Revisiting Custodial Norms: The Changing Landscape of Joint Custody

By Lee Rosenberg, Editor-in-Chief

There has been a debate in recent years whether or not there should be a presumption of joint custody. Many states already start with joint custody as the default, with the ability to argue against the presumption. New York has been historically resistant to this concept, although legislation has been proposed and languished. Some recent cases, however, have explored joint custody even after the matter was contested at trial, so that the idea may be one that is now ready for consideration.

Best Interests and Gender Neutrality

The law of custody in New York is "gender-neutral" by statute. As was held in *Linda R. v. Richard E.*,[1]

> In enacting the "best interests of the child" test, the Legislature expressly rejected the idea that either fatherhood or motherhood alone carries with it a superior right to custody (see, Domestic Relations Law §§ 70, 81, 240). The statutory declaration that there is "no prima facie right to the custody of the child" (Domestic Relations Law §§ 70, 240) rejects the notion that there is an inherent custodial preference for either parent (Matter of Fountain v. Fountain, 83 A.D.2d 694, 442 N.Y.S.2d 604, affd. 55 N.Y.2d 838, 447 N.Y.S.2d 703, 432 N.E.2d 596; Alan G. v. Joan G., 104 A.D.2d 147, 152, 482 N.Y.S.2d 272; People ex rel. Moody v. Moody, 36 A.D.2d 627, 319 N.Y.S.2d 136), while at the same time advancing equal protection concepts, and reducing invidious gender classifications and stereotyping of either sex. While the role of gender in making custody determinations has had a lengthy social and legal history, it finds no place in our current law. (Footnotes omitted).

Most family law attorneys I think would agree that notwithstanding the long-gone abandonment of the "tender-years doctrine," mothers still maintain an advantage on issues of custody. Most judges would officially opine that there is no bias in this regard, but practice would dictate otherwise. There may be valid statistical reasons for this advantage such as a greater prevalence of stay-at-home mothers vis-a-vis fathers. Nonetheless, while it would seem rare to have a father with a substance abuse or mental health history have a legitimate chance at custody, a mother with similar background seems to still have a foot in the door.[2] While this remains antithetical to the gender neutral concept of custody, it is a reality. That being said, a father's ability to obtain custody gets better and better in the modern age due to changes in parenting: a substantial increase in the involvement of fathers in the day-to-day lives of their children, and the commonality of having two working parents requiring a more pervasive sharing of parental responsibility. Interestingly, the gender-neural language in 1990's *Linda R., id.*, was used to avoid prejudice *to the mother's custody claim* because she was working:

> We stress that custody determinations must be born of gender-neutral precepts in both result and expression. We know that for a variety of reasons, mothers as well as fathers of even young children are, or must be, gainfully employed. That being so, the custody-seeking mother who works outside the home should not be penalized for her employment, any more than should the father. To do so would often confront one parent—in this case the mother—with a Hobson's choice between livelihood and parenthood, while exacting a lesser standard on the other parent—in this case the father. If a mother is held to a more rigorous standard, the legislative presumption of gender neutral custody determination, and with it, the "best interest of the child" test, is upset. In short, the wife, who is employed, should not thereby suffer in her chances

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> for custody any more than should the husband, lest the wife feel compelled to give up her source of income and risk not only financial woe, but a court's finding that her former husband's stronger economic condition is more congenial to the child's best interests. (footnotes omitted).

New York, using the "best interests" standard, based upon factors derived from case law, has not codified those factors as some other states have also done, since codification at this point would seem superfluous and unnecessary. Custody, as is set forth in DRL § 70(a) and DRL § 240(1)(a), reflects the best interests standard and the gender-neutrality of custodial rights.

> DRL 70 Habeas corpus for child detained by parent
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> (a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. *In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.* (emphssis added).
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> § 240. Custody and child support; orders of protection
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> 1. (a) 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 shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support 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...*(emphasis added).

The two seminal custody cases in the State, *Friederwitzer v. Friederwitzer*[3] and *Eschbach v. Eschbach*,[4] both of which involved a modification of custody, remain instructive.

> 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" (*Friederwitzer, supra*).
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> 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." (citations omitted). 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... (*Eschbach*, *supra*).

Courts consider a number of factors deriving from *Friederwitzer, Eschbach*, and their progeny to determine best interests. As was set forth in *Lliviganay v. Fajardo*,[5]

> In determining a custody arrangement that is in the child's best interests, the court must consider several factors, including "the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent" (Salvatore v. Salvatore, 68 A.D.3d 966, 966, 893 N.Y.S.2d 63 [internal quotation marks omitted]; see Eschbach v. Eschbach, 56 N.Y.2d at 171–173, 451 N.Y.S.2d 658, 436 N.E.2d 1260). The child's expressed preference is an additional factor to be considered, taking into account the child's age, maturity, and any potential influence that may have been exerted on him or her (see Eschbach v. Eschbach, 56 N.Y.2d at 173, 451 N.Y.S.2d 658, 436 N.E.2d 1260; Matter

of Tejada v. Tejada, 126 A.D.3d 985, 986, 6 N.Y.S.3d 122; Bressler v. Bressler, 122 A.D.3d 659, 659, 996 N.Y.S.2d 160). The court is to consider the totality of the circumstances, and the existence of any one factor is not determinative (see Eschbach v. Eschbach, 56 N.Y.2d at 174, 451 N.Y.S.2d 658, 436 N.E.2d 1260; Matter of Bowe v. Bowe, 124 A.D.3d 645, 646, 1 N.Y.S.3d 301; Matter of Bosede v. Agbaje, 121 A.D.3d 675, 676, 993 N.Y.S.2d 377).

Braiman and the Historic Aversion to Joint Custody

In 1978's *Braiman v. Braiman*,[6] the Court of Appeals reversed the Second Department's award of joint custody after the lower court, in a modification proceeding, awarded custody of the parties' sons to the father. Looking back nearly 40 years, the Court's view of joint custody appears initially antiquated in its statement that,

> On the wisdom of joint custody the authorities are divided (see Dodd v. Dodd, 93 Misc.2d 641, —-, 403 N.Y.S.2d 401, —-, Supra, for a collection of authorities and an analysis of competing concerns; Bodenheimer, pp. 1009-1010).

While also acknowledging the benefits of joint custody, the Court re-established the lower court's award to the mother while remanding for further proceedings. The take-away from *Braiman* remains that parents embroiled in an ongoing contentious relationship are not suited for joint custody. *Braiman* continues to be cited for this principle.[7] Its language, however, also sees joint custody as something akin to seeing a unicorn—an elusive fantasy.

> But, that there is no perfect solution to the divided family does not mean that the court should not recognize the division in fact of the family. Children need a home base. Particularly where alternating physical custody is directed, such custody could, and would generally, further the insecurity and resultant pain frequently experienced by the young victims of shattered families (see Foster & Freed, Law and the Family New York, s 29:6A (1978 Supp.)).
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> It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion (see, e. g., Dodd v. Dodd, 93 Misc.2d 641, —-, 403 N.Y.S.2d 401, —-, Supra ; Bodenheimer, pp. 1010-1011). As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos.
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> ...There are no painless solutions. In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. Divorce dissolves the family as well as the marriage, a reality that may not be ignored. In this case the gross conflict between the parents is so embittered and so involved with emotion and litigation that between them joint custody is perhaps a Solomonic approach, that is, one to be threatened but never carried out.

"Several recent cases, recognizing modern parenting beliefs and realities, have now addressed joint custody as a viable alternative even after trial."

And so, as we arrive at the tail-end of the 21st Century's second decade, where do we stand?

The Times They Are A-Changing[8]

Several recent cases, recognizing modern parenting beliefs and realities, have now addressed joint custody as a viable alternative even after trial.

In *Hardy v. Figueroa*,[9] the Second Department affirmed the Family Court's joint physical custody award with final authority to the father on educational, extracurricular, and religious decisions, and final authority to the mother with respect to the child's medical decisions. "The Family Court's determination that the child would benefit from equal amounts of time with each parent, and that it would be in his best interest for physical custody to be shared by

the parents is supported by a sound and substantial basis in the record ..."

In *I.L.H. v. A.H,*[10] Nassau County Court Attorney Referee Marie F. McCormack awarded joint legal and physical custody (with certain delineated final decision-making authority) of the parties' two boys after hearing,

> As to an award of joint custody, the Court of Appeals made clear that it is not appropriate when the parties are "embattled and embittered" (Braiman v. Braiman, 44 NY2d 584, 590 [1978]). The Braiman Court, however, recognized that there are situations when joint custody is appropriate and stated, "joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion" (Braiman at 590 [citations omitted]). The holding in Braiman, thus, did not preclude court-ordered joint custody in all circumstances. Moreover, the Court noted the importance of both parents in a child's life. "Of course, other considerations notwithstanding, children are entitled to the love, companionship, and concern of both parents. So, too, a joint award affords the otherwise noncustodial parent psychological support which can be translated into a healthy environment for the child" (Braiman at 589). In the years since the Braiman decision was issued, the courts have fashioned various custodial arrangements, such as shared physical custody and the award of final decision making authority to each parent in distinct areas, in order to foster the involvement of both parents and to achieve an arrangement that is in the best interests of the child...
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> This Court finds that both parents herein should have a meaningful and significant role in the children's lives. The wife testified that she grew up without parents, and she did not want the same for her children. This Court agrees. The children are entitled to the full involvement and love of both parents. Neither parent should feel more important than the other, and both parents have much to offer the children. Under the circumstances of this matter, this Court finds that both parents should have a role in decision-making for the children, and they both should have an approximately equal amount of time with the children. This Court is hopeful that the parties can put aside their differences and work together to raise their children.

In *J.R. v. M.S.*,[11] from May 5, 2017, New York County Supreme Court Justice Matthew F. Cooper, explored joint custody in the national and historical context. The court awarded joint custody and shared decision-making by use of various final and hybrid zones of decision-making[12] and a parenting coordinator.[13]

> The same way that the arrangements by which divorced parents raise their children have changed over recent years, the language employed to describe those arrangements has begun to change as well. The terms "legal custody," "physical custody," and "visitation"—all deeply ingrained components of the process by which we determine what role each parent will play in the child's life—are gradually giving way to new terms. These new terms are reflective of the greater emphasis that is now being placed on co-parenting.
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> ...I foresee a time when judges who are called upon to determine parenting issues will be able to proceed directly to deciding decision-making without having to make unnecessary, and sometimes detrimental, custodial designations. But, in light of current appellate case authority, it seems that such as time has not yet arrived. Accordingly, in addition to determining how the parties will handle decision-making, I will decide what form legal custody will take. In particular, I will determine if the custodial designation should be joint custody to both parties or sole custody to the mother.
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> Nationally, joint custody is increasingly becoming the favored custodial designation. Statutes in 18 states and the District of Columbia create a presumption that joint custody is in the best interests of the child, and those in three other states list it as the preferred option.
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> ...This case presents a good example of why, even in a situation where hostility and poor-communication abound, courts, when called upon to designate legal custody, should opt, if at all possible, for designating both parents joint

> custodial parents, rather than making one the custodial and the other the non-custodial parent. Whatever the father's idiosyncrasies and personality flaws, he is undeniably a loving, capable, and devoted parent. Moreover, he is the type of involved father who coaches the child's soccer team and is highly active in the child's school's parent association. To designate him a non-custodial parent would, in effect, label him—to the child and the rest of the world—as being somehow defective and inferior to the mother, who, in turn, would wear the crown of custodial parent. Under the circumstances presented here, it is difficult to see how it could be in the child's best interests to have his father's parental standing denigrated in this manner. Consequently, I find that the parties should be designated joint custodial parents.

In *ED. v. D.T.*,[14] the Appellate Division upheld the lower court's award of joint legal custody with residential custody to the mother. The court also affirmed decision-making authority to the mother with respect to the child's medical care and decision-making authority to the father with respect to the child's education.

> When joint custody is not possible because of the antagonistic relationship between the parties, it may be appropriate, depending upon the particular circumstances of the case, to award some custodial decision-making authority to the noncustodial parent... The division of authority is usually made either somewhat evenly, in order to maintain the respective roles of each parent in the child's life or, although unevenly, in a manner intended to take advantage of the strengths, demonstrated ability, or expressed interest of the noncustodial parent with respect to a particular dimension of child-rearing. (citations omitted).

In the "tri-custody" case of *Dawn M. v. Michael M.*,[15] which was discussed at length in the Spring 2017 issue of *Family Law Review*,[16] the three parties—husband/father, biological mother, and non-biological wife—were awarded "shared custody" of the child.

In *Ball v. Ball*,[17] the Third Department—addressing other issues, including the allotment of parenting time and child support on a 50/50 sharing of time—referenced the lower court's award of joint legal custody.

In the July 5, 2017 decision in *Spampinato v. Mazza*,[18] the Second Department, although finding the lower courts "limitation" of the father's "visitation" to be appropriate, modified the lower court's award of sole custody to the mother to award joint legal custody to both parents. Significantly, despite asserting a claim to sole custody, the mother testified that joint legal custody was a "reasonable option."

> However, the Family Court's determination that it was in the child's best interests to award sole legal custody to the mother lacks a sound and substantial basis in the record. "[J]oint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion"... "[J]oint custody is inappropriate 'where the parties are antagonistic towards each other and have demonstrated an inability to cooperate on matters concerning the child'"... .
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> Here, although it is evident that there is some antagonism between the parties, it is also apparent that both parties generally behave appropriately with the child and in a relatively civilized fashion toward each other. Further, there is no evidence that they are so hostile or antagonistic toward each other that they would be unable to put aside their differences for the good of the child (see Matter of Thorpe v. Homoet, 116 A.D.3d 962, 963, 983 N.Y.S.2d 629). The parties were able to discuss logistical issues relating to the child's care, and they were able to make accommodations for the father to have additional visits with the child on several occasions. The mother stated that joint legal custody "[a]bsolutely" was a reasonable option. (citations omitted).

Matter of McDuffie v. Reddick,[19] issued on October 6, 2017, involves the Fourth Department's review of the Family Court's award of joint custody after an evidentiary hearing.[20] While the Appellate Division reversed the trial court, it did so *not on the merits*, but due to the premature confirmation of the referee's report prior to the expiration of the father's statutory time to make application to confirm or reject the report. The matter was sent back for the opportunity to file motions under CPLR § 4403.

As is addressed in *J. R. v. M. S.*, *supra*, appellate courts have also permitted previously existing joint custody arrangements to remain intact in the children's best interests, despite prevailing acrimony.[21] The deterioration of a joint custodial arrangement will in most cases bring about a hearing to determine if the children's best interests require a change from joint to sole custody.[22]

The Challenge

Given these decisions, trial courts now have greater discretion than previously to award joint custody or to even begin the case with joint custody as the default presumption—barring circumstances which mitigate against it. There also, however, appears to be more custody matters being litigated and appealed than we have previously seen—or maybe it just feels that way. Of course, all too often the fight for joint custody with equal time is cynically used to try and mitigate or eliminate child support[23] or as a pressure tactic to gain some other financial advantage in negotiations.

As Justice Cooper concluded in *J.R. v. M.S.*,

> The only thing standing in the way of the child having all that he needs is his parents' inability to work together on his behalf. One can only hope that with this custody litigation having come to an end, the parties will seize the opportunity to chart a new and better course in raising their son.

Although the bad behavior we see in many of our cases will not go away anytime soon, contrasting Justice Cooper's sentiments with the equivocation in *Braiman* shows how far the idea of joint parenting has come. A further quote from *Braiman* may then be looked at in a new context,

> Divorce dissolves the family as well as the marriage, a reality that may not be ignored. In this case the gross conflict between the parents is so embittered and so involved with emotion and litigation that between them joint custody is perhaps a Solomonic approach, that is, one to be threatened but never carried out.

Perhaps in 2017 and beyond, carrying out the "threat" with a rebuttable presumption of joint custody is just what is needed. Let the battle begin...

Endnotes

1. 162 A.D.2d 48 (2d Dep't 1990).
2. *See, e.g.*, *In re Michael B.*, 145 A.D.3d 425 (1st Dep't 2016); *cf. Rochel H. v. Joel H.*, 55 Misc. 3d 1217(A) (Sup. Court Kings County 2017).
3. 55 N.Y.2d 89 (1982).
4. 56 N.Y.2d 167 (1982).
5. 147 A.D.3d 1059 (2d Dep't 2017).
6. 44 N.Y.2d 584 (1978).
7. *See Lee v. Fitts*, 147 A.D.3d 1058 (2d Dep't 2017); *Zall v. Theiss*, 144 A.D.3d 831 (2d Dep't 2016).
8. Dylan, B., *The Times They Are A-Changin,'* Columbia Records (1964).
9. 128 A.D.3d 824 (2d Dep't 2015).
10. N.Y.L.J. 1202736928143, at 1 (September 15, 2015, decided August 31, 2015).
11. 56 Misc. 3d 975 (Sup. Ct., N.Y. Co. 2017).
12. The decision-making areas—being the "essence of the parenting process"—are medical, education, summer-camp, extracurricular activities, and religion.
13. An article written by Professor J. Herbie DiFonzo in the April 2014 issue of *Family Court Review*, *From The Rule of One to Shared Parenting: Custody Presumptions in Law and Policy* (Vol. 52, No. 2) also explored the historical and national developments in joint custody. Professor DiFonzo recently passed away. He was kind enough to provide me with his article for this editorial.
14. 152 A.D.3d 583 (2d Dep't 2017).
15. 55 Misc. 3d 865 (Sup. Ct., Suffolk Co. 2017).
16. L. Rosenberg, *21st Century Custody: Issues in Parentage Continue*, NYSBA *Family Law Review*, Spring 2017, Vol. 49, No 1.
17. 150 A.D.3d 1566 (3d Dep't 2017).
18. 152 A.D.3d 525 (2d Dep't 2017).
19. 2017 N.Y. Slip. Op. 07055 (4th Dep't 2017).
20. The respondent-mother was designated as primary residential custodian.
21. *See, e.g.*, *Tatum v. Simmons*, 133 A.D.3d 550 (1st Dep't 2015).
22. *Zall v. Theiss, Id.*; *Rockhill v. Kunzman*, 141 A.D.3d 783 (3d Dep't 2016); *In re Lebraun H.*, 111 A.D.3d 1439 (4th Dep't 2013).
23. Contrary to the holding of *Bast v. Rossoff*, 91 N.Y.2d 723 (1998). The court can, of course, address the effect of parenting time in other ways, such as by limiting the child support award to the "statutory cap." *Ball v. Ball*, 150 A.D.3d 1566 (3d Dep't 2017).