The Case for Joint Custody in New York

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Note: This article, previously published in Volume 24, No. 1, of the Family Law Review, inadvertently omitted the Endnotes. We are republishing the article in its entirety and apologize for the error.

Joint Custody is the cooperative parenting of a child. It involves the sharing of responsibility and control over major decisions in the child's life and, at the same time, implicitly provides assurances to the child that contact with both parents will be continued.[1] Joint custodial parents consult on issues such as education, health care and religion.

Joint Custody does *not* necessarily involve the equal sharing of time with the child.[2] Joint Custody, however, does acknowledge the significance of the input of both parents to the rearing of the child.

While often described as an ideal condition, Joint Custody represents the norm for many intact families. The sharing of parental responsibility evolved following World War II, when a large number of women entered or remained in the work force. No longer were children raised primarily in a matriarchal family, fashioned in part by the absence of the working father. This was followed by the enactment of Joint Custody statutes in most states.[3] Eventually, the "tender years doctrine," which had favored custody to a mother with younger children, was eliminated.[4]

Historically, the doctrine of Joint Custody has received little recognition in case law in New York. While other states have progressed towards an acknowledgment of shared parental responsibility, New York has never enacted a Joint Custody statute.[5] Attempts to introduce the concept of Joint Custody into amendments such as the Equitable Distribution Law[6] and the Child Support Standards Act[7] have been rejected by the legislature. On at least three occasions Governor Cuomo has vetoed Joint Custody bills passed by the legislature.[8] This leaves litigants seeking Joint Custody with existing case law.

Unfortunately, the attitude of the Court of Appeals is decidedly anti-Joint Custody. This is not by design, but by practice. In other words, the application of the principles of Joint Custody as defined by the Court of Appeals rewards a parent for promoting contempt, lack of cooperation, bitterness and hostility towards the other parent. The reward is an order of Sole Custody.

In *Braiman v. Braiman*, 44 N.Y.2d 584 (1978), the Court of Appeals held:

> "Entrusting the custody of young children to their parents jointly, especially where shared responsibility and control includes alternating physical custody, is insupportable when parents are severely antagonistic and embattled. . . as a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, (Joint Custody) can only enhance familial chaos. . .the 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 not carried out. . .To expect them to exercise the responsibility entailed in sharing their children's custody seems beyond rational hope."

Thus, absent parental consent, Joint Custody is disfavored. Unlike some states which statutorily permit Joint Custody in the absence of parental consent or agreement,[9] New York has a presumption against Joint Custody absent cooperation and communication. Citing *Braiman*, several courts have rejected applications for Joint Custody because of the inability of the parents to agree.[10]

What is the result? A spouse seeking Sole Custody who is the primary caretaker for the child can guarantee success by engaging in behavior inimical to the best interests of the child. The caretaker parent need only act out the difficulties and frustrations with the other parent to "win" custody. He or she only needs to disagree with the legitimate requests of the other parent for access, to litigate minor issues of vacation and holiday access, to resist attempts to participate in the child's education and health, to unilaterally schedule events important to the child and to cut off lines of communication with the other spouse. None of these activities helps the child. All of these activities will result in a Sole Custodial order to the primary caretaker.

In spite of literature and research recognizing the need for parents to communicate and cooperate for the best interest of the child,[11] New York now rewards a custodial litigant for engaging in inappropriate behavior. Since many judges now believe that the mere litigation of custody is evidence of the inappropriateness of Joint Custody, only the child suffers. One speaker at a recent child custody seminar of the New York State Bar Association actually encouraged attorneys to have their clients "erect stone walls" if there is a custodial dispute with the opposing parent out of the child's primary residence.[12] The attorney was right, if the goal of custodial litigation is to "win" custody. However, if the goal of litigation harms a child's relationship with either parent, then the rules should be changed.

Why is Joint Custody legislatively and judicially disfavored? For no good reason. In many cases, interest groups fear the loss of economic leverage by the recognition of Joint Custody. Therefore, many feminist groups successfully fought the inclusion of all mention of Joint Custody in the Child Support Standards Act. This has

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backfired, with at least one court holding that the Act does not apply to Joint Custodial parents.[13]

More importantly, the claim that Joint Custody leads to the loss of economic leverage is false. A recent Census Bureau report indicates that fathers with joint custody pay 90.2% of the child support owed, while fathers with mere visitation pay 79.1%. Fathers who have neither joint custody nor visitation pay only 44.5%.[14] And why not? Isn't it natural for a parent to participate in the funding of the child's needs when he or she has access and input. Isn't it also natural to resist payments when the parent is reduced to a "walking wallet," needed for economic but not emotional contribution?

Therefore, statutorily or otherwise, we should recognize that the goal of custodial litigation is to foster a continued, loving, participatory relationship between both parents and the child. The court should assist the parties in the custodial arena to put aside their hostility towards each other. The activities of an uncommunicative, embattled parent should be punished, not rewarded. The loss of Sole Custody should not be used economically by either parent to avoid child support obligations. Until there is a recognition that the progeny of *Braiman* is the loss of a parent-child relationship, we are harming the children whose parents seek a judicial determination of custody and access.

Endnotes

1. *Seago v. Arnold*, 91 A.D.2d 835, Case 27 (4th Dept. 1982), *motion for leave to appeal dismissed*, 59 N.Y.2d 1027 (1983); Connecticut General Statutes Annotated, Title 46b, Section 56(a).
2. *Bishop v. Lansley*, 106 A.D.2d 732, Case 28 (3rd Dept. 1984).
3. Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont and Wisconsin.
4. *Barkley v. Barkley*, 45 N.Y.2d 936 (1978).
5. Domestic Relations Law Section 240.
6. Domestic Relations Law Section 236B.
7. Domestic Relations Law Section 240(1-b).
8. Foster, Freed and Brandes, *Law and the Family New York*, Volume 4, Section 1:11, Footnote 9.
9. Florida, Idaho and New Hampshire.
10. *Spain v. Spain*, 130 A.D.2d 806, Case 10 (3rd Dept. 1987); *Janecka v. Franklin*, 143 A.D.2d 731, Case 14 (2nd Dept. 1988); *Harvey v. Share*, 119 A.D.2d 823, Case 38 (2nd Dept. 1986). *Cf. Guarnier v. Guarnier*, 155 A.D.2d 744, Case 15 (3rd Dept. 1989).
11. *The Disposable Parent, The Case for Joint Custody*, by Mel Roman and William Haddad, Holt, Rinehart and Winston, 1978; *The Role of the Father in Child Development*, Second Edition, Edited by Michael E. Lamb, John Wiley & Sons, 1981; "The Disenfranchised Father," by Robert E. Fay, MD., *Advanced Pediatrics*, 36:407-430, 1989.
12. How to Handle a Child Custody Case in New York, Continuing Legal Education Seminar of the New York State Bar Association, December 5, 1991.
13. *Matter of Sally R. v. Stewart R.*, 573 N.Y.S.2d 231 (Fam. Ct., Dutchess Co. 1991). *Contra. Lavera R. v. Antonio D.* (Family Ct., Ulster Co. 1990) N.Y.L.J. August 14, 1990, p. 23.
14. "Child Support and Alimony: 1989" released October 11, 1991, "Current Population Report on Consumer Income," Series P-60 No. 173, Order No. 803-005-30020-0-W, U.S. Government Printing Office, Washington, D.C. 20402.

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* The Father's Rights Association would like to note that the endnote 8 reference actually reads: "On at least three or more occasions, Governors Carey and Cuomo, presumably at the request of feminist groups or their spokespersons, vetoed joint custody bills passed by the legislature.".