LAW AND THE FAMILY

Judging the 'Best Interests of the Child'

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IN CUSTODY disputes the court is bound to make its determination based solely upon what is in the "best interests of the children." 1 This rule is fairly recent, as it did not exist at the beginning of this century. Early in the 20th century, "parental fitness" was the major issue in custody disputes. Marital fault was a key factor and the "gross immorality" of the parent was a basis for denying that parent custody. Until the 1920's, an adulterous mother usually forfeited her right to custody.

> Beginning in the 1920's, custody of a child of "tender years" was almost automatically awarded to the mother unless she was grossly immoral. 2 Adultery might be forgiven, as long as the mother was not regarded as a "sex experimenter," too promiscuous, or to have abandoned the child.3 Sexual misconduct of the mother, however, when coupled with other factors, such as the use of improper language, unseemly conduct in the presence of the children, and neglect or abandonment could lead to a finding of maternal unfitness.4
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> **'Tender Years' Doctrine**
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> Until the late 1960's the "tender years" doctrine prevailed and custody of infants or young children almost invariably went to the mother. Regardless of the statutory language as to the equality of parental rights, the mother had the advantage unless she was shown to be unfit or to have abandoned the child.5
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> During the 1960's the child's "best interests" became the focal point, and marital misconduct became less important. The "tender years" doctrine went underground and what was formerly called "meretricious behavior" had to adversely affect the children in order for the parent to be deprived of custody or visitation.
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> Domestic Relations Law §240 was enacted in 1962. It purported to mandate parity between fathers and mothers with respect to child custody,

and provides that neither parent has a prima facie right to child custody, which is to be determined solely by the "best interests of the child."
As we enter the 21st century, the "best interests" of the child is the sole criterion for initial and modified custody awards. 6 While it is easy to state the rule, its application is much more difficult as it involves a weighing and balancing of the "totality of the circumstances."
In *Friederwitzer* 7 and *Esbach* 8 the Court of Appeals firmly established a "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 that a determination as to whether a custody award should be modified depends upon whether the "totality of the circumstances" including the existence of the prior award, warrants such a change in the best interests of the child.
In *Freiderwitzer*, Judge Bernard S. Meyer wrote that:

> The only absolute in the law governing custody of children is that there are no absolutes. ... Indeed, in *Matter of Nehra v. Uhlar*, 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."9

In *Esbach* 10 the Court of Appeals held that in a modification proceeding the court is not bound by the existence of a prior agreement, and it has the discretion to modify custody "when the totality of circumstances, including the existence of the prior award, warrants its doing so in the best interests of the child."

> Under the "totality of the circumstances" rule, no one factor is determinative in making an award of custody. 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;

The wishes of the child, if of sufficient age;

The length of time the present custody arrangement has continued;

Abduction or abandonment of the child or other defiance of legal process;11

The relative stability of the respective parents;

The care and affection shown to the child by the parents;

The atmosphere in the homes;

The ability and availability of the parents;

The morality of the parents;

The prospective educational probabilities;

The possible effect of a custodial change on the children;

The financial standing of the parents; and

The parents' past conduct.12

Additional factors that courts consider include:

The refusal of a parent to permit visitation and/or the willingness of a parent to encourage visitation;13

Unauthorized relocation of the parent and child to a distant domicile;14 and

Making unfounded accusations of child abuse.15

Recently, the legislature has mandated that the court consider the corrosive impact of domestic violence and the increased danger to the family upon dissolution and into the foreseeable future." 16 Where either party alleges that the other 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.
Courts view each of the factors independently, as part of the "totality of the circumstances," although certain factors appear to be more significant then others.
If a parent has a job requiring long and frequent periods away from home, that parent will be required to show adequate and specific plans for how the child will be taken care of.17
Direct care and guidance by the parent, rather than by third parties, is preferred. A parent's ability to personally devote time to the child and his/her needs is an important factor. 18

As a matter of policy, courts tend to refrain from intervening with respect to the child's religious upbringing.19 Courts may not inquire into the 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.20 However, courts may consider religion as a factor where a child has developed actual ties to a specific religion, or where a parent's particular religious practices threaten the health and welfare of child.

The contemporary view is that adults are entitled to indulge in their sexual preferences as a matter of privacy, if no harm comes to the children.21 Courts inquire into what effect, if any, the objectionable conduct had on the children.22 A parent's homosexuality is a consideration in a custody proceeding only if it is shown to adversely affect the child's welfare. 23 Sexual misconduct, however, when combined with other factors such as unseemly conduct in the presence of the children, can lead to a finding of parental unfitness.24

To guard against bias and prejudice, a court in a child custody determination should inquire into what impact, if any, has the behavior in question has had upon the children. If there is no direct impact, a punitive award should be resisted. If the behavior has been detrimental to the children, that should be considered. The difficulty, of course, is to make a reasoned distinction between the relevant and the irrelevant.

Other Considerations

Where the parent abandons the child, our courts will usually award custody to the parent who has remained with the child.25

A parent's history of mental illness is not a bar to an award of custody where that parent has, in the court's opinion, recovered.26 However, if it is detrimental to the child, that parent will be denied custody.27 Similarly, a parent who is a substance abuser will be denied custody.28

Where more than one child is involved, the court should consider the desires of each child, although it has long been recognized that it is often in a child's best interest to continue to live with his siblings,29 and there is a strong policy of maintaining close sibling relationships.30 While the court may consider the wishes of a child, the child's desires are not controlling,31 and it is not error to fail to ascertain the wishes of a child of tender years.32

No one factor is determinative in making a custody award. The courts must weigh and balance the "totality of the circumstances" in making any custody determination.

Notes

(1) *Matter of Lincoln*, 24 NY2d 270 (1960). *Finlay v. Finlay*, 240 NY 429.
(2) P*etition of Alaimo*, 36 Misc 2d 759, 233 NYS2d 508.
(3) People ex rel. *Ragona v. De Saint Cyr*, 207 Misc 194, 137 NYS2d 275; People ex rel. *Geismar v. Geismar*, 184 Misc 897, 54 NYS2d 747; *Bunim v. Bunim*, 298 NY 391, 83 NE2d 848; *Otterman v. Lombardo*, 22 Misc 2d 104, 202 NYS2d 387.
(4) People ex rel. *Wright v. Gerow*, --AD-- 824, 121 NYS2d 652.
(5) See *Application of Kades*, 25 Misc 2d 246, 202 NYS2d 362.

(6) *Ebert v. Ebert*, 38 NY2d 700, 382 NYS2d 472 (1976). See also, *Eschbach v. Eschbach*, 56 NY2d 167 451 NYS2d 658 (1983).
(7) *Friederwitzer v. Friederwitzer*, 55 NY2d 89 (1982).
(8) *Eschbach v. Eschbach*, supra.
(9) The Court was referring to *Nehra v. Uhlar*, 43 N.Y.2d 242, 401 N.Y.S.2d 168 (1977).
(10) *Eschbach v. Eschbach*, supra.
(11) *Friederwitzer v. Friederwitzer*, supra (1982).
(12) *Saunders v. Saunders*, 60 AD2d 701, 400 NYS2d 588 (3d Dept., 1977).
(13) *Young v. Young*, 212 AD2d 114, 628 NYS2d 957 (2d Dept.,1995).
(14) *Entwhistle v. Entwhistle*, 92 AD2d 879, 459 NYS2d 862.
(15) *Young v. Young*, supra.
(16) Laws of 1996, Ch 85, §1, effective May 1, 1996.
(17) *Bullotta v. Bullotta*, 43 AD2d 847, 351 NYS2d 704 (2d Dept., 1974).
(18) *Jacobs v. Jacobs*, 117 AD2d 709, 498 NYS2d 852 (2d Dept., 1986).
(19) See *People ex rel. Sisson v. Sisson*, 271 NY 285 (1936).
(20) *Aldous v. Aldous*, 99 AD2d 197, 473 NYS2d 60 (3d Dept.).
(21) *S v. J*, 81 Misc.2d 828, 367 NYS2d 405.
(22) See *Feldman v. Feldman* (1974, 2d Dept) 45 App Div 2d 320, 358 NYS2d 507.
(23) *Guinan v. Guinan* (1984, 3d Dept.) 102 AD 2d 963, 477 NYS2d 830.
(24) *Dornbusch v. Dornbusch* (1985, 2d Dept) 110 App Div 2d 808, 488 NYS2d 229.
(25) 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.
(26) *Application of Richman*, 32 Misc.2d 1090, 227 NYS2d 42.
(27) *Application of Reinhart*, 33 Misc.2d 80, 227 NYS2d 39.
(28) *Carpenter v. Carpenter*, 96 AD2d 607, 464 NYS2d 606 (3rd Dept, 1983).
(29) *Eschbach v. Eschbach*, supra.
(30) *Ebert v. Ebert*, supra.
(31) *Obey v. Degling*, 37 NY2d 768, 375 NYS2d 91 (1975); *Ebert v. Ebert*, supra.
(32) *Cohen v. Cohen*, 70 AD2d 925, 417 NYS2d 755 (2d Dept., 1979).
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