

LAW AND THE FAMILY

"Child Custody: History, Definitions, New York Law"

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NEW YORK LAW provides that a married woman is a joint guardian of her children with her husband and both parents have equal powers, rights, and duties with regard to them. [FN1] This statutory grant of equal custody rights to both parents constitutes a departure from the common law, which regarded the father as the natural guardian of his children. [FN2]

History of Child Custody

In feudal England, custody was incidental to guardianship of the father's lands, and it eventually came to be regarded as a trusteeship with responsibilities toward the child. The Court of Wards and Liveries, established during the reign of Henry VIII, developed some protection for children, and a 1600 statute transferring such jurisdiction to the Chancery, which developed the theory of *parens patriae*. Although Chancery came to recognize the mother as the natural guardian of her children upon the death of the father, it was not until 1839 that the Chancellor was given statutory power to award the custody of infants under seven years to the mother rather than to the father. This change in equity was carried over into the law courts where habeas corpus proceedings were utilized to determine custody issues. [FN3] Until 1857 the Ecclesiastical Courts and the English canon law, rather than common law, handled such matters as annulment, bed and board divorce, and child custody.

Sir William Blackstone stated in his "Commentaries on the Law of England" that, under the law, the father had a natural right to his

children and that the mother was "entitled to no power (over her children), but only to reverence and respect." Blackstone also wrote that a father could delegate his parental authority "during his lifetime, to the tutor-school master of his child who then is in loco parentis and has such a portion of the power of the parent committed to his charge, viz, that of restraint and correction as may be necessary." [FN4]

Since that time, the law of custody has gone through several distinct phases: the feudal-clerical period, when the father was usually given absolute custody; the "parental fitness" period, which undermined the father's prerogative; the preference for the mother, if she was a "fit parent," period; and the current stage of emphasis upon the best interests of children, including their psychological welfare.

Until the 19th century, American law reflected English canon law and the feudal order, and since the father completely controlled the finances, assets and property, custody ordinarily went where the money was, except in rare cases where a father had abused, abandoned or neglected the child. [FN5]

The father might transfer the custody of his children to another guardian or appoint another guardian by his will. He might apprentice them or indenture them to others, as employees or servants. This was a feudal prerogative, going with the ownership of property and so-called "marriage rights" extended to the children of the lord's serfs or tenants and was regarded as a valuable property right.

It was not until 1817, when the "Rule in Shelley's case" was adopted, which interjected the issue of parental fitness into custody cases as a major issue and also eliminated the former automatic preference for the father as custodial parent. [FN6] The *parens patriae* power of the courts was deemed sufficient to accomplish that end, although subsequent acts of Parliament confirmed that authority.

Justice Talfourd's Act of 1839 [FN7] diminished the parental rights of the father and extended the claims of the mother (unless she was guilty of adultery), so that Chancery was permitted to award her custody of children younger than 7 years old. Talfourd's Act specifically provided that custody would not be awarded to an adulterous mother and a similar practice was later developed in the Divorce Court. [FN8]

Lord Mansfield qualified the feudal rule with the proviso that the father must be a fit parent, and anticipated the "tender years" doctrine in *Blisset's Case* 11 when he denied custody to a father who was bankrupt, had contributed nothing to his family or the child and had engaged in improper conduct, saying "the court will not think it right that the child should be with him," and further, "if parties are disagreed, the court will do what shall appear best for the child."

In *Rex v. Delaval*, [FN9] Lord Mansfield freed an 18-year-old girl from apprenticeship with a musician to whom she was bound by her father. The musician had turned the girl over to Delaval for prostitution. Initially, Mansfield believed that the father was part of the conspiracy between the musician and Delaval, but he was held not to have been so involved. Nonetheless, the girl was discharged from all restraints and was set free, "to go where she will." Thus, Lord Mansfield assumed *parens patriae* power to protect the girl even from her father.

In common law England, children of 12 years of age, and sometimes younger, were expected to render services at home or to secure work to contribute to the family's resources. The legal theory came to be that, in return for a child's services, the child was entitled to adequate support from his father.

In the Victorian period and well into the 20th century, parental "fitness" became the major issue in custody disputes. Today, New York's custody laws are based on the fundamental principle that custody is awarded based upon "the best interests of the child." The underlying concept is that custody should be determined, as between parents, regardless of sex, based upon what is best for the child, considering the particular circumstances of the matter. In theory, neither parent has a superior right to custody of the child.

Defining 'Custody'

Although our statutes and cases refer to "custody," defining the term is difficult because it is not defined by any New York case or statute. Professor Clark, in his treatise "The Law of Domestic Relations in the United States, Second Edition" [FN10] points out that it is a "slippery word" [FN11] because it expresses a combination of rights and obligations. He states that in "its

broadest sense custody refers to the relationship which exists between parents and child in a normal intact family." It means that the parents and child live together, and that the parents together have the right and obligation to supervise, care for and educate the child. Conversely, the child has a right to parental care and a duty to respect the parents' supervision. In the intact family both parents have the duty to support the child and the right to his earnings. When the family is broken up due to death, dissolution, adoption, surrender, abandonment or emancipation, all of the rights must be allocated by the court between the parents and even to nonparents or the state. In those situations, "custody" is the sum of parental rights respecting the upbringing of the child.

In *Burge v. San Francisco*, the California court defined custody as follows:

Custody embraces the sum of parental rights with respect to the rearing of a child. It includes the right to the child's services and earnings (Civ. Code, 197) and the right to direct his activities and make decisions regarding his care and control, education, health, and religion. (*Lerner v. Superior Court*, 38 Cal.2d 676, 681 [242 P.2d 321]; see 2 *Armstrong*, California Family Law, p. 954.) These rights are exercised by both parents in an undivided home (Civ. Code, 197) and differences between them are ordinarily resolved at home. When the parents are living separate or apart, however, there are apt to be frequent resort to courts. In such cases a court may conclude that the best interests of the child require that one or the other be given complete custody. It may conclude that such action would be unjust, and [then] it may carve out of the sum of custodial rights, certain rights to be exercised by each parent. Thus it is common practice in divorce cases for the court to award "legal custody" to one or both parents and "physical custody" to one parent with or without the right of visitation by the other parent, or physical custody may even be awarded to a third person, usually a relative. [FN12]

We agree with these authorities and suggest that "(legal) custody" should be defined as the sum of the rights and obligations with respect to the upbringing of the child and that "sole (legal) custody," which encompasses this sum, includes the right to have physical custody of the child, to the exclusion of all others, and to make all decisions regarding the health, education, welfare and religion of the child. Although "visitation" has been described by the Court of Appeals, without explanation, as "a limited form of custody," [FN13] expanded visitation arrangements are not truly

"custody" arrangements where there is no sharing of control of the child's upbringing.

'Joint Custody' Defined

Defining the term "joint custody" is somewhat easier, once we come to terms with the definition of sole "custody." It has been said that "joint legal custody," sometimes referred to as "divided" custody or "joint decision making," which 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. [FN14] Where there is "joint physical custody," the child lives alternatively with both parents. The daily child-rearing decisions are usually made by the parent with whom the child is then living, while the major decisions, such as those involving religion, education, medical care, discipline or choice of school/camp, are jointly made. [FN15]

"Joint custody" is a two-pronged concept. There is a distinction between "joint legal custody," which usually involves sharing in the important decisions concerning the child, and "joint physical 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 Court of Appeals recently 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. [FN16] The New York Court of Appeals described joint custody as "reposing in both parents a shared responsibility for and control of a child's upbringing." [FN17]

However, as a practical matter, an award of sole custody to one parent may be so qualified that it is tantamount to an award of "joint custody." For example, a court may direct the parties to share equally their time with the child and consult with each other and agree upon major decisions affecting the child such as education, medical care and religion, so as to make the award nearly indistinguishable from "joint custody."

New York Law

It appears to us that nothing in New York's law prevents a court from making any reasonable allocation of the parental rights and obligations, so long as the determination is in the best interest of the child.

FN(1) Dom. Rel L. 81.

FN(2) People ex rel. Barry v. Mercein, 3 Hill 399.

FN(3) See Foster and Freed, "Child Custody," 39 NYU L Rev 423 (1964).

FN(4) Blackstone, COMMENTARIES ON THE LAW OF ENGLAND 453 (T Cooley ed. 1884).

FN(5) See Rex v. Demanneville, 102 Eng Rep 1054 (KB 1804).

FN(6) See Shelley v. Westbrook, Jacob 266, 37 Eng Reprint 850.

FN(7) 2 & 3 Vict. c. 54.

FN(8) Today, the Guardianship of Infants Act of 1925 covers all minors and provides that "the court shall regard the welfare of the infant as the first and paramount consideration." This is the source of the "tender years" doctrine, although Parliament may have been influenced by some American decisions, such as United

States v. Green, (1824, DC RI) F Cas No 15256, where federal jurisdiction was assumed over child custody due to diversity jurisdiction.

FN(9) (1773) Loft's Rep 748.

FN(10) 20.2, p.480-481

FN(11) Citing Justice v. Hobbs, 245 Iowa 707, 63 NW 2d 882 (1954).

FN(12) See Burge v. San Francisco, 41 Cal 2d 608, 262 P2d 6.

FN(13) Matter of Alison D., 77 NY2d 651; In Matter of Ronald FF. v. Cindy CG. 70 NY2d 141, 517 NYS2d 932, the Court of Appeals noted that "visitation is a subspecies of custody," but explained that the two relational categories differed fundamentally in degree.

FN(14) Braiman v. Braiman, 44 NY2d 584, 407 NYS2d 449 (1978).

FN(15) Trapp v. Trapp, 136 AD2d 178, 526 NYS2d 95 (1st Dept. 1988).

FN(16) Bast v. Rossoff, 91NY2d 723, 675 NYS2d 19 (1998).

FN(17) BRAIMAN V. BRAIMAN, SUPRA.

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