

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2000-146, In the Matter of Gerard F. Cote and Amy L. Miller (f/k/a) Cote, the court upon May 16, 2001, made the following order:

In this post-divorce proceeding, Gerard F. Cote appeals from a decree by the superior court approving the recommendation of the marital master to modify the custody of a child. Cote and Amy L. Miller divorced in 1997 after a three-year marriage. The court adopted their stipulated final order of divorce, which provided for joint legal and physical custody of their then two-year-old daughter Danielle. Both parties have since remarried. At the time of the divorce, Cote resided in New Hampshire and Miller resided in Massachusetts; that situation continues to this day. The award of joint physical custody, which contemplated a general equality in the custodial time of each parent, was superimposed on this geographic disparity. In 1998, Miller moved to modify the joint physical custody arrangement, seeking physical custody of Danielle, subject to reasonable visitation rights for Cote. The court approved the master's recommendation and awarded "primary physical custody" to Miller, providing for a modified schedule of custodial time for both Miller and Cote. Cote brought a motion for reconsideration arguing that the superior court erred in awarding "sole" physical custody of Danielle to his former spouse under the standard enunciated in Perreault v. Cook, 114 N.H. 440 (1974). The superior court affirmed its earlier decree concerning "custodial and physical placement" of Danielle, and determined that "maintaining a joint custodial arrangement is harmful to the child in accord with the Perreault standard."

In Perreault, we stated that "[t]he relationship established by the custody award should not be disturbed unless the moving party demonstrates that the circumstances affecting the welfare of the child have been so greatly altered that there is a strong possibility the child will be harmed if he continues to live under the present arrangement." Perreault, 114 N.H. at 443. We need not determine if the trial court was correct in its application of the Perreault standard to the facts of this case. The stipulated proposed final order of August 26, 1997 (the order), agreed to by both parties and approved by the trial court, provides for the modification of the "custodial time of each parent" once Danielle is "of school age." Such modification in the custodial time schedule does not mandate a change from joint to primary physical custody of Danielle.

Paragraph 2(b)(1) ("Custody") of the order provides that "[p]hysical care and custody of the minor child is awarded to the parties jointly." Further, paragraph 3(b) ("Custodial Guidelines") of the order provides:

Until the child is of age to attend formal schooling (kindergarten/first grade) the custodial time of each parent is expected, generally, to be

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equal over the course of any (3) month period. Once the child is of school age the parties shall negotiate a schedule in keeping with the best interests of the child.

Finally, paragraph 3(k)(1) of the order provides, in part:

Any apparently unresolvable differences or disagreement between the parties as to these guidelines or custodial time shall, in the first instance, be addressed through formal mediation conducted by a New Hampshire certified/licensed or otherwise qualified family mediator agreed to by the parties.

Danielle was born in September 1994. She is now almost seven years old and is, obviously, "of school age." The provision of paragraph 3(b) for generally equal custodial time between the parents is now moot. Consequently, the parties are mandated to schedule custodial time to accommodate Danielle's schooling. It is clear from the record that formal mediation between the parties toward this end has proved fruitless. Accordingly, the trial court is tasked with scheduling the custodial time for each parent in keeping with Danielle's best interests, as provided for in its August 1997 order. The trial court's decree of August 5, 1999, is vacated and the matter is remanded for further proceedings consistent with this order.

Vacated and remanded.

BROCK, C.J., and BRODERICK and DUGGAN, JJ., concurred.

**Howard J. Zibel,
Clerk**

Date of clerk's notice of decision: May 18, 2001

Distribution:

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