2010, when Amanda is completing fifth grade, to discuss Amanda's transition to public school, unless the parents agree she should continue home schooling at that time." (A. 91). The court continued as follows:

> Although the current Parenting Plan acknowledges that Amanda was home schooled for the 2008-2009 school year, it does not require that she be home schooled in future years. The Plan requires the parties to meet in January 2010 to discuss the "transition to public school" for Amanda, and, at paragraph B4b2 . . . , it provides for alternatives for the February and April school vacations depending whether Amanda is home schooled or is attending public school "in the future." Even assuming, therefore, that enrolling Amanda in public school for the 2009-2010 academic year modifies the recent practice, it does not modify the existing Orders.

(A. 178) (emphasis added).

However, the court's July 14, 2009 order clearly does modify the existing permanent orders, as contained in the September 2008 Parenting Plan. To claim otherwise misreads the 2008 Parenting Plan and mis-applies the procedural history of the case.

Further, the court states, "[t]o the extent that Ms. Voydatch argues that the existing Plan (agreed to by the parties in September 2008) is not a permanent Parenting Plan, the terms of the Plan are otherwise." (A. 184).

The Petitioner was the one who brought forward a petition to modify (A. 15, 29) which would require that Amanda start attending public schools. (T. 6:20-22). Everything that happened later must be viewed in the light that father was the moving party with the burden of proof.

The court's citation to section G2 of the 2008 Parenting Plan (A. 176) constitutes a misreading of the terms of the agreement reached, which does not cede the inevitability of Amanda going to public school. (A. 190-93; T. 14:4-12). Additionally, the court's reference to section B4b2 is also taken out of context. That section simply states: "[I]f Amanda is attending public school in the future . . . ." (A. 93) (emphasis added).

Most importantly, the court's November 21, 2008 narrative order states that "[t]hey agreed that the Court could schedule a one day hearing after June 1, 2009 on the issue whether the minor child should be enrolled in public school." (A. 73) (emphasis

added). Thus, even the court admits that the Parenting Plan does not assume the child would eventually attend public school.

Additionally, there is no reference in the November 21, 2008 narrative order that the issue for trial was "either home schooling/or public school" but rather the order only references that it remains to be determined whether the child should go to public school. This is borne out by the record even as late as seconds before testimony began at trial when the court clarified on the record what the framing of the issues were for trial on June 2, 2009. (T. 6-12). Since it was the father who wanted the child to go to public school, and since it was the father who brought a petition requesting the court to order the child to attend public school, it remained the father's burden of proof under RSA 461-A:11 as to why the court should order that. The September 2008 Parenting Plan did nothing to change that. This procedural posture is reinforced when viewed in the light of the court's findings of fact and rulings of law (A. 99-109) and the 2006 findings which are the law of this case.

It is clear from the 2008 Parenting Plan, the court's related November 21, 2008 narrative order, and the court's own comments on the day of trial (T. 6-12) that the father would have to go forward on his motion to modify the school placement as an attempt to modify a prior final order. The court correctly acknowledged that modification of a parenting plan is only justified "if the court finds by **clear and convincing evidence** that the child's present environment is **detrimental** to the child's physical, mental, or emotional health, and the advantage to the child of modifying the order outweighs the **harm** likely to be caused by a change in environment." RSA 461-A:11, I(c). (A. 104 (¶53), 177-78) (emphasis added).

This statutory framework does not permit the trial court to change the child's schooling, to impose its own preferences, or to consider the best interests of the child,

absent clear and convincing evidence of harm of the type set forth in the statute. Yet the court did not follow this analysis, despite the fact it found no evidence of harm.[4] Indeed, it found as follows: "[T]he evidence support[s] a finding that Amanda is generally likeable and well liked, social and interactive with her peers, academically promising, and intellectually at or superior to grade level." (A.132). It further stated that "the Court is mindful of its obligation not to consider the specific tenets of any religious system unless there is evidence that those tenets have been applied in such a way as to cause actual harm to the child. The evidence in this case does not rise to that level . . . ." (A. 133-34).

Given the above findings, it is contradictory to conclude that Amanda must be ordered to public school to have her "critical thinking" skills changed, modified and/or improved. Such a result is inconsistent with the court's own acknowledgement that Amanda is "at or superior to" where she should be for her age. Absent a finding "by clear and convincing evidence" that permitting Amanda's continued home education is "detrimental" and that a modification would not do greater harm, the court erred in modifying the parenting plan. The court's ruling acknowledges that it applied a lesser "best interests" standard (by weighing a preponderance of the evidence) to conclude that the parenting plan should be modified and to order Amanda to attend public school. (A. 133). Since the Petitioner did not sustain that burden of proof, and since the court did not weigh the evidence in that light, its decision must be reversed.

B. The Best Interests of the Child Standard is Irrelevant Where, as Here, There Is No Finding That Any of the Circumstances Listed in RSA 461-A:11 Existed.

In issuing its modification order, the trial court erroneously applied the legal standard of "best interests of the child" by weighing a preponderance of the evidence. The court justified its use of the "best interests" standard by stating as follows:

[4] Father had actually asked the court to find that mother's religion was harmful. (A. 66 (¶6)).

> However, assuming for the sake of argument that public school enrollment is a modification of the status quo, if not of the existing Orders, the Court has reviewed the proposed modification by the "best interests of the child" standard of analysis, because a request for modification of decision-making responsibility is reviewed pursuant to that standard. School enrollment is within the scope of decision-making responsibility and not within the scope of residential responsibility.
>
> The "best interests" standard also applies to the Court's analysis of cases in which the child's parents are unable to make major decisions even though they have joint decision-making responsibility.

(A. 178) (citations omitted). However, this conclusion is contrary to the clear meaning of the statutory framework which was recently affirmed by this Court. See Muchmore, supra.

The trial court's July 2009 order makes no finding that the Petitioner satisfied his burden that one of the circumstances set forth in RSA 461-A:11, I existed. Instead, it simply applied a "best interests" standard without making any such determination. (A. 133, 178). Thus, its decision must be reversed because it applied the wrong legal standard.

C. Even if the Best Interests Standard Applied Here, the Modification Ordered by the Trial Court Was Still Erroneous

1. The Court Adopted an Unsupported Definition of the Purpose of Education.

Even under a "best interests" analysis, which the Respondent submits was inappropriate, there was insufficient evidence, under applicable law, to support the modification ordered by the court. The court's best interests analysis was tainted because it created, sua sponte, a definition of the purpose of education and then used that as the yard stick by which it applied the evidence to back into the conclusion it desired by stating:

> [T]he Court is guided by the premise that education is by its nature an exploration and examination of new things, and by the premise that a child requires academic, social, cultural, and physical interaction with a variety of experiences, people, concepts, and surroundings in order to

> grow to an adult who can make intelligent decisions about how to achieve a productive and satisfying life.

(A. 133).

The court later attempted to explain its adoption of a definition of the purpose of an education in its September 17, 2009 Order by stating that it "was intended to illuminate the difference between the experience of home schooling and the experience of public schooling". (A. 180) (emphasis added). Yet this clearly contradicts the plain meaning and complete context of the July 14, 2009 Order. The court clearly described that it was imposing a decision about education based on certain criteria. In the end, however, whether the court's July 14, 2009 Order invented a definition of the purpose of education or whether it explained its perception of the experience of an education does not matter. By either definition, it is a standard that the court invented by itself. The court cites no authority for its definition.

RSA 461-A:6, I sets forth the criteria to be used by a court in assessing a child's best interests. Nowhere in that criteria is there room for considering a child's alleged religious "rigidity." Not surprisingly, then, the court never cites any authority for having considered such an issue. Therefore, even if a "best interests" analysis applied here, the lower court's decision should be reversed because the analysis applied was erroneous.

2. The Court Erroneously Concluded that Public School Is Automatically in a Child's Best Interests.

The lower court demonstrated a "per se" bias for public school over home school as the proper forum for a child's best interests, citing a need for "diversity" and "tolerance," a goal which is not a legitimate exercise of the court's function and authority. This per se preference was reaffirmed in its September 17, 2009 Order when the court stated that "Amanda is at an age when it can be expected that she would benefit from the social interaction and problem solving she will find in public school, and granting a stay

would result in a lost opportunity for her." (A.186). The court attempted to categorize the academic experience of home schooling and public school as the same. However, the fact that the same subjects are taught (T. 55:4-5, 105:8-11) does not mean that they are taught from the same world view (T. 54:20-21, 55:13-17, 139:5-13). The court heard no testimony claiming otherwise and appeared to have made this assumption sua sponte. Subjects are not taught from the same world view and it was not the testimony that they were, despite the court's claim to the contrary.

The court also attempted to justify its failure to consider other alternatives to the remedy it fashioned in its September 17, 2009 Order (including the alternative of leaving her home schooled with supplemental public school courses) by stating "Ms. Voydatch argues that the Court declined to consider other alternatives to public school education, but neither party proposed any such alternatives, and the proposals they did submit (home schooling versus public schooling) were fundamentally incompatible." (A. 183). Thus, the court claimed it was strictly bound by the remedies and proposals submitted by the parties. Yet the court did not consider itself bound to either parent's proposed Parenting Plan, but rather came up with its own plan, a fact which it highlighted in its September 17, 2009 Order. (A. 184-85).

In addition, as noted above, the court created, *sua sponte*, its own definition of what the purpose of education is. The combination of that creation and the per se preference for public school is at variance with the Legislature's stated purpose of public school education. RSA 193-E:2. The court's definition also fails to take into consideration the requirements embraced in the State's home schooling program:

> Instruction shall be deemed home education if it consists of instruction in science, mathematics, language, government, history, health, reading, writing, spelling, the history of the constitutions of New Hampshire and the United States, and an exposure to and appreciation of art and music.

> Home education shall be provided by a parent for his own child, unless the provider is as otherwise agreed upon by the appropriate parties . . . .

RSA 193-A:4, I.

Respondent submits that it is parents who decide the purpose of education for their children, not the courts. At the very least, parents have a protected right to decide how best to meet the minimum educational requirements set out by the State. Those objectives were being exceeded by the home schooling Amanda received since first grade. Each year, in compliance with State law, Amanda was evaluated by a certified teacher or took national tests. (A. 112-125, 129; T. 113-16). After reviewing those reports and tests, including the IOWA test results (A. 112-121), the Meredith public schools promoted Amanda to the next grade. This was, by definition, an admission that Amanda was receiving all the benefits listed in RSA 193-E:2. It meant she could communicate effectively and think creatively and critically; analyze mathematical and scientific information in order to solve problems and make rational decisions; make informed choices as a responsible citizen; develop lifelong interests in the arts, language and literature; and acquire skills for lifelong learning, including interpersonal skills to enable her to learn, work, and participate effectively in a changing society. Id. Moreover, the court's own findings demonstrated that the Respondent was in complete compliance with the home schooling law. (A. 133, 179). Thus, the court's finding that Amanda lacked "critical thinking" which threatened her future is at odds with her undisputed school performance. Because the Respondent met or exceeded all educational objectives set out by the State, the court erred in imposing its own definition of the purpose of education to justify the outcome it demanded. Mother and child should not have to choose between their faith and their schooling choices. It was improper for the court to intervene as it did.

The Petitioner complains that home schooling will not provide Amanda with the proper socialization skills. That component, however, is not required by State standards, nor is it a proper element for the State to be involved in. Moreover, the Petitioner's complaint is contrary to the court's findings that Amanda is well-socialized. (A. 132).

Even if the court were justified in including "socialization" as a legitimate educational objective, it cannot be used as a rationale for ordering Amanda to be removed from home schooling for several reasons. First, it is not a proper part of any standard of review; nor has the court cited any authority for considering otherwise. Second, the court's own Order admits that the child is well-socialized. (A. 132). Third, the court failed to consider a myriad of alternatives that could address this concern in a "less intrusive manner". The evidence is undisputed that the Respondent (while not agreeing there was ever a problem) attempted to acknowledge and alleviate the Petitioner's concerns by enrolling Amanda in three public school courses. (A. 129; T. 131:9-14). Amanda is also involved in a variety of extra-curricular, non-church, activities. (T. 17, 48-49). Amanda also spends time with her step-sister and her father's family and friends. The Petitioner also bears responsibility for this concern, and had many opportunities to involve Amanda in other social environments that would address it. Therefore, the solution (if one is needed) was not to remove Amanda from her home schooling.

The court's own order admits that the record is clear that Amanda is well socialized. Thus, this harsh result was not supported by the facts or the law. In addition, the court's order increased the amount of time the Petitioner has with Amanda. Since the court granted this remedy and the Petitioner admitted it would solve the problem (T. 252: 2-8), the court went beyond what the father admitted was reasonable and proper.

It is significant to point out, consistent with the 2006 order, that nobody challenged Amanda's academic achievements that resulted from her home schooling. In ad-

dition to the "at or superior to grade level" finding (A. 132), the court further stated that "[t]he parties do not debate the relative academic merits of home schooling and public school: it is clear that the home schooling Ms. Voydatch has provided has **more than kept up with the academic requirements of the Meredith pubic school system.**" (A. 133) (emphasis added).

It is also worth noting that there was **no** psychological testimony in the record that public school is the required or even desired remedy for any perceived problem or shortcoming in the child. This was solely a solution advanced by the father and improperly adopted by the GAL and the court.

The court also appears to have agreed, inconsistently, with the allegation that there was a lack of intellectual independence. On the one hand, the court gives much credence to testimony from the GAL that Amanda "has not reached the point of view where she considers in an intellectual way the postives and benefits of different alternatives." (T. 204:6-8). It is difficult to reconcile that idea with a child who, as testified to by the same GAL, does things at her father's house that she does not want shared with her mother. (T. 204-05). Likewise, a child who "vigorously defends" her views does not lack critical thinking. The court appears to be trying, impermissibly, to tip the scales to determine what Amanda will or will not be allowed to defend.

II. THE COURT COMMITTED PLAIN ERROR BY CONSIDERING THE EXPERT TESTIMONY OF THE GUARDIAN AD LITEM WHO WAS NOT QUALIFIED AS AN EXPERT

"A plain error that affects substantial rights may be considered [by the Supreme Court] even though it was not brought to the attention of the trial court." N.H. Supreme Court Rule 16-A; see also, State v. Russell, 159 N.H. 475, 479 (2009). Plain error requires (1) an error, that is (2) plain, which (3) affects substantial rights and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings. Hilario v.

Reardon, 158 N.H. 56, 60 (2008). The order sending Amanda to public school meets all four criteria. Undisturbed, the ruling below allows unqualified "expert" testimony to create a presumption that public school attendance better serves *all* adolescents regardless of how well their home-education program *actually* meets their individual needs, which is at odds with education law in New Hampshire and valid research to the contrary. In its decision, the trial court committed plain error by ordering a change in Amanda's educational setting based *exclusively* on the unqualified opinion testimony of the guardian ad litem, who admitted she is not a brain expert (T. 15:1-11), yet testified regarding adolescent brain development and Amanda's *future* educational needs. This ruling should be reversed both because it is erroneous and to prevent other courts from committing a similar error.

In addition to the "at or superior to grade level" finding, the court further stated that "it is clear that the home schooling Ms. Voydatch has provided has more than kept up with the academic requirements of the Meredith public school system." (A. 133). In other words, Amanda's home schooling served her well.

However, the only evidentiary basis for the court's decision to place Amanda in public school was the unqualified opinion testimony of the GAL regarding Amanda's *future* developmental needs. It is clear from the opinion that the GAL's non-expert opinion was the exclusive basis for its findings. The trial court found that:

> The Guardian ad Litem concluded that Amanda's interests, and particularly her intellectual and emotional development, would be best served by exposure to a public school setting in which she would be challenged to solve problems presented by a group learning situation and by the social interactivity of children of her age.

(A. 131). The only evidence on brain development was from the GAL's testimony:

> [C]oupled with the additional research that I have been able to cobble together regarding adolescent brain development, has made me feel quite strongly that Amanda should begin public school this fall.

> What the brain – I'm not an expert in brain science, but I have taken advantage of a neurologist with whom I have a personal acquaintance. I've done some research. I've attended some seminars. And what I find is that around puberty, the brain, as well as the outer being, goes through tremendous changes. And during adolescence, the brain has the capacity to become both more efficient and to develop advanced skills.

(T. 15:1-11) (emphasis added).

To testify as an expert, Rule 702 of the New Hampshire Rules of Evidence requires such witnesses to be "qualified . . . by knowledge, skill, experience, training, or education". The GAL was not offered as an expert witness, was not qualified by the court as such, and the trial court took no testimony as to her qualifications on the science of juvenile brain development. Nevertheless, the court clearly relied on the GAL's opinion as if she were an expert. Contrary to Rule of Evidence 701, which permits opinion testimony by lay witnesses in limited circumstances, the GAL's opinions were not rationally based on either her own perception (as required by the rule), or her own expert knowledge, but rather on evidence in the form of "cobbled together" research, conversations with an unnamed personal acquaintance, and undisclosed "seminars." The GAL admitted under cross-examination that she "[doesn't] know if the [home school] curriculum addresses diverse thinking" (T. 56:3-4), and she was generally unfamiliar with more than a basic outline of Amanda's home school program. (T. 54-56).

A "guardian ad litem's report . . . is not binding on the judge or master because the difficult decision regarding custody must be made on the basis of *all the evidence.*" In re Pasquale, 146 N.H. 652, 657 (2001) (emphasis added). The "guardian ad litem's recommendations carry no more presumptive weight than any other evidence." Id. Yet in this case, despite evidence to the contrary, the trial court ordered Amanda to attend public school relying *exclusively* on non-expert *opinion* and pure speculation regarding Amanda's *future* well-being.

An "error is plain if it was or should have been obvious". State v. Lopez, 156 N.H. 416, 424 (2007). The trial court essentially announced a general rule or presumption in favor of public school for all adolescents when parents in custody disputes cannot agree. Such a rule is contrary to the express findings of the Legislature, which has affirmed home education as an appropriate alternative to public or private school, noting that "home education is more individualized than instruction normally provided in the classroom setting". Laws 1990, c. 279:2[5]; see also, RSA 193:1, I(b) and RSA 193-A.

In a custody case in Pennsylvania, the superior court refused to adopt a general rule that public school is by default in the child's best interest:

> On appeal, Father asks us, *inter alia*, to adopt a clear but narrow rule that requires children to attend public schools when parents who share legal custody cannot agree on home schooling versus public schooling. We decline to adopt such a rule or presumption. To the contrary, we hold that the well-established best interests standard, applied on a case by case basis, governs a court's decision regarding public schooling versus home schooling. Utilizing this standard, we affirm the trial court's order [to leave the children in a home-education program].

Staub v. Staub, 960 A.2d 848, 849 (Pa. Super. 2008). Staub's "case by case" analysis required specific evidence about the best interests of the particular child. The GAL's "opinions" in this case about the brain development of *all* adolescents do not meet this standard. Therefore, the decision "lacks a sound and substantial basis in the record." Pasquale, 146 N.H. at 654.

"[T]o satisfy the burden of demonstrating that an error affected substantial rights, the plaintiff must demonstrate that the error was prejudicial, i.e., that it affected the outcome of the proceeding." Hilario, 158 N.H. at 60. The GAL was the *only* person to testify regarding Amanda's "brain development". Only by relying on this non-expert opin-

[5] The Legislature's findings have been borne out in practice. See T. Dumas, S. Gates, & D. Schwarzer, Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research, Widener L. Rev. (in press), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317439, for a catalogue of all available social research demonstrating home schoolers' educational and social competence.

ion could the trial court conclude that "Amanda's interests, and particularly her intellectual and emotional development, would be best served by exposure to a public school setting." (A. 131). When reviewing "the entire record," Russell, 159 N.H. at 491, it is clear that Amanda was thriving in her home-education program.

Finally, the trial court's error seriously affected the fairness, integrity and reputation of the proceedings. As explained in Hilario, "because the trial court's ruling dismissed the plaintiff's action on a basis expressly prohibited by the superior court rules, to allow the ruling to remain would seriously affect the fairness and integrity of judicial proceedings." 158 N.H. at 61. The trial court's creation or use of a rule or presumption that favors one form of legitimate education over another is contrary to the laws of New Hampshire and valid scientific research to the contrary, and therefore seriously affects the fairness and integrity of judicial proceedings. Accordingly, the trial court's decision should be reversed.

III. THE TRIAL COURT'S ORDER VIOLATES THE CONSTITUTIONAL GUARANTEES TO PARENTAL RIGHTS AND THE FREE EXERCISE OF RELIGION

A. The Order Treads upon Fundamental Parental Rights

The Supreme Court has repeatedly affirmed that the "rights of parents to make decisions concerning the care, custody, and control of their children" are "fundamental." Troxel v. Glanville, 530 U.S. 57, 66 (2000) (citing, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Parham v. J.R., 442 U.S. 584, 602 (1979); Santosky v. Kramer, 455 U.S. 745, 753 (1982)). This Court has also repeatedly affirmed that these fundamental parental rights are sacrosanct. See, e.g., State v. Robert H, 118 N.H. 713, 715 (1978); Appeal of Peirce, 122 N.H. 762, 768-69 (1982) (Douglas and Brock, JJ., concurring). "'The history and culture of Western civilization reflect a strong tradition of parental

concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition . . . .'" Id. at 768 (quoting Yoder, 406 U.S. at 232). "[W]hile the State may adopt a policy requiring that children be educated, it *does not have the unlimited power to require they be educated in a certain way at a certain place. Home education is an enduring American tradition and right* . . . ." Id. at 768-69 (emphasis added; citation omitted).

The parental right concerning education "is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme Court]." Troxel, 530 U.S. at 65-66. Thus, any state action that impinges on a parent's rights in training and educating a child is subject to strict scrutiny. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (stating that government "impinge[ment] upon a fundamental right explicitly or implicitly protected by the Constitution . . . requir[es] strict judicial scrutiny"); Troxel, 530 U.S. at 80 (Thomas, J., concurring) (finding that "strict scrutiny" applies to "infringements of fundamental rights" of parents). "In order to withstand strict scrutiny, the [state] must advance a compelling state interest by the least restrictive means available." Bernal v. Fainter, 467 U.S. 216, 219 (1984). In this context, before a state court can trump a custodial parent's direction and choices concerning a child's education, the usurpation must be justified by a compelling state interest that cannot be furthered in some more narrowly tailored, less intrusive means.

Here, the Order's only justification for forcing Amanda to cease home schooling was that there is ostensibly some "debate center[ing] on whether enrollment in public school will provide Amanda with an increased opportunity for group learning, group interaction, social problem solving, and exposure to a variety of points of view." (A. 133). That rationale fails constitutional scrutiny. Because of the "at or superior to grade level"

finding (A. 132), it was unreasonable for the court to suggest that Amanda requires public school enrollment to improve her social or critical thinking skills. Thus, there is no compelling State interest that withstands strict scrutiny.

New Hampshire law has long recognized the legitimacy and merit of home schooling, regardless of whether or how much participating students may mingle and mix with other children. The legislative intent of the State's home school law, as codified in RSA 193-A, was stated as follows:

> The general court recognizes, in the enactment of RSA 193-A . . . that it is the primary right and obligation of a parent to choose the appropriate educational alternative for a child under his care and supervision, as provided by law. One such alternative allows a parent to elect to educate a child at home as an alternative to attendance at a public or private school in accordance with RSA 193-A. The general court further recognizes that home education is more individualized than instruction normally provided in the classroom setting.

Laws 1990, c. 279:2. Individualized instruction is viewed, and has always been viewed, as a positive feature of home schooling, rather than a deficiency that must be remedied.

1. The Trial Court's Decision Did Not Advance the State's Alleged Interest by the Least Restrictive Means

As noted above, to withstand strict scrutiny, the State "must advance a compelling state interest by the least restrictive means." Bernal, 467 U.S. at 219. The court here, however, failed to design a solution that was the "least restrictive" necessary to address the perceived/alleged concern, and failed to make specific findings that counseling for the child, something both parents said they would allow Amanda to do (T. 27, 147, 232), and/or counseling between all parties (something which was not discussed but which the court obviously did not consider), would address these concerns.

The record, moreover, showed that Amanda "is an active participant in the [Meredith public schools' art, Spanish, and physical education classes] and is adapting well and making friends and keeping up with the work." (A. 130). Nonetheless, the trial court

seemed bothered by reports of a counselor who opined that Amanda "lack[s] some youthful characteristics" (A. 130), and of the guardian ad litem who suggested that Amanda somehow needs further "exposure to different points of view at [this] time in her life". (A. 131).

The trial court claimed that neither party suggested that the court should pursue less restrictive means. (A. 183). Yet, one of the Respondent's requested findings asked for exactly that: "There are less drastic ways for Amanda to be socialized, develop creative thinking, gain exposure to diversity and find opportunities to experience team building, without needing to put her into the public school system." (A. 102 (¶35)). This request was denied without explanation.

Another request stated that "[i]t is possible for Amanda to remain home schooled and still have the benefit of diverse interaction with children in the community." (A. 102 (¶36)). That request was neither granted nor denied. Indeed, the court chose to remain silent on this issue, offering no explanation as to why it did so.

Another requested finding stated that "[t]he home school curriculum can be supplemented with other community activities [by both parents] so as to provide Amanda with a well-rounded life". (A. 103 (¶39)). That request was actually granted. Such a finding was inconsistent with the remedy the court fashioned. Instead, the court took the position that public school is the only way to accomplish the Petitioner's stated concerns. This sets a dangerous legal precedent which leaves every parent to reasonably expect that all courts will assume that public schools are per se the default, State-sanctioned, preferred method to achieve the purpose of an education. This Court should not allow such precedent to stand.

The court's ruling is also inconsistent even with the Petitioner's own admissions that there are alternate solutions. For instance, Petitioner stated that Amanda's counselor

suggested that she needed more exposure to other views (T. 231:1-5), yet she did not recommend public school. The Petitioner also agreed that Amanda could be exposed to more views through increased time with him (T. 231:6-13, 252:2-8). He also asked for continued counseling for the child as the solution. (T. 232:2-8).

The trial court's decision is also hard to reconcile with two other requested findings that it granted:

> 63. New Hampshire refuses to restrict the visitation rights of a parent absent a showing of harm to the child from exposure to a different religious environment. Chandler v. Bishop, 142 NH 404, 412, 1997.
>
> 64. New Hampshire courts "seek the path of least intrusion on the religious inclinations of parents that is compatible with their children's welfare." Id. at 413.

(A. 105 (¶¶63, 64)).

Additional peer group interaction through local community organizations, or social clubs, or athletic club opportunities, to name a few, would be much less intrusive and achieve the same ends – if those ends were even appropriate for the court to consider. By failing to do so, the Order cannot withstand strict constitutional scrutiny.

B. The Order Undermines the Free Exercise of Religion

It has also been long established that the First Amendment to the Constitution also protects the right of parents to direct their children's education in conjunction with the free exercise of their religion. See, e.g., Yoder, 406 U.S. 205 (1972) (the state could not compel Amish children to attend high school in violation of their religious beliefs); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (a 1922 Oregon statute that sought to ban all private education and compel children to attend public schools held unconstitutional). This Court said the Oregon law in Pierce violated parents' rights because "[t]he implicit intent of this action was to *promote uniformity by forbidding . . . religious groups*

to educate their children in a manner they desired." Peirce, 122 N.H. at 768 (Douglas and Brock, JJ., concurring) (emphasis added).

Many other federal and state courts have applied the fundamental rights/strict scrutiny standard analysis in this context, and upheld the free exercise rights of parents. See, e.g., Peterson v. Minidoka Cty. Sch. Dist. No. 331, 118 F.3d 1351 (9th Cir. 1997); Brunelle v. Lynn Public Schs., 702 N.E.2d 1182 (Mass. 1998); People v. DeJonge, 501 N.W.2d 127 (Mich. 1993); Minnesota v. Newstrom, 371 N.W.2d 525 (Minn. 1985); State v. Popanz, 332 N.W.2d 750 (Wis. 1983); Roemhild v. State, 308 S.E.2d 154 (Ga. 1984); Bangor Baptist Church v. State of Maine, 576 F.Supp. 1299 (D. Maine 1983); Delconte v. State, 329 S.E.2d 636 (N.C. 1985); Grigg v. Commonwealth, 297 S.E.2d 799 (Va. 1982).

The Order here was wrong to opine that Amanda may be too "rigid" on "questions of faith", and too "vigorous [in] defense of her religious beliefs". (A. 130, 132). If allowed to stand, the trial court's rationale in ordering Amanda to attend public school in the face of evidence demonstrating her academic and social success as a home schooler, will undermine home schooling rights of every parent because these same arguments could apply in non-custody cases. Indeed, the principles announced in Society of Sisters more than 80 years ago are still applicable today, and should be reaffirmed here.

IV. THE TRIAL COURT'S DECISION SHOULD BE REVERSED BECAUSE IT WAS IMPROPERLY INFLUENCED BY THE TESTIMONY OF THE GUARDIAN AD LITEM WHO WAS BIASED AGAINST RELIGION

The GAL admitted to her bias when she testified: "**My recommendations have been somewhat swayed by** the way she – **the way her religion causes Amanda to shut out points of view and areas of consideration**, and shut out the thinking about points of view." (T. 203:22-204:2) (emphasis added). "She was very adultified", the GAL continued, "and highly identified with her mom's views and her mom's – **the rigidity of her**

mom's religious beliefs and how that orders her thinking causes me to believe that Amanda would be best served by starting public school as soon as possible." (T. 16:7-11) (emphasis added). This bias can also be seen in the heavy reliance in the first GAL report (which ironically does not recommend public schools) on substantive religious issues (A. 61, 63) and on the views of the father, which were that associating with Christians is not good for Amanda. (T. 233:11-13, 262:12-21). The obvious assumption by both the GAL (T. 81:23 to 82:2) and the father – that Christians are closed-minded people who are to be avoided and/or whose influence on a child needs to be counter-balanced – amounts to both religious prejudice and a gross violation of constitutional principles.[6]

All of the Respondent's personal references (including Amanda's aunt, pastor and Patch teacher), who had superior knowledge of Amanda's relationship with her mother, who were familiar with mother and daughter's religious beliefs, and were familiar with Amanda as a person in general, were not interviewed by the GAL despite the fact that the Respondent asked her to do so. (T. 37:20 to 38:16, 196:14-16). The GAL even refused to interview Amanda's step-father. (T. 37:13-14). In contrast, the GAL did interview Amanda's step-mother and paternal grandparents. (A. 55).

As the Respondent testified at trial, the GAL literally crossed people off the list if they were Christians. (T. 147:18 to 148:2). The GAL did not deny doing so. Moreover, the GAL refused to read home school research given to her, stating "I don't want to hear it. It's all Christian based." (T. 148-49, 209:11-15). This religious hostility disqualifies someone whose charge is to objectively report to the court relevant facts bearing on the appropriateness of Amanda's home schooling environment and/or curriculum. The GAL

[6] The court's statement "The evidence about particular tenets of Ms. Voydatch's faith was limited to those tenets which were reported in Amanda's statements to her parents, to the Guardian ad Litem, and to her counselor" (A. 181) is of little comfort in light of the facts noted here and elsewhere in the brief.

also revealed her bias in favor of public school to the Respondent when she said, "If I want her in public school, she'll be in public school." (T. 148:20-22).

The Respondent testified to the GAL's bias under oath at trial. (T. 147-49). The GAL's response was that she has not known the Respondent to lie. (T. 209:6-7). Such an admission by the GAL as to her bias is extraordinary testimony and extremely uncommon.

Given several of the court's findings (A. 106 (¶¶66-68)), the GAL testimony should not have been given any more presumptive weight than the Respondent's. Yet the lower court stated in its July 14, 2009 Order that it gave more weight to the GAL's testimony. (A. 132-33). This finding seems to have been particularly influenced by the Respondent's claim that Amanda only confided her true feelings to her mother, and the court didn't believe this because the GAL testified that the child had confided certain things only to the GAL. (T. 204-08). Yet Respondent was not allowed to inquire as to the alleged confidences. (T. 208:14-17). This denial by the court deprived her of the right to confront witnesses so that the court could make a fully-informed decision as to the credibility of all witnesses, including Respondent's and seriously compromised the Respondent's claims and rights.

The GAL had an acknowledged bias against the religious beliefs held by Amanda and her mother and therefore all or most of her testimony should have been disregarded for lack of objectivity. The GAL disregarded relevant evidence and refused to consider the testimony and evidence of key witnesses due solely to the fact that they were connected with Christianity. The GAL's bias should not have been rewarded by the court and no weight should have been given to her testimony or recommendations regarding school placement.

The repeated theme throughout the court's Order centers around the religious views of the Respondent and Amanda and the need to "expose" Amanda to "a variety of points of view." The court even goes so far as to imply it was improper for the Respondent to encourage Amanda to adopt her religious beliefs.

> *[i]t would be remarkable if a ten year old child who spends her school time with her mother and the vast majority of all of her other time with her mother would seriously consider adopting any other religious point of view. Amanda's vigorous defense of her religious beliefs to the counselor suggests strongly that she has not had the opportunity to seriously consider any other point of view.*

(A. 132) (emphasis added). The Order assumes that because Amanda has sincerely held Christian beliefs, there must be a problem. It is a parent's constitutionally protected right, however, to train their children in the religious beliefs they hold. It is not for the court to suggest that a ten-year old should be "exposed" to other religious views contrary to the faith of her parents. The court's narrative implies that ten-year olds are legally too young to form opinions and that they are not yet allowed to have sincerely held Christian beliefs. These are dangerous precedents and should not be allowed to stand.

The court makes no mention of the fact that the Petitioner took Amanda to church until age seven (T. 255:14-20), when he ceased doing so because, as he testified, "she is starting to hear and take in and believe in certain things that I'm not sure are what I believe in". (T. 256:2-5) (emphasis added). Thus, the Respondent's exposure of Amanda to Christianity is consistent with the Petitioner's past actions. The Petitioner changed his mind about religion and now seeks to interfere with his daughter's beliefs. The court correctly noted "its obligation not to consider the specific tenets of any religious system unless there is evidence that those tenets have been applied in such a way as to cause actual harm to the child." (A. 133-34). The court then acknowledged that "[t]he evidence in this case does not rise to that level". (A. 134). To the contrary, however, it would appear

that the court did impermissibly take sides with regard to the issue of religion and preferred one religious view (the absence of religion and/or the belief that tolerance and diversity are more important than having firmly held beliefs) over another (firmly held Christian beliefs).

Even if the court could articulate a legally cognizable concern regarding Amanda's religious upbringing and the lack of "exposure to other views", the court could not expect a public school to be the source of exposure to a multitude of religious views. Therefore, the remedy was not to remove Amanda from home schooling. Moreover, it was an abuse of discretion not to consider other options. (See Section IIIA1 above).

The Respondent does not concede that she is required to adopt the court's view that Amanda should be introduced to a variety of competing world views, but nonetheless testified that she taught other world views to Amanda. (T. 139:5-10). It is a fundamental right of a parent to raise their child according to the holdings of the parent's religion and beliefs regardless of the court's preferences. Mother and child should not have to choose between their faith and their schooling choices and it was unconstitutional for the court to interfere with either.

One of the lower court's main concerns was the allegation that the mother's religion and influence on Amanda negatively affected the father-daughter bond. Yet the Petitioner testified that everything was "absolutely perfect." (T. 219:12-16). The Petitioner also forbade Amanda from even mentioning the child's step-father's name, something the GAL noted as a serious problem. (A. 61; T. 43:12-20). The Petitioner was so oblivious to his negative impact on the child that he testified he wasn't even aware of a certain problem until the GAL called him. (T. 250:15 to 251:1). Issues of the Petitioner's anger were also part of the testimony. (T. 41:18-20, 42:5-7, 43:1-3, 74:21-23). Yet the Petitioner's shortcomings were not even a minor part of the court's analysis in its orders. It is

more likely that the problem in the father-daughter dynamic is the father. Changing schools not only will not solve this problem, but runs the high risk of making it worse.

The claim of religious rigidity also lacks credibility for two reasons. First, the Petitioner testified that he has not talked about salvation with Amanda in three or four years. (T. 225:4-6). Second, it was uncontradicted that Amanda loves and has healthy relationships with other "unsaved" people, including her half-sister, Julia, stepmother (A. 61), maternal grandparents, step-father's whole family, and paternal grandfather. (T. 192-93). The claim of religious rigidity causing a lack of critical thinking also contradicts the Petitioner's own testimony, which was that he took the child to an Episcopal church (not the child's normal church) and there were no problems. (T. 257:4-14). Viewed in this light and in the context of the Petitioner's legal assertions in court documents (A. 4-5, 45 (¶4), 61, 63, 66 (¶¶6, 7)), it appears the religious intolerance emanates from the father, not Amanda.

CONCLUSION

For the reasons stated above, the Respondent-Appellant, Brenda A. Kurowski, respectfully requests that this Court reverse the Order of the Family Court requiring that Amanda Kurowski attend public school.

REQUEST FOR ORAL ARGUMENT

The Respondent-Appellant, Brenda A. Kurowski, hereby requests oral argument. It is estimated that the Appellant will need fifteen minutes for such argument. John Anthony Simmons, Sr., Esq., will present oral argument on behalf of the Appellant.

Respectfully submitted,
BRENDA A. KUROWSKI,
By and through her attorney,

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Dated: May 17, 2010

CERTIFICATE OF SERVICE

I, John Anthony Simmons, Sr., hereby certify that on the 17 day of May, 2010, I served two copies of the foregoing Brief of the Respondent-Appellant, Brenda A. Kurowski, on all counsel of record, via first class mail, postage pre-paid, to the following:

Joshua L. Gordon, Esq.
26 South Main Street, No. 175
Concord, NH 03301

ADDENDUM OF STATUTES AND RULES

A. NEW HAMPSHIRE STATUTES

RSA 193-A:4, I Home Education; Defined

Instruction shall be deemed home education if it consists of instruction in science, mathematics, language, government, history, health, reading, writing, spelling, the history of the constitutions of New Hampshire and the United States, and an exposure to and appreciation of art and music. Home education shall be provided by a parent for his own child, unless the provider is as otherwise agreed upon by the appropriate parties named in paragraph II.

RSA 461-A:6, I Determination of Parental Rights and Responsibilities; Best Interest

I. In determining parental rights and responsibilities, the court shall be guided by the best interests of the child, and shall consider the following factors:

(a) The relationship of the child with each parent and the ability of each parent to provide the child with nurture, love, affection, and guidance.

(b) The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.

(c) The child's developmental needs and the ability of each parent to meet them, both in the present and in the future.

(d) The quality of the child's adjustment to the child's school and community and the potential effect of any change.

(e) The ability and disposition of each parent to foster a positive relationship and frequent and continuing physical, written, and telephonic contact with the other parent, except where contact will result in harm to the child or to a parent.

(f) The support of each parent for the child's contact with the other parent as shown by allowing and promoting such contact.

(g) The support of each parent for the child's relationship with the other parent.

(h) The relationship of the child with any other person who may significantly affect the child.

(i) The ability of the parents to communicate, cooperate with each other, and make joint decisions concerning the children.

(j) Any evidence of abuse, as defined in RSA 173-B:1, I or RSA 169-C:3, II, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.

(k) If a parent is incarcerated, the reason for and the length of the incarceration, and any unique issues that arise as a result of incarceration.

(l) Any other additional factors the court deems relevant.

RSA 461-A:11 Modification of Parental Rights and Responsibilities

I. The court may issue an order modifying a permanent order concerning parental rights and responsibilities under any of the following circumstances:

(a) The parties agree to a modification.

(b) If the court finds repeated, intentional, and unwarranted interference by a parent with the residential responsibilities of the other parent, the court may order a change in

the parental rights and responsibilities without the necessity of showing harm to the child, if the court determines that such change would be in accordance with the best interests of the child.

(c) If the court finds by clear and convincing evidence that the child's present environment is detrimental to the child's physical, mental, or emotional health, and the advantage to the child of modifying the order outweighs the harm likely to be caused by a change in environment.

(d) If the parties have substantially equal periods of residential responsibility for the child and either each asserts or the court finds that the original allocation of parental rights and responsibilities is not working, the court may order a change in allocation of parental rights and responsibilities based on a finding that the change is in the best interests of the child.

(e) If the court finds by clear and convincing evidence that a minor child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature minor child as to the parent with whom he or she wants to live. Under these circumstances, the court shall also give due consideration to other factors which may have affected the minor child's preference, including whether the minor child's preference was based on undesirable or improper influences.

II. For the purposes of this section, the burden of proof shall be on the moving party.

B. NEW HAMPSHIRE RULES OF EVIDENCE

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the testimony or the determination of a fact in issue.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

C. NEW HAMPSHIRE SUPREME COURT RULES

Rule 16-A. Plain Error

A plain error that affects substantial rights may be considered even though it was not brought to the attention of the trial court.