National Business Institute
Seminar

CHILD CUSTODY AND VISITATION
IN NEW YORK

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In New York there is no *prima facie* right to the custody of a child between parents. Domestic Relations Law Section 70. Normally, only parents have the right to seek custody. Whichever parent the child lives with, absent a court order, that parent has physical custody. Physical custody refers to where the child lives. It is also called residential custody. Legal custody refers to which parent has decision making authority.

I. JOINT CUSTODY

Joint custody is the legal mechanism that allows both parents equal decision making authority and an equal role in rearing their children. Joint custody was recognized by the Court of Appeals in Braiman v. Braiman, 44 N.Y.2d 584 (1978). It presupposes that the parents can and will work together for the betterment of their children's physical and emotional lives. Joint custody in its purest form gives both parents equal decision making authority and physical custody is freely shared. Joint custody works best when the parents live in close proximity to one another

which allows their child to move freely between the parents separate homes. Needless to say, joint custody requires mutual trust and respect and acknowledgment of the importance of each parent's role in contributing to their child's healthy emotional growth and development. While a Court can order joint custody over the objection of one parent, it is usually awarded on consent of both parents. The Court of Appeals noted joint custody was not appropriate where the parents could not communicate with one another.

Joint custody tries to solve the problems of sole custody by giving the child access to both parents and granting the parents equal rights and responsibilities to the child. Awarding joint custody can avoid one parent 'winning' and the other parent 'losing' and the often deleterious impact of one parent having excessive power over the child to detriment of the other parent.

II. CHILD CUSTODY LITIGATION

Only biological and adoptive parents have standing to seek custody. *De facto* parents do not have standing to seek custody from the biological or adoptive parents following a divorce[1]. All custody decisions must be made in the best interests of the child. The Court acting as *parens patriae*[2], determines custody

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1The equitable principles of estoppel may provide the *de facto* parent with standing to seek custody. See, e.g. Matter of Arriaga v. Dukoff, A.D.3d , 2014 Slip Op. 08990 (2nd Dept.2014).

2*Parens Patriae* refers to the inherent power of the Court to act for defenseless individuals, here children, who are not able to care for themselves.

based solely on what is in the best interests of the child. The standard by which the Court is guided is to make every effort to determine "what is for the best interest of the child, and what will best promote [the child's] welfare and happiness." See Eschbach v Eschbach, 56 NY2d 167 [1982], quoting DRL 70.

In reaching a custodial determination that is in the best interests of the child, the Court will review the totality of the circumstances presented. See Friederwitzer v Friederwitzer, 55 NY2d 89 [1982]; Hom v Hom, 249 AD2d 447 [2nd Dept. 1998]. In making a "best interest" determination, the factors to be considered include the quality of the home environment and the parental guidance provided for the child; the ability of each parent to provide for the child's emotional and intellectual development; the financial status and ability of each parent to provide for the child; the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent. See Eschbach v Eschbach, supra; Matter of Ring v Ring; 15 AD3d 406 [2nd Dept. 2005]; Miller v Pipia, 297 AD2d 362 [2nd Dept. 2002]. In addition, the courts may consider the length of time of the present custody arrangement (see Fanelli v Fanelli, 215 AD2d 718 [2nd Dept. 1995]; Matter of Garvin v Garvin, 176 AD2d 318 [2nd Dept.], mot lv. app den 79 NY2d 752 [1992]), and which parent is the more likely to assure meaningful contact between the child and the non

custodial parent. See Matter of Green v Gordon, 7 AD3d 528 [2nd Dept. 2004]; Matter of Dobbins v Vartabedian, 304 AD2d 665 [2nd Dept.], mot lv. app den 100 NY2d 506 [2003].

Confronted with the often daunting task of determining which parent is to be awarded primary custody, a court must carefully weigh the conflicting testimony, determine credibility, employ expert witnesses, and make findings of fact on which the ultimate determination can be supported. In making child custody determinations, courts will evaluate the testimony, credibility, character, temperament, demeanor and sincerity of the parties and their witnesses. See, Matter of Rory H. v Mary M., 13 AD3d 373 [2nd Dept. 2004]; Matter of Dobbins v Vartabedian, supra; Matter of McLaren v Heuthe, 296 AD2d 500 [2nd Dept. 2002]. The determination, in reality, is the court's prediction or best estimate as to which parent will be the superior custodial parent and which will be better able to provide a stable, nurturing home environment for the child.

The factors that comprise the best interests of a child are many and this list is not intended to be all inclusive. As noted, the Court will determine custody based upon the totality of the circumstances of each particular case. The factors weighed include:

-the wishes of the child
-the age and maturity of the child

-the child’s special needs
-parental fitness
-each parent’s skill set
-each parent’s ability to care for the child
-each parents respective mental health
-which parent has been the primary caretaker
-the child’s relationship with the each parent
-parental availability due to work schedules
-each parent’s ability to maintain the child’s relationship with the non-custodial parent
-domestic violence incidents[3]
-the recommendation of the child’s lawyer
-expert witness testimony

In determining what custodial disposition is in the child’s best interests, cases will turn on the court’s assessment of credibility of each parent and their witnesses. Credibility is based on several factors, including but not limited to, the consistency of the witness' testimony; the contradictions between the witness' testimony and any exhibits; the witness' affect and manner on the witness stand; and the witness' ability and willingness to answer questions candidly and without hesitation; witness bias; and independent expert testimony. These determinations are entitled to due deference upon appellate review. The determination should not be disturbed unless it lacks a sound and substantial basis in the record.

Courts have split custody of siblings between parents where to do so serves

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3A statutory records check is required by DRL § 240(1)(a-1) for relevant records concerning the parties. Even if the domestic violence was not committed against the child or when the child was present, a New York court will still consider domestic violence as a factor in child custody proceedings.

the best interests of the children. Robert B. v. Linda B., 119 AD3d 1006 (3d Dept. 2014) [Split physical custody of two daughters warranted based upon expert testimony, a younger child more at ease with the father, and father more likely to promote a healthy relationship with the mother and younger child; and, where older child was estranged from the father and remained with the mother].

The importance of expert witness testimony and the recommendation of the child's lawyer to the custodial outcome cannot be understated.

Expert Witnesses: It is axiomatic that a forensic examiner should be a neutral, well-qualified expert appointed by the court, not selected by a particular party. Armstrong v. Heilker, 47 A.D3d 1104, 1106, 850 NYS2d 673 (3d Dept. 2008). The expert's testimony must be based on facts in the record and his/her own analysis, not speculation. The admissibility and the scope of the expert testimony is a determination within the discretion of the trial court. Galasso v. 400 Exec. Blvd., LLC, 101 A.D.3d 677, 678; De Long v. County of Erie, 60 NY3d 296.

Child's Lawyer: The recommendation of the lawyer for the child is important but it is not determinative. The lawyer for the child should not have a particular position or decision in mind at the outset of the case before the gathering of evidence. Matter of Carballeira v. Shumway, 273 AD2d 753, 756. It is only appropriate for the lawyer for the child to form an opinion as to what is in the best

interests of the child after such inquiry. See, also Cervera v. Bressler, 50 AD3 837, 840-841. Where the lawyer for the child's position is contradicted by the evidence, the court need not follow it. Salerno v Salerno 273 AD2d 818, 819 (4th Dept.2000); Matter of Wright v. Dunham, 13 AD3d 1138 (4th Dept. 2004).

III. VISITATION BY THE NON CUSTODIAL PARENT

Generally, parents have the right to visitation with their child absent some disqualifying behavior even if custody is not granted them. Where there is reason to do so, Courts can, place limitations on the non custodial parent's right to visitation. While no two cases are the same, typically when the court grants one parent primary physical custody of the child, it will afford the non-custodial parent liberal parenting time. Ultimate parental decision making, sometimes referred to as legal custody, when joint custody is not appropriate (the parents can't or won't communicate effectively), will repose in one parent. *Braiman v Braiman*, 44 NY2d 584 [1978]; *Fedash v Neilsen*, 211 AD2d 1003 [3rd Dept. 1995]. This is usually the residential parent.

Supervised Visitation: Absent agreement between the parents, the court can select someone to supervise the visits between the child and the non custodial parent. This may occur where there is a determination that the child might be in danger alone with the non-custodial parent (e.g., mental illness, substance abuse,

mental disability, etc.)

Therapeutic Supervised Visitation: A mental health professional is utilized both to supervise the visits and to work with the parent to improve the interaction between the parent and child. A 'parent coordinator' can also be helpful unless to do so creates the tension that the coordinator is supposed to alleviate.

However, where the child is of sufficient age and maturity to state her wishes, visitation would not be enforced. Iacono v. Iacono, 117 AD3d 988 (2d Dept. 2014). In *Iacono*, the court found that the 14-year-old child was mature enough to state her wishes and declined to award the mother any visitation, including therapeutic supervised visitation.

Sandwich Visits: The sandwich visits are employed where the parent's visits with the child have taken place in a controlled or supervised setting. After a number of successful supervised visits, and before the visits move to completely unsupervised, the visits begin supervised, followed by a period of unsupervised time before concluding the remainder of the visitation time in the original supervised setting. Such visitation is used to transition from supervised to unsupervised visits.

Turn Over Site: Where the hostility between the parents may, or has, resulted in incidents that are detrimental to the child (verbal abuse, physical

confrontations, arguments, etc.), courts can dictate where the child will be picked up by the non-custodial parent and returned after the visit. Typically a public site is chosen, such as a police precinct, library, restaurant, the mall, etc.

Parental Access Schedule: Visitation is best prescribed by the court and counsel in great detail. Such parental access schedules may include some, or all, of the following provisions depending on the age and maturity of the child and availability of the non custodial parent. The schedule might provide that

-child to reside with one parent during week;
-weekends with the non-custodial parent alternating with the other parent on weekends;
-weekend time could allow the non-custodial parent to have the child beginning at 8:00 A.M. on Saturday and ending at 8:00 P.M. Sunday;
-the non-custodial parent would pick up and drop off the child at the other parent's home unless other arrangements are mutually agreed to;
-the non-custodial parent could have the child for dinner on a specific week day evening from 6:00 or 7:00 P.M. to perhaps 9:00 P.M.;
-the child could be allowed to stay with the non-custodial parent overnight after the week night dinner once the child is able to travel to school on their own in the morning;
- both parents are entitled to have all information regarding the child, including but not limited to school and medical records;
- activities which will impact both parents' time, such as Saturday sports, be coordinated with, and consented to, by the other parent prior to signing the child up for the activity;
- only a significant medical reason will be considered sufficient for postponement of parenting time. If a child is ill, makeup parenting time must be scheduled;
- when the child is of sufficient age and maturity, the child can have a cell phone.

The custodial parent should not enroll the child in any extracurricular activities which interfere with the weeknight dinner, so that the child must be home by 6:00 P.M.

The parent access schedule should also address the following:

Major Holidays: Major holidays and major holiday vacation time typically will be alternated each year between parents homes and alternated from year to year, or shared. The same would apply to school recess and summer break. The parents would be required to share their plans in advance. Other holidays such as Halloween, Memorial Day, July Fourth, Martin Luther King, Jr., weekend, Veterans Day will also be alternated from year to year.

Mother’s Day/Father’s Day/Birthdays: The Schedule should cover Mother's Day, Father's Day, as well as Parental Birthdays, so that in every year, the child will be with the mother on Mother's Day, with the father on Father's Day and with each parent on their birthdays.

Travel: In order to avoid the stress and contention that seem inevitable when the child travels there should be provisions made to alleviate the stress. For example, the Schedule can provide that during the child’s vacation and school break periods, either parent can travel with the child and be allowed to take the child out of the country. And, in the event that the child's passport is needed or has

expired, both parents are to cooperate in getting the passport or in having it renewed. Both parents will have the right to communicate with the child when the child is with the other parent, by telephone, land line or cell, by text message or by e-mail, during reasonable hours and without interference or monitoring by the other parent. The child may call either parent at any time.

When either parent goes on a trip with the child, then as soon as practicable before leaving New York, he or she will notify the other parent of the child's travel itinerary, including flight information, the address where the child will stay, and a telephone number where he or she can be reached.

Parenting time as embodied in the Parenting Access Schedule may be changed, as long as both parents agree to the change ahead of time and put the change in writing. Any requested changes in the parenting schedule that cannot be agreed upon a can be brought before the court in a motion for modification, or if agreed to, the parties can go to a mediator, psychologist, social worker, friend or family member.

Emergency decisions: The Schedule can provide that each parent will make day to day decisions regarding the care of the child during the time the child is with the parent. This can include emergency decisions concerning the health or safety of the child. Any such occurrences or decisions must be promptly brought to

the other parent's attention by e-mail or text message.

Decision-Making: If the parents are unable to communicate effectively with each other and can't make decisions jointly, then one parent, will have to have final decision making authority. That parent will, after consultation with the other parent, have final decision-making authority concerning the child. For any major decision, the parent with final decision making authority must advise the other parent of the approaching decision by e-mail, the time frame in which the decision must be decided, and the parent's proposed decision. The other parent is given the opportunity to comment and provide alternatives. However, the decision of the parent with final decision making authority controls.

The Schedule should require each parent to keep each other up to date with contact numbers and e-mail addresses and their home address, and be required to notify the other of any change in any of this information within 72 hours of any change.

IV. THIRD PARTY VISITATION

Parents have a paramount right to custody of their child over any non parents. A New York court will grant custody to a third party (a grandparent, aunt, sibling, etc.), if it determines that awarding custody to a parent is not in the best interest of the child. Bennett v. Jeffreys, 40 NY2d 543 (1976). New York is one of

the few states to allow grandparents and siblings to petition a court for visitation rights. Domestic Relations Law section 72. The process is very similar to when a parent may petition for child custody or visitation. Where the parent opposes contact with the grandparent, the grandparent has standing to seek visitation with the grandchild. The grandparent must prove a prior existing relationship with the child or that such a relationship was prevented by the parent.

Once standing is established, the grandparent (or the sibling) will then have to prove that it is in the child's best interest to have them in their lives. DRL 72 was not intended as a sword to be used against an intact family. In the Matter of Emanuel S. v. Joseph E., 78 NY2d 178 (1991), the Court found no statutory authority to foreclose visitation to grandparents solely on the grounds that their grandchild resided with fit parents in an intact family.

In Feldman v. Torres, 117 AD3d 1048 (2d Dept.2014), the Appellate Division reversed the trial court decision and granted the maternal grandfather visitation with his grandchild despite the mother's animosity toward her father and wish that he not have any contact with her. The Appelllate Division found standing based upon the grandfather's extent relationship with his grandchild and his efforts to maintain that relationship over his daughter's objection. The court also held that there was no basis for the mother's animosity toward her father and that animosity

alone was not a basis for denying visitation.

The United State Supreme Court in Troxel v Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), struck down a nonparental visitation statute because it was found to be breathtakingly broad. According to the statute's text, "any person may petition the court for visitation rights at any time," and the court may grant such visitation rights whenever "visitation may serve the best interest of the child." § 26.10.160(3). That language effectively permitted any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review.

New York's DRL 72 was subject to constitutional challenge too. However, the court held it was not unconstitutional in part because it has been 'interpreted to accord deference to a parent's decision, although the statute doesn't specifically require such deference (citations omitted). Matter of Hertz, 291 AD2d 91 (2d Dept.2002).

In the Matter of Kareem W. v. Family Focus Adoption Servs. Inc., 2009 NY Slip Op 51856(U) (N.Y. Fam. Ct. 8/12/2009), 2009 NY Slip Op 51856 (N. Y. Fam. Ct., 2009), the court held that DRL § 72 does not create any "absolute or automatic" rights to visitation by grandparents or presumptions in favor of grandparent visitation. On the contrary, the Court of Appeals held that DRL § 72

creates a "strong presumption" on behalf of the parent's wishes, and merely affords a "procedural mechanism for grandparents to acquire standing to seek visitation with a minor grandchild" (*Matter of Wilson v McGlinchey*, 2 NY3d 375, 380, 779 NYS2d 159 [2004]).

Best Interests Test: Once standing is established, the Court must determine if visitation by third party is in the child's best interests. "[T]he question of whether visitation should be granted ....must, in the final analysis, be determined in the light of what is required in the best interest of the child." LoPresti v LoPresti, 54 AD2d 582 (2d Dept. 1976) [Affirming trial court's denial of visitation to a paternal grandparent due to negative impact on child's hyperactivity and the 'uncertain effect' of visitation].

Courts have denied visitation post adoption where such award of "visitation rights to the grandmother would 'hinder the adoptive relationship.' " Matter of Sherman v Hughes, 32 AD3d 959 (2d Dept. 2006), citing Peo. Ex rel Sibley v Sheppard, 54 NY2d 320 (1981) [visitation granted where adoption was by paternal grandparents and there was "no concern here about embarrassment to the natural parents, conflicts between the authority of the natural and adoptive parents, or invasion of the natural or adoptive parents' privacy"].

An "essential part" of the best interests determination is based on the quality

of the relationship between the petitioner and the child. Eggleton v Clark, 11 AD3d 459 (2d Dept. 2004). Where there is no relationship, the petitioning grandparent must show "sufficient efforts to establish one [to be] judged on a case by case basis, measured against what the grandparent could have reasonably done under the circumstances (see Matter of Emanuel S. V. Joseph E., supra at 183)." Id.

V. PATERNITY

Because maternity is never in doubt, while paternity of an out-of-wedlock child is, the Legislature enacted Article Five of the Family Court Act. Paternity is the legal status of being a father. Paternity can be established in three ways. First, if you are married to the mother at the time the child is born, you are automatically considered to be the legal father of the child. You do not have to establish paternity in court. Second, if you sign an acknowledgment of paternity after the child is born, you have established paternity. The form is usually signed at the hospital stating that you are the father. Third, if you file a paternity petition in Family Court and get an order of filiation from the court, you are the legal father.

The issues of paternity and visitation on occasion have confronted our highest Court. In Michael v. Gerald, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). All parental rights, including visitation, were automatically denied by denying Michael status as the father. While Cal.Civ.Code Ann. § 4601 places it

within the discretionary power of a court to award visitation rights to a non parent, the Superior Court, affirmed by the Court of Appeal, held that California law denies visitation, against the wishes of the mother, to a putative father who has been prevented by § 621 from establishing his paternity. See 191 Cal.App.3d, at 1013, 236 Cal. Reporter.

In the paternity proceeding the ability of genetic testing to reliably determine paternity has reduced the number of trials. Instead, a body of law has expanded that invokes equitable principles of estoppel to defeat paternity proceedings from de-legitimizing the child.

In adoption proceedings, the issue of paternity is the cause of much litigation. New York's Domestic Relations Law created two categories with respect to the adoption of children born out-of -wedlock: infants placed for adoption before they are six months of age, and child who are older than six months of age when they are placed for adoption. DRL 111 (1) (d) & (e). The law also divides the kind of rights the unwed fathers have into two categories. Some fathers may acquire the status of 'consent' father,' meaning their consent to the child's adoption is needed for the adoption. Other fathers, may acquire the status of 'notice only' fathers, meaning they have the right to notice and the right to be heard. They do not have a veto right over the adoption. Domestic Relations Law 111-a.

The core principle of adoption law in New York is to protect children born out-of-wedlock and to create a system of proper reliance by prospective adoptive parents and agencies by creating objective rules with which unwed fathers must comply in order to secure rights in the first place. Unwed fathers have a right to secure parental rights but these rights do not automatically spring into being. ("[T]he mere existence of a biological link does not merit constitutional protection. The actions of Judges neither create nor sever genetic bonds." Lehr, 463 U.S. at 261).

VI. MODIFICATION OF CUSTODY AND VISITATION AGREEMENTS

Awards of custody and visitation agreements can be subsequently modified. The party that is seeking the modification bears the burden of making an evidentiary showing that there has been a change in circumstances since the award or agreement that requires a hearing; and, that the requested modification is in the child's best interests. Matter of Thomson v. Battle, 99 AD3d 804, 806; Matter of Nava v. Kinsler, 85 AD3d 1186.

Where the parent alienates the non custodial parent by interfering with that parent's access to the child by taking the child's cell phone away to prevent the other parent from communicating with the child, and where the home environment had changed as a result of the custodial parent's boyfriend moving into the home

with his children, constituted a change of circumstances to warrant a modification of the custody agreement. Evidence was adduced to show that the child had become withdrawn and emotionally volatile because of the changes in her home, and this coupled with her desire to reside with the other parent were sufficient bases to warrant an award of physical custody to the other parent. Cheney v. Cheney, 118 AD3d 1358 (4th Dept. 2014).

January 26, 2015

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Counsel would be well advised to provide their clients with the following Bill of Rights for children in custody and divorce situations.

Children's Bill of Rights

1. The right not to be asked to choose sides between their parents.

2 The right not to be told the details of legal proceedings between their parents.

3. The right not to be told disparaging things about the other parent's personality or character.

4. The right to privacy when talking to either parent on the telephone or sending e-mail.

5. The right not to be cross-examined by one parent after spending time with the other parent.

6. The right not to be asked to be a messenger from one parent to the other.

7. The right not to be asked by one parent to tell the other parent untruthful information.

8. The right not to be used as a confidant regarding the legal proceedings between the parents.

9. The right to express feelings.

10. The right to choose not to express certain feelings.

11. The right to be protected from parental warfare.

12. The right not to be made to feel guilty for loving both parents.

13. The parents shall not say things or knowingly allow others to say things in the presence of the children or either of them that would harm the children's love and respect for the other parent.

14. Neither parent will initiate or permit the designations "Father" and/or "Mother" or their equivalents to be used by a child with reference to a person other than the other parent.