Child Custody Awards

By Joel R. Brandes

Table of Contents

1. Custody Proceedings – Custody, Joint custody and Visitation Defined

New York Law provides that a married woman is a joint guardian of her children with her husband, with equal powers, rights, and duties in regard to them.1

The term "custody" is not defined by our cases or statutes. We define "sole custody" as the right of a parent or other person to have physical custody of a child, to the exclusion of all others, subject to reasonable rights of visitation, and the right to make all decisions regarding the health, education, welfare and religion of the child. We note that the Court of Appeals has referred to "visitation" as being "a limited form of custody". 2

It has been said that "joint legal custody", sometimes referred to as "divided" custody or "joint decision making", gives both parents a shared responsibility for and control of a child's upbringing. It may include an arrangement between the parents whereby they alternate physical custody of the child. Where there is "joint physical custody", the child lives alternatively with both parents.3 The daily child-rearing decisions are usually made by the parent with whom the child is then living, while the

---

1 Domestic Relations Law § 81; Domestic Relations Law § 70 provides that in habeas corpus suits for child custody there shall be no prima facie right to the custody of children, but the court shall determine what is for the best interests of the child. See also Domestic Relations Law §240, which provides that in all cases there shall be no prima facie right to the custody of the child by either parent. In Sanchez v. Bonilla, 115 A.D.3d 868, 982 N.Y.S.2d 373 (2d Dep't 2014) the Appellate Division held that a natural parent has standing to seek legal custody of his or her child.

2 See Alison D. v. Virginia M., 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991). In Osmundson v. Held-Cummings, 20 A.D.3d 922, 799 N.Y.S.2d 345 (4th Dep't 2005), the Appellate Division held that the right to visitation is an incident of custody and is extinguished when a child reaches the age of majority.

3 Braiman v. Braiman, 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978).

major decisions, such as those involving religion, education, medical care, discipline, or choice of school/camp, are jointly made.4

"Joint custody" is a two-pronged concept. There is a distinction between "legal joint custody", which usually involves sharing in all the important decisions concerning the child, and "physical joint custody", which involves sharing time with and physically caring for the child.

Although there is no consensus as to a precise definition of "joint custody", the New York Court of Appeals commented that "joint custody" is generally used to describe joint legal custody or joint decision making, as opposed to expanded visitation or shared custody arrangements. 5 The Court of Appeals described joint custody as "reposing in both parents a shared responsibility for and control of a child's upbringing". 6

Joint custody involves the sharing by the parents of responsibility for control over the upbringing of the children, and imposes upon the parents an obligation to behave in a mature, civilized and cooperative manner in carrying out the joint custody arrangement.7Joint custody should not be imposed on parents who do not communicate,8 who are unwilling or unable to cooperate, 9 or who are unwilling or unable to set aside their personal differences and work together for the good of the children. 10

---

4 Trapp v. Trapp, 136 A.D.2d 178, 526 N.Y.S.2d 95 (1st Dep't 1988).See Penninipede v. Penninipede, 6 A.D.3d 445, 775 N.Y.S.2d 329 (2d Dep't 2004).

5 Bast v. Rossoff, 91 N.Y.2d 723, 675 N.Y.S.2d 19, 697 N.E.2d 1009 (1998).

6 Braiman v Braiman, supra.

7 See Braiman v. Braiman, 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019; Matter of Fowler v. Rivera, 296 A.D.2d 409, 745 N.Y.S.2d 457; Matter of Fedun v. Fedun, 227 A.D.2d 688, 641 N.Y.S.2d 759.

8 See Matter of Diana W. v. Jose X, 296 A.D.2d 614, 745 N.Y.S.2d 580; Matter of Heintz v. Heintz, 275 A.D.2d 971, 713 N.Y.S.2d 709.

9 See Bliss v. Ach, 56 N.Y.2d 995, 453 N.Y.S.2d 633, 439 N.E.2d 349; Amari v. Molloy, 293 A.D.2d 431, 739 N.Y.S.2d 626

10 See Webster v. Webster, 283 A.D.2d 732, 725 N.Y.S.2d 109; Matter of Meres v. Botsch, 260 A.D.2d 757, 687 N.Y.S.2d 799,

2. Custody Proceedings - Presumption in favor of visitation

Parental access, commonly referred to as “visitation”, is an important right of the non-custodial parent and the child. 11 As the Court of Appeals decision in Weiss v. Weiss, 12 made clear, continuing contact and communication with the noncustodial parent may be as much in the interests of the child as for the benefit of the non-custodian. The best interests of the child standard is also dispositive of visitation issues.13

“A parent may not be deprived of his or her right to reasonable and meaningful access to the children by the marriage unless exceptional circumstances have been presented to the court. The term ‘exceptional circumstances' or ‘exceptional reasons' is invariably associated with a situation where either the exercise of such right is inimical to the welfare of the children or the parent has in some manner forfeited his or her right to such access.”14 “Indeed, so jealously do the courts guard the relationship between a noncustodial parent and his child that any interference with it by the custodial parent has been said to be “an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [offending party] is unfit to act as custodial parent.” 15 It is no defense that the child preferred not to visit.16 The custodial parent has an affirmative duty to ensure that visitation occurs.17

---

11 See Weiss v. Weiss, 52 N.Y.2d 170.

12 Weiss v. Weiss, 52 N.Y.2d 170.

13 See, Friederwitzer v. Friederwitzer, 55 N.Y.2d 89 (1982); Matter of Lincoln v Lincoln, 24 NY2d 270.

14 Strahl v. Strahl, 66 A.D.2d 571, 574, 414 N.Y.S.2d 184, affd. 49 N.Y.2d 1036, 429 N.Y.S.2d 635, 407 N.E.2d 479; See, also, Matter of Becker v. Becker, 75 A.D.2d 814, 427 N.Y.S.2d 492.

15 Daghir v. Daghir, 82 A.D.2d 191, 441 N.Y.S.2d 494, aff'd 56 N.Y.2d 938, 453 N.Y.S.2d 609, 439 N.E.2d 324.

16 Mahler v. Mahler, 72 A.D.2d 739, 421 N.Y.S.2d 248 (2nd Dept.1979). See also King v. King, 124 Misc.2d 946, 478 N.Y.S.2d 762 (Sup.Ct., N.Y.Co., 1984).

17 Joye v. Schechter, 118 Misc.2d 403, 460 N.Y.S.2d 992 (Family Ct., Nassau County, 1983); Spenser v. Spenser, 128 Misc.2d 298, 488 N.Y.S.2d 565, (N.Y.Fam.Ct., 1985).

In Weiss v Weiss,18 the Court of Appeals stated that in initially prescribing or approving custodial arrangements, absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her right to such access, appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course.

In Matter of Granger v Miscercola,19 the Court of Appeals, observed that since Weiss v. Weiss 20 subsequent Appellate Division decisions have frequently referred to a rebuttable presumption that, in initial custodial arrangements, a noncustodial parent will be granted visitation. "[I]t is presumed that parental visitation is in the best interest of the child in the absence of proof that it will be harmful" or proof that the noncustodial parent has forfeited the right to visitation. The Court reiterated its holding in Weiss, that a rebuttable presumption that a noncustodial parent will be granted visitation is an appropriate starting point in any initial determination regarding custody and/or visitation. Moreover, the rebuttable presumption in favor of visitation applies when the parent seeking visitation is incarcerated. A parent who is in prison does not forfeit his or her visitation rights by being incarcerated. Petitioner's incarceration, standing alone, does not make a visitation order inappropriate", but a demonstration "that such visitation would be harmful to the child will justify denying such a request." In deciding whether the presumption is rebutted, the possibility that a visit to an incarcerated parent would be harmful to the child must be considered, together with other relevant facts. Visitation should be denied where it is demonstrated that under all the circumstances visitation would be harmful to the child's welfare, or that the right to visitation has been forfeited. The Court noted that in speaking of the manner in which the presumption of visitation may be rebutted, the Appellate Division has frequently used the terms "substantial proof" and "substantial evidence". "[T]he sweeping denial of the right of the father to visit or see the child is a drastic decision that should be based upon substantial evidence." This language is intended to convey to lower courts and practitioners that visitation will be denied only upon a demonstration that visitation would be harmful to the child that proceeds by means of sworn testimony or documentary evidence. It held that the "substantial proof" language should not be interpreted in such a way as to heighten the burden, of the party who opposes visitation, to rebut the presumption of visitation. The presumption in favor of visitation may be rebutted through demonstration by a preponderance of the evidence.

---

18 Weiss v. Weiss, 52 N.Y.2d 170.

19 21 N.Y.3d 86, 967 N.Y.S.2d 872 (2013)

20 52 N.Y.2d 170 [1981]

3. Custody Proceedings - Zones of Decision Making

The law has become settled in New York, that in an appropriate case, a court may award physical custody to one parent and divide "spheres or zones of decision making" between the parents.21 It has been held that where joint custody is inappropriate it may be appropriate, depending upon the particular circumstances of the case, to grant some custodial decision-making authority to the noncustodial parent.22 This practice has evolved to the point that it has been held that the trial court should not vest all decision-making authority in one parent in a situation where it appears that neither parent can be trusted not to obstruct the other's relationship with the child. While there is a significant precedent for dividing decision- making between parents, there is no precedent for completely depriving a non-custodial parent, who is otherwise to remain fully involved with the children's lives, of decision-making authority in all areas.23 It has been held that the existence of domestic violence is a factor that must be considered by the court with respect to decision-making determinations, and mitigates against an award of either joint custody, "zones of responsibility" or any other form of shared custody.24

In Trapp v Trapp,25 the judgment of divorce was modified by the Supreme Court to provide for joint decision-making over the upbringing of the three infant children of the marriage concerning a host of items such as choice of schools, psychological or psychiatric treatment, counseling, doctors and surgeons, religion and citizenship. The

---

21 See Mars v Mars, 286 AD2d 201 (2001); Tran v Tran, 277 AD2d 49 (2000); Trapp v Trapp, 136 AD2d 178 (1988); See Matter of Davis v Davis, 240 A.D.2d 928, 658 N.Y.S.2d 548 (3d Dept., 1997); Matter of Frize v Frize, 266 A.D.2d 753, 698 N.Y.S.2d 764 (3d Dept 1999); Hugh L v Farah L, 6/ 1/ 2000 N.Y.L.J. 29, (col. 6) (Sup. Ct, Bx Co., Drager, J.); Tran v Tran, 277 A.D.2d 49, 716 N.Y.S.2d 5 (1 Dept. 2000); F V F, 10/ 19/ 2001 N.Y.L.J. 21, (col. 5) (Sup. Ct, Kings Co., Paniepinto, J.); Penninipede v Penninipede, 6 A.D.3d 445, 775 N.Y.S.2d 329 (2d Dept., 2004); Ring v Ring, 15 A.D.3d 406, 790 N.Y.S.2d 51 (2 Dept. 2005); Chamberlain v Chamberlain, 24 A.D.3d 589, 808 N.Y.S.2d 352 (2d Dept., 2005); C.C.W. v J.S.W. 15 Misc.3d 1140(A), 841 N.Y.S.2d 818, 2006 WL 4549771 (N.Y. Sup.))'; DZ v CP, 18 Misc.3d 1123(A), 856 N.Y.S.2d 497, 2007 WL 4823451 (N.Y.Sup.)) ; C. v C, 8/26/2008 N.Y.L.J. 26, (col. 1) (Sup Ct., Lobis, J)

22 Chamberlain v Chamberlain, 24 A.D.3d 589, 808 N.Y.S.2d 352 (2d Dept., 2005).

23 Mars v Mars, 286 A.D.2d 201, 729 N.Y.S.2d 20 (1 Dept., 2001).

24 Samala v. Samala, 309 A.D.2d 798, 765 N.Y.S.2d 523 (2d Dept.2003); CB v JU, 5 Misc.3d 1004(A), 798 N.Y.S.2d 707, 2004 WL 2334311 (N.Y.Sup.)

25 136 A.D.2d 178, 526 N.Y.S.2d 95 (1 Dept. 1988)

Appellate Division modified finding that since the parents continued to be severely antagonistic towards each other, such an arrangement is, was fraught with the potential for further and continuing discord and, thus, was inimical to the best interests of the children. Accordingly, it limited the joint decision-making arrangement to religion and citizenship only and modified. The Appellate Division noted that where the parties cannot agree on even the simplest of issues, they cannot reasonably be expected eventually to agree on the major areas of concern affecting the children. Joint decision-making cannot be forced on hostile and antagonistic parents As the authors of Foster and Freed, Law and the Family-New York, supra, have noted, joint custody "is of doubtful psychological validity since it ignores the 'double bind' in which the child may be placed and the potential conflict in loyalties. Most child psychologists and psychiatrists and other experts in child development are opposed to joint custody unless perhaps there are extraordinary circumstances."

4. Custody Proceedings - Role of the Court - CPLR 4213 (b)

The burden on a Judge when he acts as parens patriae is perhaps the most demanding which he must confront in the course of his judicial duties. Upon his wisdom, insight, and fairness rest the future happiness of his wards. The procedures of the custody proceeding must, therefore, be molded to serve its primary purpose, and limited modifications of the traditional requirements of the adversary system must be made, if necessary. 26 The test is whether the deviation will on the whole benefit the child by obtaining for the Judge significant pieces of information he needs to make the soundest possible decision.27

Custody determinations must have a "sound and substantial" basis in the record and not be contrary to the weight of the credible evidence.28 An appellate court will not

---

26 Kessler v. Kessler, 10 N Y 2d 445; People ex rel. Fields v. Kaufmann, 9 A D 2d 375.

27 Matter of Lincoln v. Lincoln, 24 N.Y.2d 270, 273, 299 N.Y.S.2d 842, 844, 247 N.E.2d 659, 661.

28 Parsons v. Parsons, 101 A.D.2d 1017, 476 N.Y.S.2d 708 (4th Dep't 1984); Pacifico v. Pacifico, 101 A.D.2d 709, 475 N.Y.S.2d 952 (4th Dep't 1984).

allow a custody award to stand where it lacks a "sound and substantial" basis in the record. 29

In awarding custody the Court must comply with the duty imposed upon it by Civil Practice Law and Rules §4213(b) to state the facts that it deems essential to the custody determination in order to enable an appellate court to review its determination. If an appellate court concludes that the determination reviewed is not supported by the weight of the evidence, it must reverse for lack of a sound and substantial basis or as contrary to the weight of the credible evidence.

5. Custody Proceedings - Burden of Proof - Best Interests of the Child

The Domestic Relations Law provides that in any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court must require verification of the status of any child of the marriage with respect to such child's custody, including any prior orders, and shall enter orders for custody as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child.30

6. Custody Proceedings - Burden of Proof - Effect of Domestic violence

Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and the allegations are proven by a preponderance of the evidence, the court must consider the effect of the domestic violence upon the

---

29 Gloria S. v. Richard B., 80 A.D.2d 72, 437 N.Y.S.2d 411 (2d Dep't 1981); Skolnick v. Skolnick, 142 A.D.2d 570, 530 N.Y.S.2d 235 (2d Dep't 1988)

30 Domestic Relations Law §240.

best interests of the child, together with such other facts and circumstances as the court deems relevant in making a custody direction.31

7. Custody Proceedings - Presumption as to custody

There is no prima facie right to the custody of the child in either parent.32

8. Custody Proceedings - Totality of the circumstances - Factors Considered

Domestic Relations Law § 240 (1)(a) provides that neither the mother nor the father has a prima facie right to custody, but that the court must determine solely what is in the best interest of the child, and what will best promote the child's welfare and happiness, and make an award accordingly. Neither the mother nor the father has an inherently superior right to custody of a child. In custody matters, the court's primary concern is in ascertaining what disposition is in the child's best interest. 33

In determining a child's custody, the court acts as parens patriae to do what is best for the child. The court is to place itself in the position of a "wise, affectionate, and careful" parent and make provision for the child accordingly.34

---

31 Domestic Relations Law §240.

32 Domestic Relations Law §240.

33 O'Neil v. O'Neil, 193 A.D.2d 16, 601 N.Y.S.2d 628 (2d Dep't 1993); Daley v. Daley, 51 A.D.2d 830, 379 N.Y.S.2d 545 (3d Dep't 1976); People ex rel. Robert C. MM v. Ann Jeanette NN, 50 A.D.2d 1033, 376 N.Y.S.2d 951 (3d Dep't 1975).

34 Matter of Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).

In Friederwitzer v. Freiderwitzer35 and Esbach v. Esbach,36 the Court of Appeals established its present "totality of the circumstances" approach to all custody determinations, indicating that no one factor should be determinative in deciding what is in the best interest of the child. It held in both of these cases that a determination as to whether there should be a modification of a prior custody award depends upon whether the totality of circumstances, including the existence of the prior award, warrants such a change in the best interests of the child.

We quote below the relevant portions of these two significant decisions which establish the burden of proof in custody cases. In Freiderwitzer v. Freiderwitzer, Judge Meyer wrote:

"The only absolute in the law governing custody of children is that there are no absolutes. The Legislature has so declared in directing that custody be determined by the circumstances of the case and of the parties and the best interests of the child, but then adding 'In all cases there shall be no prima facie right to the custody of the child in either parent'. Because the section speaks to modification as well as to an original matrimonial judgment, 'all cases' must be read as including both. That, or course, does not mean that custody may be changed without regard to the circumstances considered by the court when the earlier award was made but rather that no one factor, including the existence of the earlier decree or agreement, is determinative of whether there should, in the exercise of sound judicial discretion, be a change in custody. Indeed, in Matter of Nehra v. Uhlar," 37 "we were at pains to point out many of the factors to be considered and the order of their priority. Thus, we noted that 'Paramount in child custody cases, of course, is the ultimate best interest of the child', that stability is important but the disruption of change is not necessarily determinative, that the desires of the child are to be considered, but can be manipulated and may not be in the child's best interests, that self-help through abduction by the noncustodial parent must be deterred but even that 'must, when necessary, be submerged to the paramount concern in all custody matters: the best interest of the child', that the relative fitness of the respective parents, as well as length of time the present custody had continued, are also to be considered, that 'Priority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded to the first custody awarded in litigation or by voluntary agreement', whereas of lesser priority will be the abduction, elopement or other defiance of legal process as well as the preferences of the child."

---

35 Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982).

36 Eschbach v. Eschbach, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982)

37 Nehra v. Uhlar, 43 N.Y.2d 242, 401 N.Y.S.2d 168, 372 N.E.2d 4 (1977).

"The priority which is accorded the first award of custody, whether contained in court order or voluntary agreement, results not from the policy considerations involved in res judicata (which permits change in custody decrees when warranted by the circumstances), so much as from the conceptions that stability in a child's life is in the child's best interests and that the prior determination reflects a considered and experienced judgment concerning all of the factors involved. But the weight to be given the prior award necessarily depends upon whether it results from the Trial Judge's Judgment after consideration of all relevant evidence introduced during a plenary trial or, as here, finds its way into the judgment through agreement of the parties proven as part of a proceeding in which custody was not contested and no evidence contradictory of the agreement's custody provision has been presented. No agreement of the parties can bind the court to a disposition other than that which a weighing of all of the factors involved shows to be in the child's best interest. Nor is an agreement so contradictory of considered judgment as to determine custody solely upon the basis of the wishes of the young children involved a 'weighty factor' for consideration. Thus, Nehra's phrase 'absence of extraordinary circumstances' is to be read as 'absence of countervailing circumstances on consideration of the totality of circumstances,' not that some particular, sudden or unusual event has occurred since the prior award. The standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered, not whether there exists one or more circumstances that can be denominated extraordinary." 38

In Esbach v. Esbach39 the Court of Appeals referred extensively to its opinion in Friederwitzer when it stated:

"Any court in considering questions of child custody must make every effort to determine what is for the best interest of the child, and what will best promote its welfare and happiness." As we have recently stated, there are no absolutes in making these determinations; rather, there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the child. Where the parties have entered into an agreement as to which parent should have custody, we have stated that "[p]riority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded" to that agreement.

The weight to be given the existence of a prior agreement depends on whether the prior disposition resulted from a full hearing by a trial court or was merely incorporated in the court's judgment pursuant to an uncontested stipulation. This is particularly true where, as in this case, the rules of the court require that the decree specify that "as to support, custody and visitation, no such agreement or stipulation is

---

38 citations omitted

39 Eschbach v. Eschbach, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982).

binding" and that the court retains jurisdiction for the purpose of making such further custody decree "as it finds appropriate under the circumstances existing at the time application for that purpose is made to it". Since the court was not bound by the existence of the prior agreement, it has the discretion to order custody changed "when the totality of circumstances, including the existence of the prior award, warrants it's doing so in the best interests of the child." Primary among those circumstances to be considered is the quality of the home environment and the parental guidance the custodial parent provides for the child.40 While concerns such as the financial status and the ability of each parent to provide for the child should not be overlooked by the court, an equally valid concern is the ability of each parent to provide for the child's emotional and intellectual development.

In determining whether the custodial parent can continue to provide for the child's various needs, the court must be cognizant of the individual needs of each child. It is, of course, entirely possible that a circumstance such as a total breakdown in communication between a parent and child that would require a change in custody would be applicable only as to the best interests of one of several children. To this end, it is important for the court to consider the desires of each child. But again, this is but one factor to be considered; as with the other factors, the child's desires should not be considered determinative. While not determinative, the child's expressed preference is some indication of what is in the child's best interests. Of course, in weighing this factor, the court must consider the age and maturity of the child and the potential influence having been exerted on the child.

Finally, this court has long recognized that it is often in the child's best interests to continue to live with his siblings. While this, too, is not an absolute, the stability and companionship to be gained from keeping the children together is an important factor for the court to consider. "Close familial relationships are much to be encouraged." "Young brothers and sisters need each other's strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful." 41

Thus, under the "totality of the circumstances" rule, no one factor is determinative in making an award of custody.

---

40 Citing Ebert v. Ebert, 38 N.Y.2d 700, 702, 382 N.Y.S.2d 472, 346 N.E.2d 240 (1976); Bistany v. Bistany, 66 A.D.2d 1026, 411 N.Y.S.2d 728 (4th Dep't 1978); Sandman v. Sandman, 64 A.D.2d 698, 407 N.Y.S.2d 563 (2d Dep't 1978); Saunders v. Saunders, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3d Dept., 1977)

41 citations omitted

In New York, determining what is in the child's best interest requires that consideration be given to many factors, such as:

the effect of a separation of siblings; 42

the wishes of the child, if of sufficient age;43

the length of time the present custody arrangement has continued; 44

the abduction or abandonment of the child or other defiance of legal process; 45

the relative stability of the parents; 46

the care and affection showed to the child by the parents;47

the home environment and atmosphere in the respective homes;48

the ability and availability of the parents to care for the child;49

---

42 Obey v. Degling, 37 N.Y.2d 768, 375 N.Y.S.2d 91 (1975).

43 Obey v. Degling, 37 NY2d 768, 375 NYS2d 91 (1975); Ebert v. Ebert, 38 N.Y.2d 700, 382 N.Y.S.2d 472, (1976)

44 Friederwitzer v Freiderwitzer, 55 NY2d 89, 447 NYS2d 893

45 Friederwitzer v Freiderwitzer, 55 NY2d 89, 447 NYS2d 893; Young v Young, 212 A.D.2d 114, 628 N.Y.S.2d 95

46 Hernandez v. Hernandez, 77 A.D.2d 796, 430 N.Y.S.2d 744 (4th Dep't 1980)

47 Sanders v Sanders, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3 Dept. 1977)

48 Esbach v. Esbach , 56 NY2d 167, 451 NYS2d 658

49 Jacobs v. Jacobs, 117 AD2d 709, 498 NYS2d 852 (2d Dept., 1986)

the morality of the parents, in relation to the child; 50

the ability of the parents to provide for the child's intellectual development;51

the possible effect of a custodial change on the child and the effect an award of custody to one parent would have on the child's relationship with the other parent;52

the financial status of the parents; 53

the parents' past conduct in relation to the child; 54

the refusal of a parent to permit visitation. The right to visitation has been considered so basic that interference with visitation has been held to be an act so inconsistent with the best interests of the child as to raise a strong probability that an interfering parent is

---

50 McIntosh v. McIntosh, 87 A.D.2d 968, 451 N.Y.S.2d 200 (3d Dep't 1982); Saunders v. Saunders, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3d Dep't 1977); Gotham v. Gotham, 102 A.D.2d 981, 477 N.Y.S.2d 788 (3d Dep't 1984). Carpenter v. Carpenter, 96 A.D.2d 607, 464 N.Y.S.2d 606 (3d Dep't 1983) (father who engaged in excessive drinking, lived with an 18-year-old unmarried female who was pregnant by him, permitted the 8 1/2-year-old child to be exposed to adult sexual magazines and considerable profanity was denied custody where his companion interfered with the child's upbringing).

51 Esbach v. Esbach, 56 NY2d 167, 451 NYS2d 658).

52 Bliss v. Ach, 56 N.Y.2d 995, 998, 453 N.Y.S.2d 633, 439 N.E.2d 349; Young v. Young, 212 A.D.2d 114, 118, 628 N.Y.S.2d 957; J.F. v. L.F., 181Misc.2d 722, 694 N.Y.S.2d 592 (N.Y.Fam.Ct., 1999).

53 Esbach v. Esbach, 56 NY2d 167, 451 NYS2d 658; Financial ability, in general, is not looked upon as a compelling factor. See, Fox v. Fox, 177 A.D.2d 211, 212 (4th Dept., 1992); Matter of Wellman v. Dutch, 198 A.D.2d 791, 792 (4th Dept., 1993).

54 Esbach v Esbach, supra; Saunders v. Saunders, 60 AD2d 701, 400 NYS2d 588 (3d Dept., 1977)

unfit to act as the custodial parent; 55 and/or

the willingness of a parent to encourage visitation.56 The ability of each parent to promote the time spent with the non-custodial parent is a factor of great concern; 57

parental alienation; 58

the parent making unfounded accusations of child abuse; 59

the unauthorized relocation of the parent and child to a distant domicile; 60 and

race, religion, and sexual persuasion, in relation to the child. 61

In addition, the legislature has mandated that the court should consider the corrosive impact of domestic violence and the increased danger to the family upon dissolution and into the foreseeable future." Where either party alleges that the other

---

55 Entwistle v. Entwistle, 92 AD2d 879, 459 NYS2d 862; See also Paris v. Paris, 95 A.D.2d 857, 464 N.Y.S.2d 221 (2nd Dept.1983); Burkart v. Montemarano, 72 A.D.2d 561, 420 N.Y.S.2d 754 (2nd Dept.1979)

56 Young v Young, 212 AD2d 114, 628 NYS2d 957 (2d Dept., 1995).

57 See Raybin v. Raybin, 205 A.D.2d 918, (3rd Dept., 1994)

58 John A. v. Bridget M., 16 AD3d 324 (1st Dept., 2005); Lauren R. v. Ted R., 27 Misc.3d 1227(A), Slip Copy, 2010 WL 2089283 (Table) N.Y.Sup., 2010; See, Steinberger, Father? What Father? Parental Alienation and Its Effect on Children, NYSBA Family Law Review, Spring 2006; Johnston, J.R., Children of Divorce Who Reject a Parent And Refuse Visitation: Recent Research & Social Policy Implications for the Alienated Child, 38 Fam. L.Q. 757, 768-769.

59 Young v Young, 212 AD2d 114, 628 NYS2d 957 (2d Dept.,1995);

60 Entwhistle v Entwhistle, 92 AD2d 879, 459 NYS2d 862

61 Race "is not a dominant, controlling or crucial factor" but must be "weighed along with all other material elements of the lives of the family." Farmer v. Farmer, 109 Misc.2d 137, 147, 439 N.Y.S.2d 584; Matter of Davis v Davis, 240 A.D.2d 928, 658 N.Y.S.2d 548 (3d Dept., 1997)

party has committed an act of domestic violence against the alleging party or a family or household member of either party, and the allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child. 62 The Court is required to consider the effect of domestic violence, whether direct or indirect, in determining custody and visitation.63 In considering the existence of domestic violence the Court is not limited to acts of physical abuse but must also consider psychological and emotional abuse.64

As with custody, Domestic Relations Law § 240(1) (a), requires the court to consider evidence of domestic violence when determining what visitation will be in the best interests of the child.65

9. Factors Considered - Availability and ability of the Parents

.

In Jacobs v Jacobs,66 the Appellate Division stated: ”The ability to provide for the emotional and intellectual growth of one's children, which, as our dissenting colleague aptly recognizes, is of paramount important..., and cannot be measured solely on a qualitative basis. Consideration must also be given to the availability of a parent to tend to the children's needs and to participate in their development. Custody options which allow for the direct care and guidance of children by a parent rather than by third parties are naturally preferred. In the instant case, the mother has indicated both a willingness as well as an ability to provide for the needs of her children.”

---

62 See Domestic Relations Law § 240(1) (a).

63 See Finkbeiner v. Finkbeiner, 270 A.D.2d 417, 705 N.Y.S.2d 268 (2d Dept.2000).

64 See J.D. v. N.D., 170 Misc.2d 877, (Fam. Ct. Westchester Co.1996) (evidence of psychological and other forms of abuse inflicted by the father upon the mother showed that it would not be in the child's best interests to place him in the father's care and custody)

65 See A.U .G. v. J.G., 300 A.D.2d 205 (1st Dept.2002) (supervised visitation and a stay away order was appropriate where the husband had raped the wife in their home near where the children slept).

66 117 A.D.2d 709, 498 NYS2d 852.

10. Factors Considered - Interference with the relationship between child and non-custodial parent

In Young v Young,67 the court pointed out that: "...the natural right of visitation jointly enjoyed by the non-custodial parent and the child is more precious than any property right" ...and that "the best interests of the child would be furthered by the child being nurtured and guided by both of the natural parents" ... Indeed, a custodial parent's interference with the relationship between a child and a non-custodial parent has been said to be "an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent." 68

In Maloney v Maloney,69 the Appellate Division found no basis for disturbing the trial court's award of custody of the parties' three children to the defendant father. The mother, however, failed to promote, to the same degree as the father, the children's intellectual, physical and social development, although she had primary custody. Moreover, the mother persistently interfered with the father's visitation rights, causing disruption to the children's weekend routines, often causing them to miss special events which had been planned well in advance and which the children eagerly anticipated. The Court held that interference with the relationship between a child and a non-custodial parent by the custodial parent is an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent.70 Further, the court-appointed psychiatric expert testified that the children were already experiencing a sense of uncertainty as a result of the mother's vindictive attitude toward their father, and the continued pattern of interference would eventually cause the children emotional disturbance. The weight of the evidence indicated that the father would provide the more stable and nurturing home environment for the children. Therefore, it was not an improvident exercise of discretion for the trial court to award custody to the father.

Parental alienation has been described as “the programming of the children by one parent, into a campaign of denigration against the other. The second component is the child's own contributions that dovetail and complement the contributions of the

---

67 212 A.D.2d 114, 628 N.Y.S.2d 957

68 citations omitted

69 208 AD2D 603, 617 NYS2d 19

70 Citing, Leistner v Leistner, 137 AD2d 499; see also, Matter of Krebsbach v Gallagher, 181 AD2d 363, 366.

programming parent. It is this combination of both factors that define the term parental alienation.” 71

11. Factors Considered - “Friendly parent" concept

New York’s traditional dislike of joint custody, as an alternative to sole custody subject to reasonable visitation rights, encourages controversy and incidentally invites the formulation of social and psychological factors as an aid to decision making. Social workers and the helping professions have responded by giving emphasis in their reports, recommendations, and testimony, to two basic principles. First, the desirability of continuity in the child’s home environment, and second, the desirability of giving custody to the contender who will be the more cooperative and responsible in keeping open communication and contacts between the child and the non-custodian. The latter has been labeled the more "friendly parent" concept.72 This concept has received judicial acceptance in New York.

The "friendly parent" doctrine is further supported by the rules which apply as to a custodian’s wrongful interference with visitation rights. Under New York law such wrongful interference, has been said to be "an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent”. 73

As we have said, the friendly parent concept is supported by generally accepted psychological principles. It is a fair inference that willingness to cooperate post-divorce indicates that the child’s welfare is being placed ahead of selfish self-interest. The cooperative parent is not treating the child as an object and has his or her priorities in the right place. The uncooperative parent more often than not is treating the child as an object or prop and is advancing perceived self-interest as the top priority. The parental attitude is important because it is an indicator of future conflicts and has a direct bearing on the enforcement and collection of child support.

---

71 Zafran v. Zafran, 191 Misc.2d 60; People v. Fortin, 184 Misc.2d 10

72 See In Brozzo v. Brozzo, 192 A.D.2d 878, 596 N.Y.S.2d 588 (3d Dep’t 1993).

73 See Daghir v. Daghir, 82 A.D.2d 191, 441 N.Y.S.2d 494 (2d Dep’t 1981), order aff’d, 56 N.Y.2d 938, 453 N.Y.S.2d 609, 439 N.E.2d 324 (1982); and Leistner v. Leistner, 137 A.D.2d 499, 524 N.Y.S.2d 243 (2d Dep’t 1988).

The rationale for what is referred to as the "Friendly Parent" doctrine, was originally set forth in New Trends In Child Custody Determinations,74 which is the report by the Committee on the Family of the Group for the Advancement of Psychiatry. Several leading American psychiatrists, who were oriented toward a family rather than a one-on-one approach, spent several years on the project. The recommendation was made that in custody disputes: "The court's determination should aim at providing the child with an ongoing relationship with as many members of his or her family of origin as possible. We are convinced that this is more helpful in the long run and less disruptive than a primary relationship with one parent and treating the non-custodial parent as though he or she were a visitor in the child's life." Secondly, "The court should not confirm the moral condemnation of one parent by the other since the child's welfare is badly served by the loss of trust such condemnations engender. In the adversary process of a court contest between the parents, phrased as a struggle on behalf of the child's best interests, the child may become the silent, helpless victim. It is to the child's advantage that all trust diminishing process be minimized. A loss of trust in either parent is more damaging in the long run than most kinds of inadequate parenting behaviors." Thirdly, "In determining parental competence, the court should seriously consider the comparative willingness of the two contestants to provide the child with access to the other parent, to siblings, grandparents, and other relatives." Fourth, "The child should not be considered merely a passive recipient of parental care but also a concerned and willing source of support for both parents. Regardless of the legal determinations of divorce and custody, the child has a need to express and channel concern about all family members, including the non-custodial parent." The report also observes that "continued post-divorce quarreling and litigation are signs that something is wrong in the equilibrium and that this now divorced 'family' needs continued help." Finally, the report says that "The court should be ready and able to 'interfere' in re-evaluating custody determinations that are no longer satisfactory for the children".75

In Turner v. Turner,76 the Appellate Division reversed an Order of the Family Court which granted respondent custody of the parties' child. The Appellate Division held that a concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child as to raise a strong probability that the interfering parent is unfit to act as a custodial parent. In this case, the Family Court reasoned that respondent's behavior was the result, not of a desire to alienate petitioner from the child, but was prompted instead by respondent's

74 Dr. Joseph Satten, Ed, (1980).

75 Id. at pages 146–147.

76 260 A.D.2d 953, 689 N.Y.S.2d 269 (3d Dep't 1999).

hypersensitivity to sexual abuse which she and other members of her family had purportedly experienced in the past. The Appellate Division held that this rationale was unpersuasive for it was not respondent's motive that was of importance, but rather, the effect of the child of respondent's manipulation of the child in relation to these false allegations. Respondent engaged in persistent efforts to interfere with petitioner's right to see the child and as a consequence of the three petitions filed by her, accusing the father of sexual abuse, his relationship with the child was undeniably affected at the very minimum by the fact that his visitation to her was suspended and when not suspended, she was required to endure supervised visitation.

In Shuchter v. Shuchter,77 the Appellate Division held that the Supreme Court properly granted custody of the parties' daughter to the father. The overwhelming weight of the expert testimony adduced at the hearing supported the Supreme Court's conclusion that there was a danger of psychological harm and the child would never be allowed to develop a relationship with the father if the wife retained custody. If found that Supreme Court took into consideration the physical abuse of the wife by the husband during the marriage but concluded in accordance with expert testimony that the wife had greatly exaggerated the number and severity of the acts and the acts were isolated, that the husband was not a dangerous person and he was willing to engage in counseling to understand and overcome his past conduct.

In David K. v. Iris K.,78 the Appellate Division held that the conclusion of the trial court, that an award of custody of the parties' child to plaintiff was in the best interests of the child, was supported by a sound and substantial basis in the record. The evidence revealed that defendant deliberately frustrated and interfered with plaintiff's visitation rights and made false allegations of sexual misconduct. Such conduct was inconsistent with the best interests of the child. Defendant contended that a change in custody would be emotionally harmful to the child. However, "that a sudden change in custody may prove temporarily disruptive is not determinative, for all changes in custody are disruptive." Here, the mental health experts all concluded that the risk of emotional trauma caused by a change in custody was outweighed by the risk that the child would sustain emotional harm if she remained in defendant's custody.

In our view, the use of the "friendly parent" concept as a factor in custody determinations is fully justified, both theoretically and by the public policy that now exists in New York. As a consideration relevant to both the initial custody proceeding and later

77 259 A.D.2d 1013, 688 N.Y.S.2d 323 (4th Dep't 1999)

78 276 A.D.2d 421, 714 N.Y.S.2d 297 (1st Dep't 2000).

modification proceedings, the friendly parent concept fits nicely into our policy of protecting the rights of a parent having visitation, and New York's preference for sole custody, plus protected visitation, rather than joint custody.

12. Factors Considered - Psychological factors and Expert Opinions

The ability to provide for the child's emotional needs has been said to be a key factor in child custody determinations in New York.79

Psychological principles play a significant part in several factors which New York courts have considered in child custody determinations, including continuity, stability, and security in the child's home environment, the child's expressed preference as to custody, and the desire to keep siblings together. Psychological concerns also predominate under the "friendly parent" concept.

It has been held by the Court of Appeals that the weight to be given the testimony of an expert witness is for the trier of facts. 80

Expert testimony may be rejected by the trial court "if it is improbable, in conflict with other evidence or otherwise legally unsound."81 The fact that an expert has been designated or appointed by the court, does not, in any way, require that the court accept

---

79 See Landau v. Landau, 214 A.D.2d 541, 625 N.Y.S.2d 239 (2d Dep't 1995) (Custody of the child awarded to father and mother's visitation suspended where mother was found to suffer from, among other things, severe depression, persecutorial delusions, extreme emotional lability (openness to change), exceedingly poor judgment and distortion of reality, all of which impaired her parenting skills. Her unfounded allegations that the father had sexually abused the child and physically abused her were further evidence of her unfitness to act as the custodial parent)

80 In re City of New York, West Park (Manhattan Town) Clearance Project, 1 N.Y.2d 428, 154 N.Y.S.2d 1, 136 N.E.2d 478 (1956); Commercial Casualty Ins. Co. v. Roman, 269 N.Y. 451, 199 N.E. 658 (1936).

81 Desnoes v. State, 100 A.D.2d 712, 474 N.Y.S.2d 602 (3d Dep't 1984).

the opinion of that expert.82 The Court is not obligated to accept the recommendations of the court-appointed forensic expert,83 and this determination will not be disturbed on appeal if there is an explanation of the Court's determination which is sounded within a substantial basis in the record.84 While certainly, the Court can and should consider the recommendations set forth by its appointed expert,85 the weight to be accorded an expert's testimony is left to the trier of fact.86

13. Factors Considered - Home environment, material resources and logistics

The quality of the home environment the child will experience is a meaningful factor in child custody decisions.87 It is the quality of the parenting and of the home environment of the child which is the legitimate concern in determining child custody. 88 Courts will favor a parent who is concerned and committed, who provides loving care and guidance, and who is there when the child needs him.89 The quality of parenting

---

82 State ex rel. H.K. v. M.S., 187 A.D.2d 50, 592 N.Y.S.2d 708 (1st Dep't 1993), appeal dismissed, 81 N.Y.2d 1006, 599 N.Y.S.2d 804, 616 N.E.2d 159 (1993); Alanna M. v. Duncan M., 204 A.D.2d 409, 611 N.Y.S.2d 886 (2d Dep't 1994). See Brandes and Weidman, "Court appointed Experts in Custody Decisions," NYLJ, 12-27-94, P.3, Col.1.

83 See Vinciguerra v. Vinciguerra, 294 A.D.2d 565 (2nd Dept., 2002)

84 See, Berstell v. Krasa-Berstell, 272 A.D.2d 566; Alanna H. v. Duncan H., 204 A.D.2d 409 (2nd Dept., 1994).

85 See Prete v. Prete, 193 A.D.2d 804.

86 In Zelnik v. Zelnik, 196 A.D.2d 700, 601 N.Y.S.2d 701 (1st Dep't 1993), the Supreme Court ordered that the custody of the parties' child be returned to the mother, contrary to the parties' initial joint custody agreement. The Appellate Division affirmed based on evidence of acrimony between the parties which may have impinged upon the child's emotional and intellectual development. The Court held that the trial Court was free to reject the opinions of both the child's law guardian and the Court-appointed psychiatrist. See, Matter of Tina B. v. Craig B., 224 A.D.2d 933 (4th Dept., 1996)).

87 See Eschbach v. Eschbach, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982); Blake v. Blake, 106 A.D.2d 916, 483 N.Y.S.2d 879 (4th Dep't 1984)

88 Brady v. Brady, 216 A.D.2d 660, 628 N.Y.S.2d 191 (3d Dep't 1995),

89 Salk v. Salk, 89 Misc. 2d 883, 393 N.Y.S.2d 841 (Sup. Ct. 1975).

and the needs of the particular child are major factors in comparing alternative homes for the child. 90

14. Factors Considered - Continuity of stable environment

There is one principle which has won near-unanimous acceptance by behavioral experts, experts in child development, and by the courts. That is the importance of continuity, stability, and security in the child's home environment. 91

15. Factors Considered - Child's preference

The rule in New York is that the child's preference as to his or her custodian will be considered by the court if the child is of sufficient age and maturity to formulate a judgment.92

In Ebert v. Ebert,93 the Court of Appeals held that the wishes of two children to live with their father was not a sufficient basis for removing them from their mother and transferring custody to the father. In Dintruff v. McGreevy, 94the Court of Appeals held that a child's expressed desire to live with one parent is not exclusively determinative of the long-term best interests of the child regarding custody.

---

90 Harvey v. Roselle, 125 A.D.2d 997, 510 N.Y.S.2d 392 (4th Dep't 1986) (affirmed an award of custody to the father due to his ability to provide his son with parental guidance and a proper home environment)

91 Kazmi v. Kazmi, 201 A.D.2d 857, 608 N.Y.S.2d 535 (3d Dep't 1994); Nehra v. Uhlar, 43 N.Y.2d 242, 401 N.Y.S.2d 168, 372 N.E.2d 4 (1977).

92 Calder v. Woolverton, 50 A.D.2d 587, 375 N.Y.S.2d 150 (2d Dep't 1975), order aff'd, 39 N.Y.2d 1042, 387 N.Y.S.2d 252, 355 N.E.2d 306 (1976)

93 38 N.Y.2d 700, 382 N.Y.S.2d 472, 346 N.E.2d 240 (1976)

94 34 N.Y.2d 887, 359 N.Y.S.2d 281, 316 N.E.2d 716 (1974)

Where the stated preference of a child is deemed to have been inspired by pressure or brainwashing, it will not be given any weight.95 In Young v. Young,96 the Appellate Division determined that the Supreme Court placed undue emphasis on the factor of stability, expressing its belief that a change of custody would be extremely disruptful of the children. Although stability has been found to be in a child's best interests, it also cannot be determinative. The court held that the weight to be given the preference of the child is within the discretion of the trial court, and it may be disregarded altogether, especially where the preference results from pressure or "brainwashing" on the part of the favored parent.

While the Court may consider the wishes of a child, the child's desires are not controlling.97 It is not error to fail to ascertain the wishes of a child of tender years.98

16. Factors Considered - Keeping siblings together

Depending upon all the circumstances, New York's public policy favors keeping siblings together rather than parceling them out in an arbitrary fashion as rewards or consolation prizes. The Court of Appeals has said: "[T]his court has long recognized

---

95 Pact v. Pact, 70 Misc. 2d 100, 332 N.Y.S.2d 940 (Fam. Ct. 1972) (quoting Foster and Freed, Law and the Family New York, former §29:12). See also McCrocklin v. McCrocklin, 77 A.D.2d 624, 430 N.Y.S.2d 320 (2d Dep't 1980).

96 212 A.D.2d 114, 628 N.Y.S.2d 957 (2d Dep't 1995).

97 Obey v. Degling, 37 NY2d 768, 375 NYS2d 91 (1975); Ebert v. Ebert, 38 NY2d 700, 382 NYS2d 474 (1976). In Dintruff v. McGreevy, 34 NY2d 887, 359 NYS2d 281, the Court of Appeals said "We believe that custody of children should be established on a long-term basis and should not be changed merely because a child at some time states that he desires it. While a child's view should be considered to ascertain his attitude and to lead to relevant facts, it should not be determinative. If it were, then all a court would be required to decide is whether his preference of parents is voluntary and untainted and then follow the child's wish. This would certainly not be conducive to the proper raising of children."

98 Cohen v. Cohen, 70 AD2d 925, 417 NYS2d 755 (2d Dept., 1979).

In Feldman v. Feldman, 58 AD3d 882, 396 NYS2d 879, the Appellate Division reversed an order of Special Term awarding custody of a 16 year old to the wife because the Court did not ascertain the wishes of the child.

that it is often in the child's best interests to continue to live with his siblings." 99 There is a strong policy of maintaining close siblings relationships.100

The exigencies of the particular fact situation, however, may require the splitting of siblings. Keeping them together is a factor to be considered, but it is one factor that easily may be overridden.101

Although it frequently is said that New York "frowns upon the separation of siblings", that depends upon the totality of the circumstances, and in large measure upon the

---

99 Eschbach v. Eschbach, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982). See also Ebert v. Ebert, 38 N.Y.2d 700, 382 N.Y.S.2d 472, 346 N.E.2d 240 (1976) (reversed the Appellate Division's award of two older boys to the father and a younger son to the mother. The Court of Appeals said that the separation of siblings is to be frowned upon, where, as here, the mother was fit and willing and able to function as the custodian of all three children.); Obey v. Degling, 37 N.Y.2d 768, 375 N.Y.S.2d 91, 337 N.E.2d 601 (1975), held that under most circumstances, the custody of siblings should be awarded to the same parent, so that they can be reared together in order to promote and strengthen the familial bond.

100 Ebert v. Ebert, (1976) 38 NY2d 700, 382 NYS2d 472, 346 NE2d 240; Fountain v. Fountain, (1981, 3d Dept.) 83 App Div. 2d 694, 442 NYS2d 604, affd 55 NY2d 838, 447 NYS2d 703, 432 NE2d 596; Gotham v. Goham (1984, 3d Dept.) 102 App Div. 2d 981, 477 NYS2d 788.

101 See Sandman v. Sandman, 64 A.D.2d 698, 407 N.Y.S.2d 563 (2d Dep't 1978) (under the circumstances of the case, an award of one child to each parent was proper); People ex rel. Repetti v. Repetti, 50 A.D.2d 913, 377 N.Y.S.2d 571 (2d Dep't 1975) (held, two judges dissenting, that the interests of two younger children required that they stay with the mother with whom they had always lived, but that three older children, ages 13, 15, and 16, should be with the father. The three older children preferred that arrangement.) Wurm v. Wurm, 87 A.D.2d 590, 447 N.Y.S.2d 758 (2d Dep't 1982), appeal dismissed, 56 N.Y.2d 886, 453 N.Y.S.2d 429, 438 N.E.2d 1145 (1982), involved an appeal from an award of a 12-year-old daughter to the mother and a 17-year-old son to the father, holding that the award was proper under the circumstances, even though the splitting of siblings is not favored. In Porges v. Porges, 63 A.D.2d 712, 405 N.Y.S.2d 115 (2d Dep't 1978), an appeal by the father from the trial court's determination which split siblings, the daughter going to the mother, the son to the father, the Appellate Division affirmed because the evidence showed a close relationship between mother and daughter and between father and son, and verbal harassment of the son by the mother.

ages of the children and their attachment to one another. 102

17. Factors Considered - Parents Lifestyle, sexual orientation

The more recent New York cases regarding what formerly was called "meretricious" behavior inquire into what effect, if any, the objectionable conduct had on the children. The mere fact that a parent has engaged, or is engaging, in nonmarital sexual relations with a third party, whether heterosexual or homosexual or is a homosexual, has been held not sufficient to warrant a denial of custody.103 In determining custody, the court should give careful consideration to the conduct of the parents, including their lifestyles and morality, in relation to the welfare of the child. 104

18. Factors Considered - Primary caretaker

The "primary caretaker" doctrine, which provides generally that custody of a child should be placed in the parent who, prior to divorce or separation, had been his or her primary caretaker, has not been elevated to the status of a presumption in New York, as it has in some other states. The primary caretaker status of a parent is one factor to be

---

102 Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982).

103 Blank v. Blank, 124 A.D.2d 1011, 508 N.Y.S.2d 129 (4th Dep't 1986), (a parent's sexual infidelity should be considered only where it is shown to have an adverse affect on the child's welfare.); Anonymous v. Anonymous, 120 A.D.2d 983, 503 N.Y.S.2d 466 (4th Dep't 1986) (in the absence of proof that the child had been adversely affected by the mother's lifestyle, her relationship with a lesbian lover did not render her an unfit parent).

If, however, the children are neglected when sexual gratification is sought, or are left alone, sexual activity may become a serious factor in the determination of custody or visitation, and sexual activity that occurs in the presence of children, or within their sight or hearing, is deemed to be very significant. Gottlieb v. Gottlieb, 108 A.D.2d 120, 488 N.Y.S.2d 180 (1st Dep't 1985). See also, Guinan v. Guinan, 102 A.D.2d 963, 477 N.Y.S.2d 830 (3d Dep't 1984).

104 Carpenter v. Carpenter, 96 A.D.2d 607, 464 N.Y.S.2d 606 (3d Dep't 1983); McIntosh v. McIntosh, 87 A.D.2d 968, 451 N.Y.S.2d 200 (3d Dep't 1982); Saunders v. Saunders, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3d Dep't 1977); Gotham v. Gotham, 102 A.D.2d 981, 477 N.Y.S.2d 788 (3d Dep't 1984).

considered in the determination of custody. 105

19. Factors Considered - Economic Status

The relative financial position of the parents is not controlling in awarding custody.106 Greater wealth does not alone assure the greater welfare of a child. Poverty alone is not a basis for denying a parent custody.107

20. Factors Considered - Child Care Arrangements

If a parent has a job requiring long and frequent periods from home, that parent must show adequate and specific plans for how the child will be cared for.108 Direct care and guidance by the parent rather than third parties is preferred. The parents' ability to personally devote time to the child and his/her needs is an important factor. 109

21. Factors Considered - Parental Lifestyle and Religion.

In view of the constitutional protection of religious freedom, as a matter of policy, courts tend to refrain from intervening with respect to the child's religious upbringing.110

---

105 See Russo v. Maier, 196 A.D.2d 720, 602 N.Y.S.2d 2 (1st Dep't 1993); Diane L. v. Richard L., 151 A.D.2d 760, 542 N.Y.S.2d 783 (2d Dep't 1989) (Appellate Division reversed an order of the Family Court which awarded custody to the father and awarded custody to the mother, where she had been the primary caregiver for the greater part of the children's lives and the father's involvement with the children was of relatively recent origin.)

106 Salk v. Salk, 89 Misc.2d 883, 393 NYS2d 841 (Sup.Ct., NY Co., 1975), aff'd mem., 53 AD2d 558, 385 NYS2d 1015 (1st Dept., 1976).

107 Application of White, 118 AD2d 336, 505 NYS2d 116, (1st Dept., 1986).

108 Bullotta v. Bullotta, 43 AD2d 847, 351 NYS2d 704 (2d Dept., 1974).

109 Jacobs v. Jacobs, 117 AD2d 709, 498 NYS2d 852 (2d Dept., 1986).

110 See People ex rel. Sisson v. Sisson, 271 NY 285 (1936)

Courts may not inquire into religious beliefs and practices of a parent and base a custody decision on a determination that such beliefs and practices would or would not be in the child's best interest.111

Courts may consider religion as a factor where the child develops actual ties to a specific religion or where particular religious practices threaten the health and welfare of the child. Otherwise, decisions as to a child's religious upbringing will be left to a child of sufficient age or intelligence, the agreement of the parents, or where there is no agreement, to the custodial parent.112

22. Factors Considered - Illicit Sex

Adults are entitled to indulge their sexual preferences as a matter of privacy if no harm is occasioned to the children.113 New York cases inquire into what effect if any, the objectionable conduct has on the child. 114

Prior to the enactment of New York's "same-sex marriage" act on July 24, 2011, a parent's homosexuality was a consideration in a custody proceeding, but only if it was shown to adversely affect the child's welfare. 115

Sexual misconduct, however, when combined with other factors such as unseemly conduct in the presence of the children, and their neglect or abandonment,

---

111 Aldous v. Aldous, 99 AD2d 197, 473 NYS2d 60 (3d Dept.), appeal dismissed, 63 NY2d 74 (1984), cert. denied, 469 US 1109, 105 S.Ct., 786, 83 L.Ed.2d 780 (1985)

112 Spring v. Glowan, 89 A.D.2d 980, 454 N.Y.S.2d 140; New York courts will consider religion in a custody dispute when a child has developed actual religious ties to a specific religion and those needs can be served better by one parent than the other. Gribeluk v. Gribeluk, 120 A.D.3d 579, 579, 991 N.Y.S.2d 117, 118 (2 Dept.,2014)

113 S v. J, 81 Misc.2d 828, 367 NYS2d 405

114 See opinion by Justice Benjamin in Feldman v. Feldman (1974, 2d Dept.) 45 App Div. 2d 320, 358 NYS2d 507, where the "penumbra of the Bill of Rights" was invoked, citing Griswold v. Connecticut (1965) 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678. See also S v. J, 81 Misc.2d 828, 367 NYS2d 405.

115 Guinan v. Guinan (1984, 3d Dept.) 102 App Div. 2d 963, 477 NYS2d 830.

can lead to a finding of parental unfitness.116

23. Factors Considered - Abandonment of the Child

Where the parent abandons the child, our courts will usually award custody to the parent who has remained with the child.117

24. Factors Considered - Mental Illness of a Parent

A parent's past history of mental illness is not a bar to an award of custody where that parent has recovered.118 However, if it is detrimental to the child, that parent will be denied custody.119

25. Custody Proceedings - Evidence - Admissibility of Hearsay

Custody proceedings represent something of a hybrid. The usual rules of evidence are applied in custody cases, but experience has demonstrated that the welfare of children and the court's need for full information require some modification of the usual rules of procedure in adversary proceedings. The urgent need for reliable data, as an aid to decision-making in custody and visitation cases, has led to a

---

116 Dornbusch v. Dornbusch (1985, 2d Dept.) 110 App Div. 2d 808, 488 NYS2d 229, app den, app dismd 65 NY2d 1024, 494 NYS2d 304, 484 NE2d 667. Carpenter v. Carpenter (1983, 3d Dept.) 96 App Div. 2d 607, 464 NYS2d 606.

117 Ottensman v. Lombardo, 22 Misc.2d 104, 202 NYS2d 387. See also, People ex rel. Ragona v. De Saint Cyr, 207 Misc. 104, 137 NYS2d 275.

In Meirowitz v. Meirowitz, 96 AD2d 1030, 466 NYS2d 434 (2d Dept., 1983), the Court found that the husband implicitly agreed that the wife should be the custodial parent, when he moved out of the marital residence and left the child with his wife.

118 Application of Richman, 32 Misc.2d 1090, 227 NYS2d 42; Anonymous v. Anonymous, 34 Misc.2d 44, 226 NYS2d 702 (history of schizophrenia).

119 Application of Reinhart, 33 Misc.2d 80, 227 NYS2d 39.

relaxation of traditional adversary procedure,120 and, at least arguably, of the hearsay rule.121 An award of custody will be reversed if based on hearsay unless the error is harmless.122

All four of the New York Appellate Divisions have held that in a custody or visitation matter, the trial court may allow hearsay evidence of abuse or neglect under the authority Section 1046 of the Family Court Act.123 Evidence of previous statements made by the child relating to any allegations of abuse or neglect may be admitted in court if they are corroborated by any other evidence tending to support the reliability of the statements, in order to present a prima facie case.

---

120 Kesseler v. Kesseler, 10 N.Y.2d 445, 225 N.Y.S.2d 1, 180 N.E.2d 402 (1962); Lincoln v. Lincoln, 24 N.Y.2d 270, 299 N.Y.S.2d 842, 247 N.E.2d 659 (1969)

121 In People ex rel. Cusano v. Leone, 43 N.Y.2d 665, 401 N.Y.S.2d 21, 371 N.E.2d 784 (1977), where a Supreme Court order sustaining a writ of habeas corpus in a custody dispute was reversed, the court noted in a footnote, that, "in the dispositional hearing, as opposed to the fitness hearing, hearsay testimony may be considered as long as it is material and relevant and its use would not be a breach of traditional notions of fairness."

But compare Ponzini v. Ponzini, 135 Misc. 2d 468, 515 N.Y.S.2d 974 (Fam. Ct. 1987), Justice Hurley declined to follow Cusano v. Leone.

See also Matter of Leon RR, 48 N.Y.2d 117, 421 N.Y.S.2d 863, 397 N.E.2d 374 (1979), which involved a proceeding to terminate parental rights due to child neglect. In reversing, the Appellate Division emphasized: "The case file admitted by the court was replete with inadmissible hearsay which played a large part in the ultimate disposition of the case."

122 In Siegman v. Kraitchman, 30 A.D.2d 979, 294 N.Y.S.2d 1005 (2d Dep't 1968), an award of custody to the father was reversed because of the admission of hearsay evidence regarding the son's mental condition and because the mother had been denied an examination of psychiatric reports concerning herself, the father, and the son.

But see Rush v. Rush, 201 A.D.2d 836, 608 N.Y.S.2d 344 (3d Dep't 1994).

123 See In re Nilda S., 302 A.D.2d 237, 754 N.Y.S.2d 281 [1st Dept.2003]; Loren B. v. Heather A., 13 A.D.3d 998, 788 N.Y.S.2d 215 [3rd Dept.2004]; Admissibility of Hearsay Linda P. v. Thomas P., 240 A.D.2d 583, 659 N.Y.S.2d 55 [2d Dept.1997]; Stacey LB v. Kimberly RL, 12 A.D.3d 1124, 785 N.Y.S.2d 238 [4th Dept.2004] lv denied 4 N.Y.3d 704 [2005]).

For a discussion of this exception see Chapter 2.

26. Custody Proceedings - Evidence - Use of Experts, Evaluations, and Reports

The New York Court of Appeals adopted a policy regarding the use of experts evaluations in custody cases, in two custody cases decided during the 1960's, where traditional adversary procedure was adapted to serve the "best interests" of the children.

In Kessler v. Kessler,124 the Court of Appeals held that in a custody proceeding the court may order forensic evaluations by impartial professionals who would be available to be called as an expert witness and testify in accordance with the common-law rules of evidence. The Court held that even without the consent of the parties the court may direct that a probation officer, family counselor attached to the court, or other qualified and impartial psychiatrists, psychologists or other professional medical personnel to make investigations, although they may not report to the court. The report could be used to furnish leads for the introduction of common-law evidence. The Court of Appeals went on to state that there was no reason which would prevent the court, in the proper exercise of judicial discretion, from calling upon such persons, to examine the infant or to examine the parents also if they will submit to such examination. However, the psychologists, psychiatrists or other medical personnel could not report to the court in the absence of a stipulation by the parties.

In Lincoln v Lincoln, 125 the Court of Appeals held that the trial court may interview the child in camera, out of the presence of the parties and their attorneys. It observed that in Kessler it "...held that professional reports and independent investigations by the Trial Judge entail too many risks of error to permit their use without the parties' consent. More important, the interest of the children themselves requires that the accuracy of these professional reports be established and that there be an opportunity to explain or rebut material contained in the reports. "

Another hurdle lawyers have to overcome with regard to forensic reports is that "reports", rather than testimony, are hearsay. 126

---

124 10 N.Y.2d 445, 225 N.Y.S.2d 1, 180 N.E.2d 402 (1962)

125 24 NY2d 270, 273 [1969]

126 Kessler v. Kessler, 10 N.Y.2d 445, 225 N.Y.S.2d 1(1962); Matter of D' Esposito v Kepler, 14 AD3d 509, 788 N.Y.S.2d 169, (2d Dept., 2005); Kahn v. Dolly, 6 AD3d 437, 774 NYS2d 365 (2d Dept.,2004) ("reliance upon professional reports without the consent of the parties is impermissible, since such reports contain inadmissible hearsay"); Chambers v Bruce, 292 AD2d 525, 740 NYS2d 76 (2d Dept.,2002) (error to

In Family Court proceedings it became customary for the court to order mental health examinations pursuant to Family Court Act §251, conducted by clinicians on the staff of the Family Court Mental Health Services Clinic or by another mental health expert, such as one selected and agreed to by both parties. The court could sua sponte order the examinations or order them in response to a motion by one of the parties.[127] It can be considered an abuse of discretion for the court not to order a psychiatric evaluation in a custody case in which psychological factors are critical.[128]

Mental Health examinations are available in Supreme Court custody cases by the use of the CPLR 3121 disclosure device. CPLR 3121(a) which is applicable in matrimonial actions,[129] provides that a party may be required to submit to a pretrial physical, mental or blood examination conducted by the other party whenever the

---

admit report into evidence); Wilson v Wilson, 226 AD2d 711, 641 NYS2d 703 (2d Dept., 1996).

127 Family Court Act §251 provides, in part: "After the filing of a petition under this act over which the family court appears to have jurisdiction, the court may cause any person within its jurisdiction and the parent or other person legally responsible for the care of any child within its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed or designated for the purpose by the court when such an examination will serve the purposes of this act. . ."

128 Giraldo v. Giraldo, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dep't 1982), held that the Family Court had abused its discretion in failing to order an independent psychiatric evaluation once it became evident that the decision would hinge upon psychological factors. The case was remanded and referred to another judge who would consider the issues anew.

In Lee v. Halayko, 187 A.D.2d 1001, 590 N.Y.S.2d 647 (4th Dep't 1992), the Court ruled that the divorce Court did not err in failing to sua sponte order home studies before deciding custody. Both parents were well educated, intelligent people with no history of psychological problems, and neither party questioned the fitness of the other as a parent.

In Paul C. v. Tracy C., 209 A.D.2d 955, 622 N.Y.S.2d 159 (4th Dep't 1994), the Appellate Division held that the Family Court did not err in failing to order a psychological or social evaluation of the parties. The decision whether to direct the psychological or social evaluation in a child custody dispute is within the sound discretion of the court. Neither the parties nor the law guardian requested a psychological evaluation, and there was nothing in the record to indicate that the children displayed emotional problems which would make the assistance of psychological experts necessary.

129 Wegman v Wegman, 37 NY2d 940, 941 (1974).

physical or mental condition or blood relationship of that party ‘‘is in controversy.’’ Service of a notice to submit to a mental examination, pursuant to CPLR 3121(a), became a useful tool for many years to compel the adverse party to submit to a forensic evaluation by a party’s own expert.130

However, the right to conduct such an examination pursuant to CPLR 3121(a) was restricted by the Appellate Division in Rosenblitt v Rosenblitt,131 where the issue was whether the noncustodial spouse could obtain an order directing that the custodial spouse be examined by a psychiatrist designated by the noncustodial spouse, after evaluations of the parties and the children had already been conducted by the Forensic Division of the Department of Social Services, although not yet submitted to the court. The Second Department observed that in Wegman v Wegman132 the Court of Appeals noted that, recognizing the potential for abuse in such cases, the courts' “broad discretionary power to grant a protective order ...should provide adequate safeguards”. The Appellate Division held that where forensic examinations have been conducted and there is no showing that such examinations were in any way inadequate or deficient, it is an abuse of discretion to compel one particular party to submit to further evaluations at the insistence of the adverse party, where not a single reason is presented in support of the application. A disgruntled litigant should not be permitted to thus compel an adversary to join in his or her efforts to shop around for favorable expert testimony. While it is entirely appropriate for trial courts to call upon qualified and impartial health care professionals to render reports based upon examinations of the children and parents, courts have expressed a preference that such examinations be conducted by neutral and impartial professionals, and that it would be patently unjust to permit defendant's retained expert, who has already reached a conclusion favorable to defendant, to conduct a psychiatric evaluation of plaintiff. Under the circumstances of that case, a further evaluation of plaintiff was unnecessary and inappropriate. The court pointed out that even if it were to conclude that a further psychiatric evaluation was warranted, defendant's partisan expert would not be the proper person to conduct it.133

---

130 See, for example, Proschold v Proschold, 114 Misc 2d 568, 451 NYS2d 956 (Sup Ct 1982).

131 Rosenblitt v Rosenblitt, 107 A.D.2d 292, 486 N.Y.S.2d 741 (2d Dept. 1985)

132 Wegman v Wegman, 37 NY2d 940, 941 (1974).

133 See also, Meisner v Meisner (1985, 2d Dept.) 111 App Div. 2d 788, 490 NYS2d 536 (forensic examinations ordered on wife's unopposed motion, to be conducted by a court-appointed doctor, to be used as an aid to determine whether visitation is proper and, if so, whether conditions should be imposed.)

In B. v B. (1987) 134 Misc. 2d 487, 510 NYS2d 979, the court granted the mother's motion for an order, pursuant to CPLR § 3121, directing the father to appear for a psychiatric examination by the mother’s designated expert. While it was bound by

In 1988 the First Department observed that notwithstanding the absence of any explicit statutory authority, courts had been routinely appointing independent

---

the Rosenblitt decision, that case was distinguishable because the impartial examinations that the parties had already agreed to in this case had not yet been conducted, the petitioner's expert had not yet done an examination, the potential for delay was minimal, the addition examination was not harassing and the context in which the case came to the court (i.e., the breakdown of a complex joint custody arrangement in a separation agreement) was different.

In Radigan v Radigan (1985, 2d Dept.) 115 App Div. 2d 466, 495 NYS2d 703, the Appellate Division reversed an order of Special Term and granted a husband's motion to the extent of directing the wife and son to submit to an examination by a court appointed psychiatrist, on condition that he also submit to such examination and pay the cost of it. The Family Services social worker assigned to the case recommended that the wife be given custody, based on 6 ½ interviews with the parties and child. The court held that there is no restriction in CPLR § 3121(a) limiting the number of examinations and that a subsequent examination is permissible where the party seeking the examination demonstrates the necessity for it. It found that Special Term should not have denied the husband's motion for psychiatric examinations because the history of the family unit disclosed that its members had a history of using mental health professionals, and the social worker's report was made without psychiatric assistance.)

In Sardella v. Sardella, 125 A.D.2d 384, 509 N.Y.S.2d 109 (2d Dep't 1986), the Appellate Division held that trial court did not abuse its discretion by ordering the wife and child to submit to further mental examinations upon finding that the prior examinations were unsatisfactory; however, it directed that the new examinations should be performed by a neutral psychiatrist selected by the court, to eliminate the multiplicity of examinations by parties' experts which could delay determination of the case.

In Forrest v Forrest (1987, 2d Dept.) 131 App Div. 2d 425, 516 NYS2d 79, the Appellate Division affirmed an order that denied the wife's motion for a psychiatric evaluation of the husband where the parties and one child were already examined by the Forensic Services Division of the Nassau County Department of Mental Health. It held that Special Term properly denied the wife's motion for further psychiatric evaluation by the parties' respective experts ‘‘absent any indication that the investigatory and analytical efforts of the Forensic Division are deficient in any respect.’’

In Garvin v. Garvin, 162 A.D.2d 497, 556 N.Y.S.2d 699 (2d Dep't 1990), it was held that petitioner's request for psychological testing of the mother by his expert, where a neutral forensic investigation had been ordered, was premised on nothing more than a desire to bolster petitioner's credibility, a ground which has been previously held to be insufficient justification for such an examination.

psychiatrists and psychologists in custody proceedings since 1962 when the Court of Appeals recognized its inherent power to do so in Kessler.134 It has become a common practice for attorneys to request the court to order forensic evaluations by impartial professionals in contested custody cases, although occasionally the court will order a forensic evaluation on its own motion. Fairness and justice require that the use of secret reports by the trial court be prohibited and that the parties and counsel have access to the material relied upon by the court. The current rule in New York custody cases is that it is error for a trial court to base its determination on reports not revealed to the parties or counsel unless the parties stipulate otherwise.135

---

134 Zirinsky v Zirinsky, 138 A.D.2d 43, 529 N.Y.S.2d 298 (1st Dep't 1988)

135 In Fellows v. Fellows, 25 A.D.2d 865, 270 N.Y.S.2d 143 (2d Dep't 1966) the Appellate Division observed that "in the absence of stipulation or consent by the parties, it was improper for the court below to base its determination upon probation reports and psychiatric reports which were made confidentially to the court and the contents of which were not revealed to the parties or counsel (Kessler v. Kessler, 10 N Y 2d 445; Knapp v. Knapp, 21 A D 2d 761; Matter of Johnson v. Johnson, 21 A D 2d 256)."

In Isaacs v. Murcin, 38 A.D.2d 673, 327 N.Y.S.2d 126 (4th Dep't 1971), the trial court was reversed because it relied upon a confidential report by the Probation Department when the parties had not stipulated to its use and the accuracy of the report had not been established. No opportunity had been afforded to explain or rebut material contained in the report.

In Falkides v Falkides, 40 A.D.2d 1074, 339 N.Y.S.2d 235 (4th Dep't 1972) the Appellate Division remitted the visitation matter for a further hearing to afford the parties an opportunity to review the Probation and Family Court Clinic Reports and to cross-examine the Probation Officer, Court Psychiatrist and any others involved in making these reports, and further to afford the parties an opportunity to present testimony in opposition thereto, if they so choose. These reports were furnished to the Trial Court in this case and the record revealed that although the Court reserved the attorneys' right to go through the whole probation investigation, such opportunity was never accorded them. Moreover, the Trial Court stated that it based its custody determination on these reports. It pointed out that the law is well settled that the parties may stipulate to waive an examination of these reports and permit them to be received by the Trial Court. However, 'professional reports and independent investigations by the Trial Judge entail too many risks of error to permit their use without the parties' consent' (Matter of Lincoln v. Lincoln, 24 N.Y.2d 270, 273). Without the stipulation of consent the reports may be made but the parties must be given an opportunity to explain or rebut the material contained in them.

In DeStefano v DeStefano, 51 A.D.2d 885 (4th Dept., 1976), the trial court ordered an investigation by the Probation Division of Family Court and psychiatric evaluations of

the parties by the Family Court Clinic, with the consent of the parties. The Appellate Division held that trial court erred in holding the results of the investigation to be confidential, absent a stipulation to that effect by the parties. The consent of the parties that the investigation be undertaken cannot be construed as consent to the confidential use of the reports by the trial court in light of respondent's request that they be made available to counsel. Moreover, professional reports and independent investigations by the Trial Judge entail too many risks of error to permit their use without the parties' consent. The best interest of the children require that the accuracy of the contents of the probation report and the psychiatric evaluations be established and that there be an opportunity to explain or rebut the material contained therein. The matter was remitted for a further hearing to afford the parties an opportunity to review the results of the probation division investigation, and the psychiatric evaluations, and to cross-examine all those involved in the making of the reports, and to afford the parties an opportunity to present testimony or other evidence in contravention thereof.

In Baumgartner v. Baumgartner, 64 A.D.2d 880, 408 N.Y.S.2d 99 (2d Dep't 1978), an action for divorce, plaintiff appealed an order of the Supreme Court as directed her and her counsel to execute a stipulation permitting a Probation Department investigation as to the custody aspects of the litigation. The Appellate Division modified the order by adding thereto a provision that, in addition to being permitted to read the report, counsel shall be permitted to examine the author thereof. The stipulation which plaintiff refused to execute provide that “The contents of the report shall be confidential and shall be used by the Court and shall not be divulged to the parties or their attorneys”. The Appellate Division pointed out that it has been held that absent a stipulation, a trial court may not hold the results of such an investigation to be confidential. Accordingly, plaintiff and her counsel were within their rights in refusing to sign the stipulation in the precise form that it was presented. However, the order of Special Term directing plaintiff and her counsel to execute the stipulation provided that “Upon the coming in to the Court of said investigation, counsel for each party hereto will be permitted to read the report, when submitted.” Moreover, in a reply affidavit submitted to the Special Term, defendant's attorney argued that “the reports in question should be made available to counsel and that the author should be subject to cross-examination.” Under these circumstances, and by so providing in the order, plaintiff's rights would be fully protected.

In Sauer v. Sauer, 67 A.D.2d 1082, 415 N.Y.S.2d 129 (4th Dep't 1979) in its memorandum the trial Court explained that the decision to grant custody to respondent was based in part on the results of a posthearing investigation conducted by the county probation department. However, this report was not made available to appellant and there was no evidence that he waived his right to examine it. The Appellate Division held that the order awarding custody must be reversed and the matter remitted to afford appellant an opportunity to explain or rebut the material it contains.

Supreme Court may not direct the parties and their counsel to execute a stipulation providing that “The contents of the report shall be confidential and shall be used by the Court and shall not be divulged to the parties or their attorneys”.136 Absent consent of the parties the results of such investigation or examination cannot be deemed confidential and must be made available to the parties and their attorneys. 137

For many years there has been disagreement among courts as to the circumstances under which the parties and their counsel may have copies of such reports and review such reports in preparation for trial. It appears that the current state of the law is unsettled with regard to whether the parties themselves are entitled to copies of the independent forensic reports ordered by the court, rather than just their attorney, and the circumstances under which they are entitled to receive and use the reports. We note that where the parties have obtained their own expert reports, there is no issue, as they are required by 22 NYCRR 202.16 (g) to file and exchange the written reports of their own experts no later than 60 days before the date set for trial.

In Waldman v. Waldman, 95 A.D.2d 827, 463 N.Y.S.2d 868 (2d Dep't 1983), the wife appealed from an order that she and her husband execute a stipulation consenting to investigation by the probation department. The Appellate Division reversed that part of the order. It held while the court's power to direct a Probation Department investigation or a psychiatric examination to aid it in the determination of issues of custody or visitation is not dependent upon the consent of the parties, absent such consent the results of such investigation or examination cannot be deemed confidential and must be made available to the parties and their attorneys.

In Chrisaidos v. Chrisaidos, 170 A.D.2d 428, 565 N.Y.S.2d 536 (2d Dep't 1991), the judgment, awarded custody to the wife. In its decision the Supreme Court indicated that it had relied upon an in camera review of reports of a Court-appointed psychiatrist who had examined the parties and the child. The Appellate Division reversed and remitted the matter to the Supreme Court for a new determination. The Court held that the use of professional reports, without providing the parties with an opportunity to explain or rebut material contained therein, entails too many risks of error. The parties must be provided with all the reports which were viewed in camera by the Court. They should also have an opportunity to cross-examine the Court-appointed psychiatrist and to submit other evidence in connection with any issues raised in the reports.

136 Baumgartner v. Baumgartner, 64 A.D.2d 880, 408 N.Y.S.2d 99 (2d Dep't 1978),

137 Waldman v. Waldman, 95 A.D.2d 827, 463 N.Y.S.2d 868 (2d Dep't 1983)

In Scuderi-Forzano v Forzano, the Appellate Division limited the right of the parties to a custody case to see copies of such reports.138

The First Department has held that a pro se petitioner's application that he be provided with a copy of a forensic report to prepare for the custody trial and to permit him to take notes of the report while he reviewed it under court supervision was not improperly denied since he was permitted to review it in court. Thus, he was not denied access to the information. However, it directed petitioner should be permitted to take notes during the in-court review because he was proceeding pro se and opposing counsels had unfettered access to the report. As this issue was likely to arise again, it noted that the better practice in most cases would be to give counsel and pro se litigant's access to the forensic report under the same conditions.139

The issue arose again in Sonbuchner v. Sonbuchner,140 where the First Department held that counsel and pro se litigants should be given access to the forensic report under the same conditions. When the attorney for the represented party is given a copy of the report, the court should give the report to pro se party, even if the court set some limits on both parties' use, such as requiring that the report not be copied or requiring that the parties take notes from it while in the courthouse. Here, during the direct examination of the forensic expert, the forensic report was introduced into evidence, and plaintiff, who was proceeding pro se, had access to it before his cross-examination. On appeal, plaintiff argued that the court improperly prevented him from reviewing the report in advance of the forensic expert's direct testimony. The Appellate Division held that although the court erred in not allowing plaintiff to read the report before the expert testified, plaintiff had an opportunity when he was represented by counsel at an earlier point in the case to review the report with counsel. He also had an opportunity, long before the trial commenced, to review the report with the court-appointed social worker in the case. The record showed that plaintiff questioned the forensic expert about a number of issues that were covered in the report. Most of the expert's testimony turned on his recollection of his numerous interviews with the parties and his opinion as to the parties' parental fitness, and plaintiff had an opportunity to cross-examine him about those opinions. The court's reliance on the expert's testimony, as opposed to the report, was apparent from the fact that the court's decision cites to specific pages of that testimony. Plaintiff also was aware of the issues he had discussed during his interviews with the expert, and many of those issues were explored by

---

138 Citing Kesseler v Kesseler, 10 NY2d 445, 455; Waldman v Waldman, 95 AD2d 827; Matter of Fellows v Fellows, 25 AD2d 865; Chrisaidos v Chrisaidos, 170 AD2d 428, 429.

139 Isidro A.-M. v. Mirta A., 74 A.D.3d 673, 902 N.Y.S.2d 362, (1st Dept. 2010)

140 96 A.D.3d 566, 567, 947 N.Y.S.2d 80 [1st Dept. 2012]

plaintiff on cross-examination. The evidence about defendant's strong bond and parenting history with the child was substantial, and the court's decision on custody and relocation had ample record support. Thus, any error in not allowing plaintiff access to the report in advance was harmless and provided no basis for reversal.

27. Custody Proceedings - Evidence - Investigations

Where an investigation is undertaken by the court's staff or there is a referral to an outside professional, and a report or recommendation is made to the court, there are due process limitations on the court's use of such data. The authors of such reports and recommendations must be made available for cross-examination in court.141

28. Custody Proceedings – Evidence - In-camera and Lincoln interviews

In-camera interviews by the court are important, and perhaps necessary, in contested custody and visitation cases. New York trial courts are free to conduct such

---

141 In Birnham v. Birnham, 112 A.D.2d 967, 492 N.Y.S.2d 777 (2d Dep't 1985) where the trial court ordered, received and made use of forensic reports after the conclusion of the custody hearing, it was an abuse of discretion to deny a party's motion to re-open the hearing in order to examine the authors of the report.

Falkides v. Falkides, 40 A.D.2d 1074, 339 N.Y.S.2d 235 (4th Dep't 1972), held that where the Family Court received and relied upon its clinic's psychiatric reports, there must be an opportunity to explain or rebut such reports in order for them to be considered.

interviews without the consent of the parties, and in the absence of counsel,142 and may be required to do so.143

However, the court may not conduct an in-camera interview unless a stenographic record is made of the interview. The court should also make it available to counsel, although it is not required to do so, after which an opportunity should be afforded to explain or rebut the material brought out in the interview.144

The Appellate Division, Third Department has indicated that there is a distinction between in camera interviews with the children and a Lincoln hearing. The purpose of a Lincoln hearing in a custody proceeding "is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing." Thus, a true Lincoln hearing is held after, or during, a fact-finding hearing; there is no authority or legitimate purpose for courts to conduct interviews in place of fact-finding

---

142 Lincoln v. Lincoln, 24 N.Y.2d 270, 299 N.Y.S.2d 842, 247 N.E.2d 659 (1969), is a leading Court of Appeals decision which held that it was not error or the deprivation of the fundamental rights of the parties for the trial court to have a confidential interview with the children, in the absence of counsel, and without the consent of the parties, since the rights of the parents must yield to the paramount interests of the children.

The trial court may interview the child when necessary or helpful, and it may obtain independent evidence to assist in the determination of custody and visitation. Barnett v. Barnett, 80 A.D.2d 717, 437 N.Y.S.2d 728 (3d Dep't 1981); Corsell v. Corsell, 101 A.D.2d 766, 475 N.Y.S.2d 415 (1st Dep't 1984).

LaMonte v. LaMonte, 38 A.D.2d 635, 327 N.Y.S.2d 130 (3d Dep't 1971), held that a mother's rights were not abridged by an in-camera interview with the children without her consent.

143 McDermott v. McDermott, 124 A.D.2d 715, 508 N.Y.S.2d 467 (2d Dep't 1986), held that the trial court erred in failing to conduct an in-camera interview with the children, on the record, especially where it accorded the children's preference great weight in its custody determination.

Mosesku v. Mosesku, 108 A.D.2d 795, 485 N.Y.S.2d 122 (2d Dep't 1985), held that the failure of the trial court to conduct an in-camera interview with a 3-year-old child, on the record, where the court gave paramount importance to the child's wishes, made intelligent review of its determination impossible. There must be a full and comprehensive hearing to resolve disputed factual issues, and specific findings must be made.

144 Civil Practice Law and Rules §4019(a) mandates the stenographic record be taken.

hearings.145 The decision to hold a Lincoln hearing is a matter committed to Family Court's sound discretion. In the context of a Family Ct Act article 6 proceeding, a Lincoln hearing is the preferred manner for ascertaining a child's wishes. A child, regardless of age, should not be placed in the position of having his or her relationship with either parent further jeopardized by having to publicly relate his or her difficulties with them when explaining the reasons for his or her preference.146

Depending on the age, maturity, and motivations of the child or minor, a true or false picture of the family situation may emerge from the interview. Children caught up in the divorce process of their parents have many conflicting emotions and ideas, and respond in different ways to questioning. Children also are subjected to brainwashing.

---

145 Matter of Spencer v Spencer, 85 A.D.3d 1244, 925 N.Y.S.2d 227 (3d Dept., 2011).

In Matter of Stevens v Gibson, 99 A.D.3d 1052, 952 N.Y.S.2d 648 (3d Dept., 2012) a custody modification proceeding, the Appellate Division held that the court's in camera interview with the child, which was conducted shortly after the petition was filed, before issue had been joined and approximately eight months before the commencement of the fact-finding hearing, did not constitute a "Lincoln hearing". The purpose of a Lincoln hearing in a custody proceeding is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing.

In Roberta GG. v. Leon HH., 99 A.D.3d 1057, 952 N.Y.S.2d 778 (3d Dept., 2012) the father cross-petitioned for custody. After speaking with the child in camera and conducting a fact-finding hearing, Family Court directed that the parties have joint legal custody and awarded residential custody to the father with visitation to the mother. The Appellate Division affirmed. It rejected the mothers argument that the in camera interview with the child was improper because it occurred prior to the fact-finding hearing. It was held on the same date and the court was satisfied by its review that, contrary to the mother's speculation, it served to corroborate evidence presented at the fact-finding hearing.

146 In Matter of Gerber v Gerber, 133 A.D.3d 1133, 21 N.Y.S.3d 386 (3d Dept., 2015) the Appellate Division observed that the decision to hold a Lincoln hearing is a matter committed to Family Court's sound discretion. In the context of a Family Ct Act article 6 proceeding, "a Lincoln hearing is the preferred manner for ascertaining a child's wishes" (Matter of Battin v. Battin, 130 AD3d 1265, 1266 n. 2 [2015]). A child—regardless of age—"should not be placed in the position of having his or her relationship with either parent further jeopardized by having to publicly relate his or her difficulties with them when explaining the reasons for his or her preference.")

Since under the judicial division of labor the trial judge determines credibility,147 it is important that the judge is well-versed as to the behavior of children under stress. What appears to the judge to be a kindly and friendly in-camera interview may, in fact, have been threatening to the child. For this reason, a verbatim record of the interview is now mandatory.148

29. Custody Proceedings – Evidence - Confidential communications - Waiver in Custody Cases

Unless the client or patient waives it, there is a privilege against disclosure of confidential communications between an attorney and a client,149 physician, dentist or nurse and patient, 150 clergyman and confessor, 151 psychologist and client,152 and social worker and client.153

The Second Department154 has held that by actively contesting custody, a party puts their mental and emotional condition in issue and that the psychologist-client privilege is automatically waived.

The Fourth Department155 has held that the physician-patient, psychologist-client and social worker-client privilege is not automatically waived in a custody proceeding, "Where it is demonstrated that invasion of protected communications

---

147 "The trial court is the best judge of the credibility of witnesses . . . The trial court also may interview the children when necessary . . . [and] when helpful it may obtain independent evidence to assist in its determination." Barnett v. Barnett, 80 A.D.2d 717, 437 N.Y.S.2d 728 (3d Dep't 19810.

148 Desmond v. Desmond, 134 Misc. 2d 62, 509 N.Y.S.2d 979 (Fam. Ct. 1986), held that the court might hold its in-camera interview with the children in the public park in order to relieve their distress over the custody proceedings.

149 Civil Practice Law and Rules §4503.

150 Civil Practice Law and Rules §4504.

151 Civil Practice Law and Rules §4505.

152 Civil Practice Law and Rules §4507.

153 Civil Practice Law and Rules §4508.

154 Baecher v. Baecher, 58 A.D.2d 821, 396 N.Y.S.2d 447 (2d Dep't 1977).

155 Perry v. Fiumano, 61 A.D.2d 512, 403 N.Y.S.2d 382 (4th Dept., 1978).

between a party and a physician, psychologist or social worker is necessary and material to a determination of custody the rule of privilege protecting such communications must yield to the dormant . . . duty of the Court to guard the welfare of its wards." However, it is not its purpose, to discourage troubled parents from seeking professional assistance from and counseling agencies or to compel a custodial parent to forego needed psychiatric or other help out of fear that confidences will later be unfairly and unnecessarily revealed through the animus act of a present or former spouse. It thus, limited its rule, stating: "There first must be a showing beyond 'mere conclusory statements' that resolution of the custody issue requires revelation of the protected material".

The Second Department subsequently adopted the limitation of the Fourth Department that before the court may find that there has been a waiver of the physician-patient privilege there first must be a showing beyond mere conclusory statements that resolution of the custody issue requires revelation of the protected material." 156

30. Custody Proceedings - Evidence - Child Permitted to Assert Psychologist - Patient Privilege

156 McDonald v. McDonald, 196 A.D.2d 7, 13 (2d Dept.,1994) ("It is well settled that in a matrimonial action, a party waives the physician-patient privilege concerning his or her mental or physical condition (see, CPLR 4504) by actively contesting custody (see, Baecher v Baecher, 58 AD2d 821; People ex rel. Chitty v Fitzgerald, 40 Misc 2d 966). However, "[t]here first must be a showing beyond 'mere conclusory statements' that resolution of the custody issue requires revelation of the protected material" (Perry v Fiumano, 61 AD2d 512, 519). Clearly, resolution of the custody issue in the instant case does not require revelation of the wife's medical records concerning her in vitro fertilization."); Bruzzese v Bruzzese, --- N.Y.S.3d ----, 2017 WL 2961475, 2017 N.Y. Slip Op. 05579 (2d Dept., 2017) (' "[I]n a matrimonial action, a party waives the physician-patient privilege concerning his or her mental or physical condition ... by actively contesting custody ... However, [t]here first must be a showing beyond mere conclusory statements that resolution of the custody issue requires revelation of the protected material" (McDonald v. McDonald, 196 A.D.2d 7, 13 [citations and internal quotation marks omitted]; see Baecher v. Baecher, 58 A.D.2d 821). Here, since the defendant actively contested custody, and the plaintiff made the requisite showing that resolution of the custody issue required revelation of the protected material, the court should not have precluded the testimony of Drs. Wilkie and Riesel regarding the defendant's mental health.")

In a custody proceeding is proper for the court to refuse to permit a parent to call the child's therapist as a witness, where the attorney for the child does not consent[157] to the disclosure of confidential communications between the child and his therapist [158] and the proceeding is not a child protective proceeding pursuant to Family Court Act article 10.

In the context of a child custody proceeding, communications between an unemancipated minor and her therapist may not be disclosed to the parties or counsel until the child, through his attorney for the child, has an opportunity to assert her statutory privilege protecting such disclosure. Records obtained without a judicial subpoena duces tecum or other court order, is information improperly or irregularly obtained. The notes, records and communications are subject to the patient/psychotherapist privilege embodied in CPLR 4504, "confidences to a psychiatrist", and CPLR 4507, "confidences to a psychologist".[159]

---

157 Matter of Ascolillo v Ascolillo, 43 A.D.3d 1160844 N.Y.S.2d 339 (2 Dept. 2007); Forrestel v Forrestel, 125 A.D.3d 1299, 3 N.Y.S.3d 483 (4th Dept.,2015)

158 citing Matter of Billings v. Billings, 309 A.D.2d 1194

159 In Liberatore v. Liberatore, 37 Misc. 3d 1034, 955 N.Y.S.2d 762 (Sup. Ct., 2012), during the trial of this custody matter the court made a determination and order from the bench to confiscate the notes and records of the child's psychologist and clinical psychologist, obtained by the father via a HIPAA release only without the aid of the court for use in the custody battle. It observed that in the context of a child custody proceeding, communications between an unemancipated minor and her therapist may not be disclosed to the parties or counsel (citing Perry v. Fiumano, 61 A.D.2d 512, 517 (4th Dept.1978), until the child, through his attorney for the child, has an opportunity to assert her statutory privilege protecting such disclosure. Consequently, the court held that the records obtained without a judicial subpoena duces tecum or other court order, was information improperly or irregularly obtained, and they had to be returned to the therapist or otherwise destroyed. The Supreme Court held that the notes, records and communications were subject to the patient/psychotherapist privilege embodied in CPLR 4504, "confidences to a psychiatrist", and CPLR 4507, "confidences to a psychologist". The Court rejected Plaintiffs argument that the attorney for the child was on notice that he intended to obtain the therapists' records and that it was his obligation to positively assert the patient/psychotherapist on behalf of his client and did not do so. Supreme Court held that a party seeking to obtain privileged material as it pertains to a minor child is obliged to utilize a judicial process sufficient to give notice to the court and the treatment provider via motion or an application for a judicial subpoena duces tecum on notice to the parties and treatment provider.

31. Custody Proceedings - Evidence - Admissibility of child abuse reports

In any proceeding brought to determine the custody or visitation of minors, a report, or a portion of a report, which was made to the statewide central register of child abuse and maltreatment,160 which is otherwise admissible as a business record pursuant to Rule 4518 of the Civil Practice Law and Rules, is not admissible in evidence, notwithstanding the rule, unless:

● An investigation of the report conducted pursuant the Social Service Law has determined that there is some credible evidence of the alleged abuse or maltreatment, and

● The subject of the report has been notified that the report is indicated, and

● The report, or relevant portion of the report, has not been amended or expunged by the State Commissioner of Social Services or his or her designated agent.161

If the report has been reviewed by the State Commissioner of Social Services or the Commissioner's designee and has been expunged, it is not to be admissible in

---

160 The Social Services Law specifies the procedure to be followed to seek an expungement or amendment of a child abuse report. See Social Services Law §§411 et seq.

161 Social Services Law §412; Family Court Act §651-a.

In Matter of Gloria DD, 99 A.D.3d 1044, 952 N.Y.S.2d 785 (3d Dept., 2012) a proceeding for violation of a dispositional order, the Appellate Division rejected Respondents argument that Family Court erred by admitting into evidence, the contents of a report filed with the Child Protective Services hotline alleging that the children had been abused while in foster care. The Appellate Division pointed out that Social Services Law § 422 [4][e] provides that "[r]eports made pursuant to this title ... shall be confidential and shall only be made available to ... a court, upon a finding that the information in the record is necessary for the determination of an issue before the court" While such a finding was not expressly made by the court prior to admitting the report, a caseworker had already testified without objection that respondent's daughter, when informed of the report, claimed that the allegations of abuse were not true. The daughter also stated to the caseworker that she believed respondent was responsible for filing it. As such, the report, and the circumstances under which it was made, were relevant on the issue as to whether respondent filed it knowing that the allegations were false and, as a result, she had engaged in conduct that was clearly not in the children's best interests.

evidence.162 Similarly, if the report has been reviewed and amended to delete any finding, each deleted finding is inadmissible.163

If the report has been amended to add any new finding, each new finding, together with any portion of the original report not deleted, is admissible if it meets the other requirements of this section and is otherwise admissible as a business record.164

If the report, or portion of the report, is admissible in evidence but is uncorroborated, it is not to be sufficient to make a fact finding of abuse or maltreatment in such proceeding. However, any other evidence tending to support the reliability of the report will be sufficient corroboration.165

32. Custody Proceedings - Evidence - Child as a Witness

A child may be called to testify as a fact witness in a custody case but such a practice should be used sparingly and only when absolutely necessary.166 It has been

---

162 In K. v. K., 126 Misc. 2d 624, 483 N.Y.S.2d 602 (Sup. Ct. 1984) Supreme Court held that even though both parents consented to discovery of the files of the child protective service regarding abuse reports initiated by the father against the mother, such discovery would not be permitted. Since the child protective services found the reports to be unfounded, all information identifying the subject of the report had been expunged as mandated by law, and thus the records were not available to the parties. Furthermore, a party could not depose the child protective services' investigator since that would be an impermissible attempt to circumvent the law requiring expungement of unfounded reports.

163 Domestic Relations Law §240(1-a).

164 Domestic Relations Law §240(1-a).

165 Domestic Relations Law §240(3); Family Court Act §656.

166 In Matter of John V. v. Sarah W.,143 AD3d 1069, 39 N.Y.S.3d 310 (3d Dept., 2016) a custody modification proceeding, the mother argued that Family Court committed reversible error by allowing the child to testify as a fact witness in the presence of counsel but not the parties, and by not sealing the child's testimony. Although this argument was not preserved for review, the Court took the opportunity to underscore the importance of protecting a child's right to confidentiality, which is paramount and superior to the rights of the parties. Even if, as occurred here, a child assents to his or her testimony being shared with his or her parents, Family Court must not put a child in the position of having his or her relationship with either parent further jeopardized by having to publicly relate his or her difficulties with them or be required to openly choose between them. Moreover, because the mother corroborated the father's

said that calling a child to testify in a custody proceeding is generally neither necessary nor appropriate. 167

Courts have allowed a child to testify as a fact witness in the presence of counsel, but not the parties.168

---

hearsay account of the incident that occurred between the child and her fiancé, it perceived no reason for the child to have testified as a fact witness and reiterated that such a practice should be used sparingly and only when absolutely necessary.

167 In Matter of Rutland v O'Brien, 143 AD3d 1060, 41 N.Y.S.3d 292 (3d Dept.,2016) the Appellate Division observed, in a footnote, that during the trial testimony of the children, who were called as witnesses by the father, the parents remained outside the courtroom, but the record was not sealed. The children were required to testify at length, subject to extensive cross-examination by counsel, as well as extensive questioning by Family Court. It emphatically reemphasize[d] that calling a child to testify in a Family Ct Act article 6 proceeding is generally neither necessary nor appropriate. It noted that to the extent that the children were questioned as to their preferences, by all counsel and the court, such questioning should have been confined to the Lincoln hearing.

In Reed v. Reed, 189 Misc. 2d 734, 734 N.Y.S.2d 806 (Sup 2001), the court denied the father's motion to have his six-year-old child testify in open court on the issues of custody and marital fault. The Court went on to state that the preferred practice in a custody/visitation case, in order to determine best interest, is to have an in camera interview with the child on the record in the presence of the attorney for the child. It noted that the Appellate Division in Pascuzzo v Pascuzzo (55 AD2d 947 [2d Dept 1997]) held that where trial court, in chambers, ascertains that testimony of the parties' children would be on the issue of cruel and inhuman treatment in a case where defendant previously admitted certain acts of cruelty, trial court properly excluded children's anticipated testimony as immaterial.

168 See Matter of John V. v. Sarah W., 143 AD3d 1069, 39 N.Y.S.3d 310 (3d Dept., 2016); Matter of Rutland v O'Brien, 143 AD3d 1060, 41 N.Y.S.3d 292 (3d Dept., 2016).