New York Law: Custody and Visitation Awards[1]

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.[2]

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 best interests of the child, together with such other facts and circumstances as the court deems relevant in making a custody direction.[3]

No Presumption as to custody

There is no prima facie right to the custody of the child in either parent.[4]

Role of the Court

The burden on a Judge when he acts as parens patriae is perhaps the most

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[2] Domestic Relations Law §240.

[3] Domestic Relations Law §240.

[4] Domestic Relations Law §240.

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. [5] 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.[6]

In Anonymous v Anonymous,[7] a visitation case, the Appellate Division stated: "We here speak only in terms of the child's welfare. All the circumstances bearing on that subject, the sole consideration in this case, should be examined before a determination is reached as to visitation, and this regardless of who has failed to come forward with evidence, despite the opportunity so to do, and who has objected to development of the proof, for whatever reason...But there are several applicable rules of law, so axiomatic as not to require citation: the child is our ward, and neither parent, despite where custody may reside, has any property right in the child. This being so, it is the duty of the Court, in exercising its grave responsibility, to become aware of and to seek out every bit of relevant evidence and advice on the subject,... (citations omitted)".

Custody determinations must have a "sound and substantial" basis in the record and not be contrary to the weight of the credible evidence.[8] An Appellate Court will not allow a custody award to stand where it lacks a "sound and substantial" basis in the record. [9]

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

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

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

[7] 34 A.D.2d 942, 312 N.Y.S.2d 348 (1 Dept 1970).

[8] 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).

[9] 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).

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.

Factors Considered in Determining the Best Interest of the Child

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. [10]

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.[11]

In Friederwitzer v Freiderwitzer, [12] the Court of Appeals firmly established a "totality of the circumstances" approach to all custody and visitation determinations, indicating that no one factor should be determinative in deciding what is in the best interest of the child. Judge Meyer wrote that:

The only absolute in the law governing custody of children is that there are no absolutes. He noted that in Matter of Nehra v. Uhlar,"[13] "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 non-custodial 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

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[10] 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).

[11] Matter of Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).

[12] 55 NY2d 89, 447 NYS2d 893

[13] 43 N.Y.2d 242, 401 N.Y.S.2d 168 (1977).

fitness of the respective parents as well as length of time the present custody had continued are also to be considered . . . 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." (Citations omitted)

Shortly thereafter, in Esbach v. Esbach,[14] 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" . . . 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 . . . 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." (citations omitted)

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

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; [15]

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[14] 56 NY2d 167, 451 NYS2d 658.

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

the wishes of the child, if of sufficient age;[16]

the length of time the present custody arrangement has continued; [17]

the abduction or abandonment of the child or other defiance of legal process; [18]

the relative stability of the parents; [19]

the care and affection shown to the child by the parents;[20]

the home environment and atmosphere in the respective homes;[21]

the ability and availability of the parents to care for the child;[22]

the morality of the parents, in relation to the child; [23]

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[16] 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)

[17] Friederwitzer v Freiderwitzer, 55 NY2d 89, 447 NYS2d 893

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

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

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

[21] Esbach v. Esbach , 56 NY2d 167, 451 NYS2d 658

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

[23] 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 81/2-year-old child to be exposed to adult sexual magazines and

the ability of the parents to provide for the child's intellectual development;[24]
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;[25]

the financial status of the parents; [26]

the parents' past conduct in relation to the child; [27]

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 children as to raise a strong probability that an interfering parent is unfit to act as the custodial parent,[28] and/or the willingness of a parent to encourage visitation.[29] The ability of each parent to promote the time spent with the non-custodial

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considerable profanity denied custody where companion interfered with the child's upbringing).

[24] Esbach v. Esbach , 56 NY2d 167, 451 NYS2d 658).

[25] 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., 181 Misc.2d 722, 694 N.Y.S.2d 592 (N.Y.Fam.Ct.,1999).

[26] 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).

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

[28] Entwistle v. Entwistle, Entwhistle v Entwhistle, 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)

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

parent is a factor of great concern; [30]

parental alienation; [31]

the parent making unfounded accusations of child abuse; [32]

the unauthorized relocation of the parent and child to a distant domicile; [33]

race, religion and sexual persuasion, in relation to the child;[34]

In addition, 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." 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. [35] The Court is required to consider the effect of domestic

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

[31] 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.

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

[33] Entwhistle v Entwhistle, 92 AD2d 879, 459 NYS2d 862

[34] 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)

[35] See Domestic Relations Law § 240(1)(a).

violence, whether direct or indirect, in determining custody and visitation.[36] 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.[37]

As with custody, Domestic Relations Law § 240(1)(a), requires that the court consider evidence of domestic violence when determining what visitation will be in the best interests of the child.[38]

]Parental Access - Visitation

Parental access, commonly referred to as "visitation," is an important right of the non-custodial parent and the child. [39] As the Court of Appeals decision in Weiss v. Weiss, [40] 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 noncustodian. The best interests of the child standard is also dispositive of visitation issues. [41]

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

[37] 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)

[38] 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).

[39] See, Weiss v. Weiss, 52 N.Y.2d 170.

[40] Weiss v. Weiss, 52 N.Y.2d 170.

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

It is no defense that the child preferred not to visit.[42] The custodial parent has a duty to protect and to nurture the child's relationship with the noncustodial parent, and to ensure access by the noncustodial parent. To be meaningful, however, visitation must be frequent and regular. Only then may a noncustodial parent provide his child with the guidance and counsel youngsters require in their formative years. Only then may he be an available source of comfort and solace in times of his child's need. Only then may he share in the joy of watching his offspring grow to maturity and adulthood. (See Weiss v. Weiss, supra.) “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.”[43] “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.” [44]The custodial parent has an affirmative duty to insure that visitation occurs.[45]

In Weiss v Weiss,[46] the Court of Appeals stated: It is also well to consider the attitudes of the law on parental visitation. Sometimes referred to as a "natural" parental right ... this appellation is too narrow. It ignores the primacy of the child's welfare. Where the physical and emotional well-being of a child is involved, it is, at best, anomalous that its protection should be dependent on the vindication of the "rights" of

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[42] 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.County, 1984)].

[43] 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.

[44] 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.

[45] 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).

[46] Weiss v. Weiss, 52 N.Y.2d 170.

the parents. Visitation is a joint right of the noncustodial parent and of the child .... This view does not lose sight of the fact that, while legal custody may be in one or both of the parents, the fact that it is placed in one does not necessarily terminate the role of the other as a psychological guardian and preceptor. ...How valuable the mature guiding hand and love of a second parent may be to a child is taught by life itself. This is surely so when the parent-child relationship is carefully nurtured by regular, frequent and welcomed visitation as here ....Therefore, 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." (Citations omitted)

In Matter of Granger v Miscercola,[47] Petitioner, an inmate in New York's correctional system, who had acknowledged paternity of a child prior to his imprisonment, commenced a Family Court proceeding seeking visitation with the child after respondent mother refused to bring the child to the prison. Family Court granted the petition, awarding petitioner periodic four-hour visits at the prison with the child, who was then three years old. It noted that "the law in New York presumes visitation with a non-custodial parent to be in the child's best interest and the fact that such parent is incarcerated is not an automatic reason for blocking visitation."The court found that petitioner had "demonstrated that he was involved in a meaningful way in the child's life prior to his incarceration and seeks to maintain a relationship." It further found that the child was old enough to travel to and from the prison by car without harm, and would "benefit from the visitation with his father."The court considered the length of petitioner's sentence and reasoned that "[l]osing contact for such a long period is felt to be detrimental to an established relationship."The court concluded that visitation with petitioner would be in the child's best interests.

The Appellate Division affirmed Family Court's order, finding "a sound and substantial basis in the record to support the court's determination to grant the father visitation with the child in accordance with the schedule set forth in the order" (96 AD3d 1694, 1695 [4th Dept 2012]). While his appeal was pending, petitioner had been moved to a different correctional facility, further from respondent's home. The Appellate Division made no finding of fact in this regard, ruling that any such change in circumstance was more appropriately the subject of a modification petition. The Court of Appeals affirmed rejecting Respondent's primary contention that the lower courts employed an incorrect legal standard in reviewing the petition for visitation.

The Court of Appeals, in an opinion by Judge Pigott, rejected Respondents contention that this presumption was contrary to this Court's holding in Tropea v. Tropea (87 N.Y.2d 727 [1996]) pointing out that its holding was not that presumptions

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[47] --- N.E.2d ----, 2013 WL 1798581 (N.Y.)

can never be relied upon, but that "each relocation request must be considered on its own merits ... and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child". It observed that in Weiss v. Weiss (52 N.Y.2d 170 [1981]), it held 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". 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. Family Court noted that New York law "presumes visitation with a non-custodial parent to be in the child's best interest."

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.

The Court of Appeals concluded that the lower courts used the appropriate legal standard, applying the presumption in favor of visitation and considering whether respondent rebutted the presumption through showing, by a preponderance of the evidence, that visitation would be harmful to the child.