

Custody Awards and 'Zones of Decision-Making'

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Part One of a Two-Part Article

The overriding policy that governs New York law with regard to custody determinations is that "there shall be no prima facie right to the custody of the child by either parent but the court shall determine what is for the best interests of the child." Domestic Relations Law § 240. New York courts traditionally awarded the "custody" or "sole custody" of a child to one parent and visitation rights to the "non-custodial parent." Since the 1960s, New York Courts have also sometimes awarded the parents "joint custody."

In more recent years, New York courts have divided "spheres," or "zones of decision-making," between the parents, in addition to determining the physical custody of the child. Courts have had little difficulty categorizing the "zones" of parental decision-making. The cases break down the areas of decisions into religion, education, choice of schools, extra-curricular activities (including after-school and recreational programs), tutoring, summer camp, health (medical, dental, therapy, counseling, psychological or psychiatric treatment, doctors and surgeons), finances, and citizenship. But what prompts the courts to make these types of custody determinations? A review of the case law reveals the many and varied considerations that have formed the basis for awarding parents "zones of decision-making."

Where Joint Legal Custody Is Inappropriate

The first case to recognize "zones of responsibility" was *Trapp v. Trapp*, 136 AD2d 178 (1st Dept. 1988). The parties' divorce proceeding was marked by their almost complete refusal to speak to one another and their inability to agree on any issue without resort to the judicial forum. Supreme Court modified the judgment of divorce to provide for joint decision-making over a host of child-rearing issues, such as choice of schools, religion, citizenship and psychological and medical treatment. The Appellate Division modified the order, finding that because the parents continued to be severely antagonistic toward each other, the scheme was fraught with the potential for continuing discord. Thus, the arrangement was inimical to the best interests of the children. The appellate court limited the joint decision-making arrangement to religious and citizenship questions only. The court noted that joint legal custody — or joint-decision making, as the husband characterized it — is to be distinguished from joint physical custody, where the children live alternately with both parents. In joint legal custody, which was the form of custody originally imposed, the children actually lived with only one parent, but both parents continued to share the same rights and responsibilities as they did during the marriage to participate in the decisions affecting their children. In this situation, the day-to-day child-rearing decisions are made by the parent with whom the children are living, while decisions with respect to the important issues — such as religious training, education and medical care, and sometimes even less significant matters, such as discipline, diet and the choice of a summer camp — are jointly made. The Appellate Division noted that in any event, both arrangements constituted a form of joint custody. In its view, 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. However, the court did not believe that a distinction should be made between matters involving religion and citizenship, which form a profound part of a child's heritage and generally do not require daily and immediate intervention by the caretaker parent, and those involving education and welfare. It did not believe that the sole decisional authority as to the children's religion and citizenship ought to be reposed in either parent. Thus, it left

untouched the provision for joint decision-making as to those two matters. It vacated the provision for joint decision-making with regard to the remaining matters.

In *Wideman v. Wideman*, 38 AD3d 1318 (4th Dept, 2007), the court granted the parties joint custody and granted plaintiff decision-making authority with respect to religion, finances, counseling/therapy, and summer activities. It granted defendant decision-making authority with respect to education, medical/dental care, and extracurricular activities. The Appellate Division affirmed. It pointed out that joint legal custody was not a realistic possibility in this case, given the parties' past acrimony and the predictions of the experts and plaintiff herself that the parties would be unable to agree on major decisions concerning their children. It concluded that the court did not err in determining that it was appropriate to divide the decision-making authority with respect to the children.

Where Each Parent Might Obstruct the Other's Relationship with the Child

In *Hugh L. v. Farah L.*, 6/ 1/ 2000 N.Y.L.J. 29, (col. 6) (Sup. Ct, Bx Co., Drager, J.), the court found that the parties were "caring, responsible parents" and that their child was "thriving." It also found it "equally apparent that enormous tension exist[ed] between the parents and that each parent present[ed] troubling behavioral patterns." The mother was a responsible parent, but she intentionally engaged in conduct designed to thwart the father's visitation and involvement with the child. For example, she limited his access to the child's pediatrician for information about the child's development, but complained that he did not know how to properly care for the child. She was quick to use any minor medical issue to deny visitation, canceling 30 scheduled visits in 1999. She made it very clear to the social worker that she believed a father's visits with a child should be limited and controlled by the mother. Her cooperation with the court was sporadic and she indicated that if the court extended the father's visitation, she would disobey the court's order. The father's behavior was equally problematic. He was impulsive and, at times, inflexible. It was clear that joint custody could not succeed because the parties were incapable of working together. The court therefore awarded to each parent spheres of legal decision-making responsibility, with each being responsible for the ultimate decision in certain areas, after consultation with the other parent. In addition, the mother was prohibited from using any medical condition to prevent visitation unless she obtained a doctor's note.

In *Mars v. Mars*, 286 AD2d 201 (1st Dept. 2001), Supreme Court had vested all final decision-making authority in the mother, though requiring her first to consult with the father concerning significant decisions, except in emergencies. The Appellate Division found on appeal that each party was "so centered on obtaining goals or advantages for himself or herself, that all their supposed concern for the best interests of their children may disappear when it conflicts with their own needs." Therefore, the trial court should not have vested all decision-making authority in one parent because neither could be trusted not to obstruct the other's relationship with the children. The court found the children's interests would be best served by giving the father decision-making authority over the children's religious upbringing — an area in which he apparently took a greater interest than the mother — and over their dental treatment, in recognition of his professional expertise.

In next month's issue, we will look at more cases that illustrate those circumstances that New York courts consider justify the awarding of zones of parental decision-making.

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