Published in the January 21, 2015 Edition

New Jersey Law Journal

Addressing Preschool in Custody Agreements

Madison v. Davis and Other Considerations

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When most of today's practicing attorneys were young children, preschool enrollment was considered an option, not an expectation. Over the years, preschool has evolved to be the foundation of a child's education. In 2009, the New Jersey Core Curriculum Content Standards were revised to better align preschool standards with later learning. In other words, similar to college being considered the new high school, preschool has become the new kindergarten.

According to a 2014 report released by Kids Count, New Jersey ranks among the top in the nation for preschool attendance. Given the importance of preschool to a child's educational foundation as well as the increased attendance, the issue of preschool must be more comprehensively addressed in custody agreements.

But what happens when unmarried parents disagree on where their child should attend preschool? What if one parent is unhappy with the current preschool and wants to enroll the child in another? These issues frequently arise.

Fortunately, the recently published trial decision of *Madison v. Davis*, 43 N.J. Super. 20 (Ch. Div. 2014), sheds some light on this dilemma. Although this decision is not binding on other courts, it is nevertheless persuasive and provides guidance to attorneys addressing this issue.

In *Madison*, the parties were divorced for only four months before returning to court. Their child was attending a particular preschool that also served as their work-related childcare. They had already agreed to share the costs. However, their agreement did not address whether they were prohibited from changing preschools.

The mother, who was the parent of primary residence (PPR), wanted to change the child's preschool. The father disagreed. He argued that since they shared "joint legal custody," he had an equal say regarding education issues according to the landmark New Jersey Supreme Court case of *Beck v. Beck,* 86 N.J. 480 (1991). The mother, on the other hand, argued that preschool selection is not a major education issue that falls within the parameters of legal custody. She claimed that their preschool served as a daycare provider and, as the PPR, it was her prerogative to change providers. Her position seemed supported by another landmark New Jersey Supreme Court case, *Pascale v. Pascale,* 140 *N.J.* 583 (1995).

The court found that neither the generic principles in *Beck* nor *Pascale* provided a definitive answer as to how to address the issue. Primarily, this is because preschool is neither pure "school" nor pure "daycare." The court particularly noted that although a child's attendance at preschool is beneficial (both academically and socially), it is not mandated in New Jersey. As such, the court created a seven-step analysis to follow when addressing parties' disagreements regarding where their child should attend preschool:

(1) If the purpose of the preschool program is primarily to fill the need for work-related childcare, the primary residential custodian has the initial right to select the program or transfer the child to another program.

(2) The choice must be reasonable, which considers cost, location and accessibility, hours and days of operation, curriculum, and other "ancillary services."

(3) Assuming there is no restraining order or other court order restricting the parents' communication, the residential custodian must provide the non-custodial parent with notice of any proposed change in the provider in a "reasonably timely fashion".

(4) The non-custodial parent has the right to investigate and

evaluate the proposed preschool. He/she cannot simply refuse without justification. The non-custodial parent must file a motion with the court and prove, by a preponderance of evidence, that the proposed preschool is "unreasonable and contrary to the child's health, education, general welfare and best interests."

(5) If the non-custodial parent disagrees with the proposed preschool, he/she must specifically demonstrate there is a "specific, more reasonable alternate plan."

(6) Based on the case presented, the court will issue a ruling concerning the child's attendance at preschool and each parent's financial contribution towards it.

(7) If the court determines either party acted unreasonably, it may award counsel fees and/or sanctions.

In addition to delineating the above procedure, the court also ruled that the non-custodial parent may remove the child from preschool during the day if: (1) reasonable notice is given to the PPR and the school; and (2) the request for the "occasional extra time is reasonable."

Although *Madison* provides guidance for cases with similar circumstances, it is seemingly silent regarding whether the same analysis should apply if the preschool is not also serving as work-related childcare. Furthermore, the trial court specifically noted that this analysis would not apply to a case in which the parents share joint residential custody and neither parent is the PPR.

As family law attorneys and mediators, it is our responsibility to help our clients reasonably contemplate future issues they may not foresee. As such, *Madison* should serve as an impetus for practitioners to provide more detailed guidance not only on the issues of preschool and work-related childcare, but other provisions in a custody agreement impacted by this area. We therefore offer the following tips to family law practitioners when negotiating and drafting custody agreements:

1. Do not underestimate the potential impact of the PPR/PAR designations.

The Appellate Division case of *Benisch v. Benisch*, 347 N.J. Super. 393 (App. Div. 2002) provides a detailed definition of the PPR/PAR designations. Basically, the PPR is the parent with whom the child spends more than 50% of the annual overnights. The PAR is the parent with whom the child resides when not living in the primary residence. We now know from *Madison* that such a designation may greatly impact preschool selection.

If the PAR wants to ensure his/her involvement in the selection of preschool, the custody agreement should specifically set forth that the parties are waiving the *Madison* analysis and shall have an equal say in selecting the preschool. The use of an "anti-*Madison* clause" would be similar to the anti-*Lepis* clause we often include in agreements regarding the nonmodifiability of alimony.

2. Address whether the child will attend preschool, even if it is not needed as work-related childcare.

The *Madison* analysis seems to only apply when the preschool is functioning primarily as work-related childcare. If it does not, the custody agreement should address whether the parties still want to apply the *Madison* doctrine, include an anti-*Madison* clause or address it in some other way. The agreement should also contemplate how long the child will attend preschool before kindergarten.

3. Designate a procedure for choosing or changing pre-schools.

The *Madison* decision provides various factors to consider in selecting a preschool. If the parties choose to consider additional factors, such as their child's personality and/or special needs, they should be specifically noted in the custody agreement. Further, the agreement should delineate the protocol for changing preschools, such as requiring a minimum notice period the parent requesting the change must provide to the other. Both parents should have a reasonable opportunity to visit and research the preschool. Neither parent should be permitted to unilaterally withdraw the child absent consent.

4. Consider the existence of any special needs.

The diagnosis for developmental disabilities in very young children (including infants and toddlers) has substantially increased over the last several years. If at the time of the agreement, a child has already been diagnosed with a developmental disability (such as Autism Spectrum Disorder or Sensory Processing Disorder) or a parent suspects that such a diagnosis is forthcoming, a typical preschool or daycare center may not be in that child's best interest.

A child's special needs also affect the selection of the child's health insurance. For example, New Jersey's Autism Insurance Act requires insurance plans regulated by the State of New Jersey and local governments to provide coverage for expenses incurred for "medically necessary occupational therapy, physical therapy and speech therapy." This includes services provided by preschool-structured organizations, which could be considered as an alternative to daycare or preschool that is more suitable for the child and covered by the insurance company.

When negotiating the child's health insurance coverage in the

agreement, bear in mind that self-funded or federally-regulated plans are not required to comply with the Act. Thus, if only one parent has State-regulated or local government insurance available to them, consider whether the child should be covered under that parent's policy.

5. Provide for a mediation clause.

The unfortunate reality is that parents who repeatedly litigate against each other are less likely to be capable of constructively communicating and co-parenting. Custody mediation is designed to empower parents to jointly make decisions rather than becoming entangled in the expensive, time-consuming and unpredictable web of litigation. When appropriate, custody agreements should include a clause requiring the parents to attend mediate non-emergent custody issues. Some counties will even permit the parties to attend court-sponsored parenting time mediation for post-judgment issues.

We recognize that, at first glance, the holding in *Madison* seems to apply to a select few cases that make up our practices – custody agreements involving children who are preschool age or younger. Even so, attorneys must be mindful that the most important element of a case is the best interest of the child. To quote Judge Jones in *Madison*, parents must recognize that they need to minimize post-judgment litigation and function effectively as co-parents "of a very young child whose happiness and well-being clearly depends on both parents' ongoing ability, and willingness, to reasonably communicate and cooperate with each other on important issues."

We should assist our clients in carving a path that will hopefully minimize their post-judgment issues, especially those that pertain to children. This will allow them to concentrate on effectively co-parenting in two homes rather than waging war in the courtroom.

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