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Conflict Ridden Homes, Harm to Children, and Reform of DRL 234

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It is a fact universally acknowledged by mental health professionals working in the divorce field that parental conflict is damaging to children. It is a rule of New York law that while a divorce action is pending, a court cannot legally direct a parent's removal from the marital residence absent proof of threats to the physical safety of persons or property or the existence of an alternative residence for the "excluded" parent. This essay will explore the intersection where these values clash and propose that the rules be changed.

Framing the Problem

Clients often ask whether, to protect the children from parental conflict, they can move out of the marital residence before there is any custody agreement in place. A prudent matrimonial lawyer will advise that this decision could have far-reaching implications not just for the outcome of the litigation but also for their future relationship with their children. By moving out, they will be creating a new custodial status quo. The risk is that the remaining parent will tend to be viewed as the primary physical custodian, leaving that parent with greater control over where the children spend their time and with more insight and information about the children's adaptation to the separation than the other parent. For example, they often will be in a better position to observe and describe such behavioral events as nighttime disturbances that children experience, the way the children attend to homework, or how easily the children leave home in the morning. Control over these facts can provide meaningful advantages to litigants in a custody trial as they will be better positioned to provide the court with current information about the children's behaviors and their emotional state. Moving out therefore can have a major impact on any negotiated or litigated

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Time Limits Should Be Imposed On A Section 1034 Application to Protect the Best Interest of a Child and a Parent's Constitutional Rights

Hon. Fiordaliza A. Rodriguez, NYC Family Court, Bronx County

Recently, I rendered a decision on a case where it became apparently clear that the relevant statute warrant further redress. As a result, a review and discussion of my case might shed some light for a more thorough and careful process to ensure that all parties are not unnecessarily affected. The process, the timing, the hearing, the evidence

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President's Message

Daniel O'Leary, Ph.D.,
Distinguished Professor of Psychology,
Stony Brook University

Special Thanks to Avi Yohananoff, Family News and Views Editor from AFCC-NY President Daniel O'Leary

Our thanks go to Alberto (Avi) Yohananoff for developing and coordinating the July 2017 edition of Family News and Views from AFCC-NY. As you can see, Avi had five individuals from the legal profession write articles about issues that concern them. He also wrote an article himself regarding control of bias in custody evaluations. I also thank each of them for presenting thought- provoking manuscripts. It is my hope that upon reading these articles, the issues the authors present will concern you as well. In alphabetical order we have the following individuals addressing important specific concerns:

Breanna Deney: The need for courts and forensic evaluators to address the financial needs and motivations in cases of shared parenting time, especially as the parenting time is close to 50-50, as there is an inextricable link between finances and the shared parenting time.

Sherri Donovan: Taking off on the Brook v Elizabeth case from the Court of Appeals in a decision by Judge Abdus-Salem, Donovan reviews how the non-biological parent now has standing for visitation and custody in cases where there was a decision to conceive a child. Further, the legal decision can be used retroactively and the court left the door open for expansion of the definition of parent in which there was not an agreement to conceive.

Elliot Wiener: The need to use more than danger as a criterion in removing one parent from a home in a family/custody dispute; documents the negative impact of conflict on children and recommends that conflict be assessed by judges and forensic evaluators in addressing the issue of whether a parent should be removed from the home.

Teresa Ombres: Summary of a March 2017 Hofstra Law School Matrimonial Summit reflecting the need for change to allow families with better access to resolution of their problems at lesser expenses via various means including use of technology and interdisciplinary collaborative and mediation approaches. Ombres argues that the time has come for individuals and AFCC to begin to seriously implement such suggestions. The views expressed herein are in clear accord with the challenges presented in two plenary sessions at AFCC 2017 in Boston, namely those of Prof. Robert Mnookin, head of Harvard Negotiation Project, and Dr. Bernie Mayer. In fact, Mayer held that time as come for AFCC to take a stand on diverse ways to assist families in helping resolve issues via courts when almost half of such cases are now pro se.

Hon. Fiordaliza Rodriguez: With a nicely crafted ACS child sexual abuse allegation case exemplification, the Judge opines about the need to establish time limits on Section 1034 applications to protect the parent's constitutional rights as well as the child's best interests.

Alberto Yohananoff: As Nobel winning scientist Kahneman has documented, bias is inherent in all judgment. This article reviews various sources of bias in custody evaluations and ways to minimize such. Notably, Dr. Yohananoff suggests one way to control bias in custody evaluations is to have two custody evaluators. While the suggestion is controversial because of cost and practical issues, it is an approach that is used in competency to stand trial in criminal proceedings.

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outcome. For this reason alone, on a motion for exclusive possession, the responding party who intends to seek an award of primary physical custody or even equal time is well advised to oppose the motion.

These risks are only marginally reduced if the parties sign an agreement that says the move-out is "without prejudice" to the moving party's custody claim. While this reservation protects against the formal argument that having moved out, the "mover" has ceded primary custody to the remaining parent, it does nothing to blunt the tendency, many months later at the custody trial, to preserve the new status quo that the move-out created (if it's not broken, why fix it). Frequently, parents see that the parental conflict is causing damage to the children and are willing to take the risk that, in the fullness of time, their custodial claims will be upheld by a court or recognized by the other parent. But many parents make the opposite decision. That's when one of the parents learns about the rules of pre-trial exclusive possession of the marital residence.

"Children living in homes with high levels of conflict and aggression have been found to have difficulty with emotional regulation."

What's So Bad About Children Witnessing Parental Conflict?

"[C]hildren caught in high-conflict environments seldom thrive. They are forced to make too many compromises in their own development in valiant efforts to cope with their parents' hostility. Compared to the children of divorces in which conflict is minimal, few of them make it to adulthood with a health capacity to form relationships." Garrity and Baris, Caught in the Middle 29. Conflict "immediately and profoundly weakens the parents' fundamental protective role in the life of their children. . . forc[ing] children into a middle to which there is no satisfactory alternative." As it undermines the parents' role as the child's "first and most important role models . . . the unique and overwhelming sense of responsibility felt by children caught in the middle of parental conflict easily translates into feelings of guilt." Ultimately, and most importantly, children caught up in parental wars are denied "permission to love both their parents." Id. 35-36.

Families with "risky family characteristics", such as anger, aggression, and deficient nurturing "may create vulnerabilities or may exacerbate certain genetically based vulnerabilities that not only put children at immediate risk for adverse outcomes (as with abuse), but also lay the groundwork for long-term physical and mental health problems. . . ." These children are especially likely to exhibit health-threatening behaviors, including smoking, alcohol abuse, and drug abuse, and engage in promiscuous sexual activity. "Taken together, these behavioral and biological consequences for risky family environments represent an integrated risk profile that is associated with mental health disorders across the lifespan, including depression and aggressive hostility, major chronic illnesses including hypertension and cardiovascular disease, and early death." Gould and Martindale, The Art and Science of Child Custody Evaluations 222. "The research literature overwhelming documents that overt conflict and aggression in the family are associated both cross-sectionally and prospectively with an increased risk for a wide variety of emotional and behavioral problems in children, including aggression, conduct disorder, delinquency and antisocial behavior, anxiety, depression, and suicide." Id. 223. "[H]igh levels of conflict at home sensitize children to anger. These children are reported to react with greater distress, anger, anxiety, and fear." Id. 224-225. The legacy of growing up with high levels of overt anger and aggression at home may be not only a "stronger emotional reaction in situations that involve conflict, but also a particular set of behaviors for responding in those situations" including a desire to reduce tension and escape stressful

situations and attempts to "distract their own and others' attention from interpersonal conflict." Id. 225-226. The quality of social behavior and relationships outside of the home is also related to risky family characteristics and social competence. "Children living in homes with high levels of conflict and aggression have been found to have difficulty with emotional regulation." Studies have found that these children have "fewer positive skills that facilitate successful interactions with peers" and these children are "more likely to behave in an aggressive or anti-social manner." Id. 228.

Of course, the impact on children of parental conflict is not uniform. Mental health professionals repeatedly point out that there are developmental, personality, environmental, and even genetic differences that make it impossible to say how a particular child will react to parental conflict. But the import of these authors' arguments is that if we want to protect children from the effect of their parents' conflict, the legal rules we apply to these situations must take into account the myriad ways in which non-physical conflict takes its toll on children.

It is true that many parents who are not divorcing have conflict-ridden relationships that expose their children to all of these risks and there is nothing a court can do about it unless the situation deteriorates to the point that a neglect proceeding is commenced. But, by bringing a divorce or custody proceeding, the court's overarching obligation as parents patriae is triggered. This is especially true in our contemporary era where we have re-cast courts as "problem solving" institutions, not merely as tribunals to adjudicate disputes.

New York's Legal Response

DRL §234

Where the parents have not yet separated, the mechanism for insulating children from parental conflict that has not escalated to physical abuse is for a court, under Domestic Relations Law (DRL) §234, to award one parent the right to exclusive possession of the marital residence by ordering one of the parents to move out of the home during the pendency of the action. With little guidance in the statute about how it should be applied, over the years, courts have imposed severe limitations on its use.

"Safety Rule"

The courts have held that the statute authorizes an award of exclusive possession to ensure the physical safety of persons or property ("Safety Rule"). Kenner v. Kenner, 13 AD3d 52 (1st Dept. 2004). This rule is rooted in Mayeri v. Mayeri, 26 Misc.2d 6 (SC, Nassau Co. 1960), a fifty-seven year old case that pre-dates the family offense statutes (Family Court Act Article 8). The Second Department adopted this standard in 1978 in a case where it reversed the order of the trial court which awarded exclusive possession without first holding a hearing. Scampoli v. Scampoli, 37 Ad2d 614 (2nd Dept. 1971). Whether the appellate court overturned the trial court because there was no evidence to meet the Safety Rule or whether it would have approved the award after a hearing without such evidence was not resolved. Today, the reported decisions of the lower courts and the appellate courts consistently require proof of threats to safety as a condition for an award of exclusive possession.

A court may award exclusive possession based on the Safety Rule without holding a hearing, if "a party's allegations of violent threats or conduct [are] supported by evidence of prior police intervention … the existence of a court order of protection … uncontroverted medical evidence … or corroborative third-party affidavits...." Without such supporting evidence, the moving party fails to establish a right to temporary exclusive occupancy of the marital residence so as to permit the court to grant such relief. Preston v. Preston, 147 AD2d 464 (2nd Dept. 1989, citations omitted). To meet this test, some parties have gone to the extent of submitting affidavits from teenage children. See, e.g., Kurppe v. Kurppe, 147 AD2d 533 (2nd Dept. 1989). It is unlikely that such a submission makes anyone happy, but it is the predictable result of a rule that requires corroboration of conduct that usually occurs in the privacy of the home.

The twenty-eight year old expression of the rule in Preston renders the Safety Rule almost indistinguishable from the rules that apply to family offense proceedings. See, e.g., Niyazova v. Shimunov, 134 AD3d 1122 (2nd Dept. 2015), where the petitioner's unrefuted testimony establishes that the respondent hit her which she corroborated with photographic evidence. The Appellate Division affirmed a finding of harassment in the second degree. By requiring for exclusive possession under DRL §234 the same proof that is required for an order of protection under DRL §240(3) or Family Court Act Article 8, DRL §234 is rendered virtually superfluous. There is nothing in the statute that justifies this and it is contrary to the rules of statutory construction to render statutes superfluous.

Where the parties' affidavits describe an "acrimonious" relationship but sharply disagree about which party is responsible for the situation, in the absence of the corroborative evidence contemplated by Preston, the court is required to hold an evidentiary hearing. Karakas v. Karakas, 154 AD2d 439 (2nd Dept. 1989).

Some courts have sought to distinguish between "domestic strife" and the sorts of "petty harassments such as hostility and contempt … that are routinely part and parcel of an action for divorce." Estis v. Estis, NYLJ 10/4/02, (SC, Nassau 2002). In Fleming v. Fleming, 154 AD2d 250 (1st Dept. 1989), the husband unsuccessfully sought to exclude the wife from their apartment, describing what the court held was "petty harassment" that did not "justify an award of exclusive occupancy in order, 'to protect the safety of persons and property.'" In SD v. ND, 27 Misc.3d 1215(A) (SC, Kings Co. 2010), according to the wife's unrebutted affidavit, after the parties entered into a stipulation of settlement, the husband "forced himself upon the family at the former residence on more than one occasion . . . parked himself in [the wife's] bedroom for the night, lock[ed her] out and forc[ed her] to sleep elsewhere in the house." The court held that these "few episodes of conflict … [do not] represent either substantial domestic turmoil, pervasive and destructive acrimony or any other circumstances which would render it unsafe for both the parties' to continue to utilize the residence." The analysis of the mental health authors cited above suggests that these kinds of distinctions fail to appreciate the impact of the conflict on the children living in the home.

Domestic Strife and the "Alternative Residence Rule"

The courts have held that where physical safety cannot be proven but where a party has "voluntarily established an alternative residence," Fleming v. Fleming, 154 AD2d 250 (1st Dept. 1989), to avoid "domestic strife" in an acrimonious relationship, a court can bar that parent from returning to the marital residence" ("Alternative Residence Rule"). Kenner; Kristiansen v. Kristiansen, 144 AD2d 441 (2nd Dept. 1988); Delli Venneri v. Delli Venneri, 120 AD2d 238 (1st Dept. 1986); IQ v. AQ, 228 AD2d 301 (1st Dept. 1996); Yecies v. Yecies, 108 AD2d 813 (2d Dept. 1985). In effect, these cases hold that once you've left, you're not coming back where your return would contribute to "domestic strife."

Doctrinally, the presence of "domestic strife," without proof of threats to physical safety, is a recognized standard for an award of exclusive possession. The First Department has "rejected any rule which would ignore other salient facts and limit the award of temporary exclusive possession to only those instances where, based on past experience, there is a verifiable danger to the safety of one of the spouses." Delli Venneri. However, in that case, the excluded party had an alternative residence, thereby limiting the previous broad statement to dicta that was unnecessary to the resolution of the case.

No Physical Strife and No Alternative Residence

So what happens in a case where the parties have a child or children, the strife is high-pitched but not physical, but where neither party has an alternative residence? There is abundant anecdotal evidence that some judges do not feel bound by the limitations of the Safety or the Alternative Residence rules. These judges will exclude one of the parents, usually on the basis of the affidavits filed in support and opposition to a motion for exclusive possession, without a hearing, but sometimes even on an oral application. There are two practical reasons for this procedure. It relieves the child of the stress of living in a home pervaded by marital strife and it resolves the issue without the consumption of time that a hearing entails. Appellate decisions repeatedly reverse exclusion orders made without a hearing, see, e.g., Karakas, supra, but the benefit of this level of formality only accrues to litigants who perfect their appeals or who happen to have cases before judges who interpret the Safety Rule narrowly to include only threats to physical safety and to exclude emotional and psychological harm to the child.

Maeckelbergh v. Maeckelbergh, NYLJ 6/18/97, p. 29, c. 6 (SC, NY Co., not officially reported), offers an alternative remedial option. There, the parties resided together in a one-bedroom apartment and their nineteen year old daughter returned to the apartment during her college vacations. The wife complained that the husband spent alternate nights at his paramour's apartment and that he flaunted this relationship, facts that he did not deny, and when he slept in the apartment, she slept on the floor in the bedroom. Reasoning that an estranged couple living in a one-bedroom apartment is a "source of stress and turmoil for both Wife and the parties' daughter," the court concluded that it did not have the authority to direct the husband to move out, but awarded the wife additional maintenance to allow her to either "rent an apartment of her own or to spend significant amounts of time away from the stressful living arrangement."

Strikingly, in the fifty-seven years of reported decisions on exclusive possession in New York since Mayeri, supra, only one reported case awards exclusive possession before custody has been finally resolved to save a child from the effect of the parents' verbal and emotional conflict. In Berman v. Freedman, NYLJ 8/25/88, p. 17, c. 6 (SC, NY Co, Schackman, J.), where custody was not resolved, the court granted pre-judgment exclusive possession of the marital

residence to the mother on the basis of the report of the court-appointed forensic psychiatrist who concluded that the child was suffering by living with both of his parents in an acrimonious household. The court wrote, "The best interest of the child … is paramount to this court and, since there is a clear indication that the status quo is having a deleterious effect on the mental health of the child, the court is not loathe to act on his behalf." Berman implicitly finds a "safety" concern when a child's emotional and psychological well-being is threatened by his continued residence in a home where the parties' relationship has deteriorated to the point of constant fights. Some judicial observers predicted that this case would lead the way to other decisions, but that never happened. Berman has never been cited in a reported decision.

Two recent decisions by Justice Ellen Gesmer are variations on the basic theme of Berman. In Gottlieb v. Gottlieb, (SC, NY Co, 10/28/13, Gesmer, J. (not officially reported)), citing the need to protect the parties' children who lived with the wife, the court made a pre-judgment award of exclusive possession of a marital residence in the absence of threats to physical safety and in the absence of voluntary relocation to an alternative home. While there was no expert report attesting to the harm the child was experiencing from his parents' conflict, the parents agreed that the children would be better off if the parents separated. In MB v. RM, (SC, NY Co., 7/7/15, Gesmer, J. (not officially reported)), the parties entered into a final custody agreement that provided that the child would reside primarily with the mother. The father declined to move out of the marital residence. The court held a hearing where the court-appointed forensic evaluator, who had previously filed his report as part of the custody portion of the matrimonial action, "strong[ly]" recommended that the parties "separate as soon as possible for the child's sake." He was "struck with the degree of inter-parental conflict and . . . thought this is terrible for this kid and I want to do something about it sooner rather than later." Here, the father who refused to move out of the home said that the child "would benefit if we lived apart." In each of these cases, there was ample evidence in the record from the parents' concessions, and in one case from a non-partisan expert, that the child was being harmed by having to live in their conflict-ridden home. In both cases, custody had been resolved either formally or informally. Underscoring the importance of undisputed custodial claims to a motion for exclusive possession, in Kurppe v. Kurppe, 147 AD2d 533 (2nd Dept. 1989), the appellate court noted that "Since the father did not seek custody of the children, the court properly granted the wife temporary exclusive possession of the marital residence."

The Safety Rule Should be Reformed

Our understanding of the harm children suffer when they live in a home where their parents are at each other's throats has advanced to the point where it is clear that we need to dispense with the category of "safety" or to expand it to take cognizance of the emotional and psychological harm to the children that parental conflict causes. To continue to require proof of threats to physical safety is to require children to suffer and to increase the risk of their long-term injury. This is especially egregious when we factor into the analysis the length of time - too often measured in years - it takes to dispose of custody issues.

Procedural Considerations

Changing the rule will result, in some cases, in courts holding hearings to determine which parent, if any, should be excluded from the home and to fashion a parenting schedule that balances the child's needs with the imperative that the interim order not pre-ordain the outcome of the final custody issues. Often, courts will be making decisions on an evidentiary record that is less complete than would be developed at a custody trial. But balancing the needs of the parties for resolution, even if, as here, that resolution is only interim, with the desire to limit the risk of error, is a problem courts face on any request for interim relief. For example, where the parties are sharply divided on the facts, an award of interim custody may only be awarded after a hearing. Carlin v. Carlin, 52 AD3d 559 (2nd Dept. 2008); Martin R.G. v. Ofelia G.O., 24 AD3d 305 (1st Dept. 2005). However, "[t]he nature and extent of a hearing may be as abbreviated, in the court's discretion, as the particular allegations and known circumstances warrant. The extent of the hearing may perhaps be as little as questioning the parties under oath by the court, subject to limited questioning by the lawyers. In any such case, the court should ensure that the factual underpinnings of any temporary order are made clear on the record." Martin R.G., 24 AD3d at 306. That said, the abbreviated hearing must provide a "sufficient basis for the court to form [a reasoned] opinion. Hathaway v. Baker, 103 AD2d 762 (2nd Dept. 1984). This is not inconsistent with the rule in SL v. JR, 27 NY3d 682 (2016), that courts award final custody only after a full hearing, not on the basis of papers and "information".

Sources of Evidence at the Hearing

It is to be expected that the parents will present diametrically opposite explanations for the strife in the household. The search for other evidence will often turn up partisan witnesses, e.g., relatives of a party, or witnesses who will be accused of bias or prejudice, e.g., domestic employees. Sometimes older siblings will

be offered as witnesses, e.g., Kurppe v. Kurppe, supra, 147 AD2d 533 (2nd Dept. 1989) (teenager's affidavit submitted). Teachers, coaches, and other similarly situated individuals may be able to shed light on changes in the child's behavior that may be probative of the impact of the marital strife on the child. But often, there are no witnesses to what goes in the home except the parties and the children. And the court must be mindful that the exclusive possession determination can have a significant impact on the resolution of the final order of custody. Berman and MB v. RM both teach that expert testimony can have a powerful influence on the court's evaluation of the remedy to be imposed to best serve the child's needs.

Forensic Reports and Testimony

One alternative is for the court to review the forensic evaluation, if one exists, or to order one. But, postponing the resolution of the exclusive possession motion until a forensic evaluation has been completed and reviewed by counsel means waiting months. The court ordered forensic report may beget a peer review, and there is always the temptation to bypass the limited issue hearing on exclusive possession and move right to the custody trial, further delaying resolution of an issue that may be of utmost importance to the child. See, e.g., Biagi v. Biagi, 124 AD2d 770 (2nd Dept. 1986) (temporary custody hearing required where there was no "realistic prospect" of a prompt custody trial).

The court could ask the forensic evaluator to conduct an initial, limited review, focused on the questions of how the child is doing in the home with both parents living together ("Focused Evaluation"). The Focused Evaluation can address the information the court specifies and the information the evaluator believes the court should consider and why. It may be that this Focused Evaluation will sacrifice some thoroughness when compared to a full forensic evaluation, but its obvious advantage is the reduced time it takes to produce it. Notably, the clinics attached to the Family Courts regularly conduct evaluations that take far less time and that are reflected in much briefer reports than the typical forensic evaluation in a matrimonial action in Supreme Court.

The Court of Appeals may have recently endorsed the use of an expert's report before trial. SL v. JR, 27 NY3d 682 (2016), involved a review by the Court of the procedures that a trial court may use to resolve custody on a final basis. The Court noted, without comment, that the trial judge used the forensic report even though it was not formally admitted into evidence. In Berman, supra, the motion was made before trial and before the parties entered into a custody agreement. Justice Schackman read the forensic report and it was relied upon by counsel as a key piece of evidence. See also Gandia v. Rivera-Gandia, 260 AD2d 321 (1st Dept. 1999) (affirming an award of temporary custody based, in part, on the forensic evaluator's opinion). However, some matrimonial judges decline to read the forensic report or to allow counsel to make arguments based on it, until it is admitted into evidence at trial. If the court conducts a hearing on the exclusive possession motion, the forensic report can be offered in evidence and the expert can be called to testify, but this prospect will likely trigger the peer review process and delay resolution of the interim issue.

Long-standing precedent in New York holds that "[i]n disposing of custody of children, courts are not so 'limited that they may not depart from strict adversary concepts' in certain respects. Custodial questions have sociological implications, and we are confronted here by a situation where common-law adversary proceedings and social jurisprudence are not entirely harmonious and where reconciliation between them is necessary." Kessler v. Kessler, 10 NY2d 445, 452 (1962). There, the Court was required to determine the proper procedures to be used regarding expert reports and it opted for procedures that ensured the trial court would receive accurate information tested by the rules of "common-law adversary proceedings." The use of Focused Evaluations as described here would be consistent with Kessler's procedural protections. Deviating from the traditional procedures entails risks, but, in a related context, the Court endorsed the use of new procedures and expressed confidence that the state's trial judges recognize the risks. The method of analysis to be employed in determining the propriety of new procedures requires the "weighing [of] the competing considerations" with the focus on best serving the "interests of the child." Lincoln v. Lincoln, 24 NY2d 270, 273 (1969).

With no-fault divorce firmly entrenched in New York, the issue is not whether the parties should live separately, but when and whether that will happen consensually or coercively. See Binet v. Binet, 53 AD2d 836 (1st Dept. 1976) where the court considered that the parties were getting divorced and would be living separately in the foreseeable future. Moreover, exclusive possession is usually granted to the custodial parent with minor children. Mosso v. Mosso, 84 AD3d 757 (2nd Dept. 2011). Of course, to consider this factor, the court must make some assessment of which parent, if either, is likely to be awarded primary physical custody and the harm to the displaced parent in terms of creating a new status quo, as noted above. Often, this decision will be relatively

straight-forward, despite the formal demands expressed in the papers, prompting some writers to suggest that we need "a mechanism for a determination akin to summary judgment, permitting judges to make custody determinations without a hearing upon 'adequate and relevant information.'" Dobrish, "S.L. v. J.R., A Clarion Call for Clarity in Custody Cases (LOL)" 48 Family Law Review 10 (Fall 2016, No. 2). Sometimes, this decision will be difficult, but in those cases, resolution of the ultimate custodial issue will itself be difficult. The court must weigh the benefits of developing a full record against the harm to the child of the time it takes for such development. Are we confident that the decision following a full evidentiary hearing is any more likely to be in the child's best interests than one that is made on the basis of a limited hearing, especially in light of the vagueness of the "best interests" standard. See Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy", 39 Law and Contemporary Problems 226 (1975), for the seminal discussion of the vagueness of the best interests standard.

The rule should be reformed so that judges may issue orders that relieve children of the burden of having to live under same roof with their warring parents.

Conclusion

The psychological literature makes it abundantly clear that children suffer real and long-lasting harm when they are exposed to serious parental conflict. The fifty-seven year-old judge-made Safety Rule is not required by the language of DRL §234, it was invented and sustained by judges, and judges can change it. As applied, it raises the standard the movant must meet to a level that is indistinguishable from a family offense proceeding, tending to make DRL §234 superfluous, a result that the Legislature cannot have intended. The rule should be reformed so that judges may issue orders that relieve children of the burden of having to live under same roof with their warring parents.

Elliot Wiener has been practicing family law his entire career and has represented many parents in the resolution of their custody disputes through both negotiation and litigation. He is a member of the American Academy of Matrimonial Lawyers, the International Academy of Family Lawyers, the Interdisciplinary Forum on Mental Health and Family Law, and is the Chair of the Board of FamilyKind, a non-profit organization that provides services to divorcing and separating couples.

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Editor's Corner

Combating Bias in Child Custody Evaluations – An Overlooked Approach?

Alberto Yohananoff, Ph.D.

Mental health professionals who have engaged in forensic evaluations, and child custody evaluations in particular, have witnessed a gradual evolution in expectations. Greater methodological rigor has become the standard for the conduct of all forensic evaluations. Professional guidelines have been promulgated by a variety of organizations such as the Association of Family Court and Conciliation (2007) and the American Psychological Association (2013), leading to a fairly standardized approach to the content of these evaluations.

Although significant efforts have been made to render child custody evaluation more scientific, the undersigned believes that inevitably a subjective component pervades most of these evaluations. Consider the following hypothetical scenario-- a group of professional clinicians is presented with a custody vignette with the same set of data. What it the likelihood of good inter-rater reliability (agreement among clinicians) in such a scenario? Are the clinicians presented with such a hypothetical likely to reach similar or different conclusions given that they will inevitably bring to bear on the data their own subjective perspectives, values and biases.

Martindale (2005), Stahl (2006) and Wittman (2013) among others discuss the issue of inherent bias in child custody evaluations. Bias can be defined as "an emotional or cognitive inclination that interferes with an unprejudiced consideration of the data that has been gathered about a family" (Wittman 2013). Biases are an inherent part of how people operate and social scientists (see Nisbett and Ross, 1980; Kahneman, 2011) extensively wrote about cognitive "heuristic devices" humans routinely use to make sense of complex set of data. Martindale (2005) notes that clinicians are particularly subject to confirmatory bias (the desire to identify data that support an initially developed hypothesis) and confirmatory distortion (i.e., overconfidence in an initial hypothesis leading the evaluator to intentionally select the data to be considered and reported). Wittman, Braunstein and Tippins (2017) discuss a number of common biases clinicians need to beware that can affect clinicians at each stage of the forensic evaluation process (how data are chosen, gathered and interpreted). Wittman (2013) notes that the biases that forensic clinicians are subject to can be categorized into 3 broad clusters: (a) Relational biases, (b) data gathering biases and (c) inferential biases.

Relational biases refer to "emotional or cognitive inclinations in the forensic relationship with parents, children, or relevant professionals that interfere with an unprejudiced consideration of the data." It includes biases such as 1. Group membership bias ("a tendency to have one's judgment skewed by cultural, gender or racial stereotypes.") 2. Retention bias – the clinician's judgment being skewed by a desire to please the referral source. 3. Affiliative Bias – a tendency to judge more positively people who present with similar world-view, or beliefs, or those that the clinician finds likable or attractive. 4. Disaffiliative Bias – a propensity to arrive at negative judgments about litigants a clinician finds to be difficult or unattractive. 5. Credibility bias – a clinician's belief in his/her ability to discern deception and truth telling.

Data gathering biases refers to emotional/cognitive distortions being manifested during the critical process of data collection. Under this category fall biases such as: 1. Data Selection Bias – a tendency to favor the gathering of information that is marginally related to parental capacity (the key critical construct in custody evaluations). 2. Instrument bias – the propensity to use psychological measures one is familiar with despite that such instruments may not reliably assess parenting capacity.

Inferential Biases refers to emotional or cognitive biases in the reasoning process that may interfere with an accurate interpretation of data. Examples of such biases are 1. Primary/Recency Bias – a tendency to grant greater importance to the earliest or latest information received during an assessment process. 2. Internal Factor Bias -- - a clinician's propensity to attribute psychological factors to internal states, or personality constructs while not sufficiently considering situational/environmental factors that may account for the data. 3. Shock or "availability" bias – a clinician's propensity to consider more heavily information that is more easily recalled. The latter can be affected by factors such as salience, or sheer repetition.

Given that child custody evaluations involve complex and often seemingly contradictory set of data that need to be carefully parsed and integrated, to combat bias, child custody evaluators are encouraged to rely on multifaceted, multi-prong approach to data collection designed to increase convergent validity.

This include multiple interviews and observations with all parties involved, collateral data and psychological testing. Forensic evaluators have also been historically encouraged to address potential biases by additional means such as peer supervision and introspection. For instance, Wittman, Braunstein and Tippins (2017) indicate that in addressing the issue of affiliative bias a clinician may want to consider what weakness he/she overlooked. Conversely, to address disaffiliative bias one may want to consider what strengths he/she overlooked.

One approach to address forensic evaluator's biases in child custody evaluation that has received scant attention is the use of a set of two evaluators to conduct such an evaluation. This approach is not commonly used because it is potentially cumbersome, not particularly cost effective, and presents several potential problems (which expert would to be called to testify; having to rely on two set of notes if called to testify to list a few). Yet, such an approach has been used in other, less complex type of forensic evaluations. For instance, in New York State, two independent clinicians are required to independently evaluate a defendant's competency to stand trial in criminal proceedings.

The question thus arises as to why such an approach could not be considered in child custody evaluation notwithstanding some of the potential pitfalls noted above. It could be argued that there would be several advantages were such an approach employed in child custody evaluation including: (1) such an approach could potentially result in more thorough and nuanced evaluations presumably because by having an opportunity to discuss and analyze data through the course of multiple interviews this would result in a more rigorous product. (2) It would be yet another way to address the issue of clinician's bias.

By employing two evaluators one could argue that the risk of clinician's bias would be somewhat attenuated given that the final product would rely on "two set of eyes" to reach its conclusions. In effect, such an approach would be akin to have an additional set of "check and balances" to offset clinician's bias and could arguably augment the degree of confidence in the final product and arguable the degree of convergent validity. Granted this is a somewhat controversial, not particularly cost-effective approach, that perhaps should be used only in a limited manner. Yet it carries the potential benefit of reducing the risk of clinician's bias and insure a more rigorous evaluation process altogether.

*Many thanks for Dr. Jeffrey Wittman for his helpful comments in his review of this short manuscript.

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Time limits should be imposed on a Section 1034 Application to protect the best interest of a child and a parent's constitutional rights

submitted, the limited precedents, and the potential harm to a family unit compelled me to write about this area of family law.

The public policy power of the state to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child who needs protection has been around for many years. The role of the courts as parens patriae has been applied to children since the seventeenth and eighteenth centuries. (See People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment, 1996 BYU Law Review 186, 227-34). This application is due to the principle that protecting the best interest of a child is the most important concern for the courts. Weighing a child's best interest against a parent's constitutional rights is one of the hardest jobs Family Court Judges are called to perform on a daily basis. The decision making of a Judge is based on the law and the adequacy of the facts and evidence presented. It is complicated by the fact that nowhere in the law is best interest defined. It is left to statutory interpretation of the facts and circumstances of each case. (See M.S. v J.S., 2005 NY Misc LEXIS 3451 [Sup Ct NY 2005]; Friederwitzer v Friederwitzer, 55 NY2d 89, 447 NYS2d 893, 432 NE2d 765 [NY 1982]). Thus, agreement on the outcome of a decision depends on who you represent, i.e., the agency, the parent or the child.

The power of the state to intervene against an abusive or neglectful parent legal guardian or informal caretaker has been around for years.

In the case I decided, the allegation was that a 9 ½ year old boy put his penis in the mouth of his younger sibling, 2 ½ years old, who was in a stroller. The initial report mentioned the allegation took place on 4/26/16, while the parties lived in a shelter and the incident was captured on video. When the Mother was approached by shelter staff about the allegation, the Mother requested to see the video and was denied access. She subsequently left the shelter and went to live with her parents. A report was called in to the State Central Registry on 5/2/16 and a caseworker was assigned to investigate the allegations. The caseworker went to the home the same day and spoke to the mother. The Mother denied the allegations and advised the caseworker that she requested proof and was denied access to the video. The caseworker observed the children on different days and did not note any child protective concerns. At some point, the caseworker observed the video and along with the visits to the home, told the Mother the case would be closed. However, ACS kept the case open and on 12/30/16, went to court requesting an ex-parte order under §1034 of the Family Court Act directing the Mother to bring the children for a child advocacy center (hereafter "CAC") interview.

Based on the severity of the allegations, the Intake Judge granted the ex-parte order. The case was assigned to me on 1/5/17. The Mother once again refused to have the children interviewed. It is well settled that parents have "a constitutionally protected liberty interest in the care, custody and management of their children." (see Southerland v City of NY, 680 F.3d 127, 142 (2d Cir. 2011) (quoting Tenenbaum v Williams, 193 F3d 581, 593 (2d Cir. 1999)). This interest, however, is "counterbalanced by the compelling governmental interest in the protection of minor children particularly in circumstances where the protection is considered necessary as against the parents themselves." (Id. at 152 (citation and internal quotation marks omitted)). In an effort to balance a parent's constitutional rights and a governmental interest in protecting children, the Legislature in 1969, enacted the Child Protective Procedures Act (Family Ct Act art 10).

Article 10 proceedings establish "procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its Family Court, may intervene against the wishes of a parent on behalf of a child so that his [her] needs are properly met." (NY CLS Family Ct Act §1011; People v Kenyon, 46 AD2d 409; Matter of Maureen G., 103 Misc 2d 109). A related, perhaps secondary, purpose would be--where possible-- "to preserve and stabilize family life" (Social Services Law, §423, subd 1; §411 [child protective services]; §397, subd 2, par [a]; §398, subd 2, par [a]). See also In re Theresa C., 121 Misc2d 15 [NY Fam Ct 1983]).

In 1970, Section 1034 was added to Article 10 to provide preliminary procedures when court intervention is necessary. According to the statute, a family court judge may order a child protective investigation and the agency, New York City Administration for Children's Services (hereafter "ACS"), is to submit a report on its findings "in any proceeding under this article ... in order to determine whether a proceeding under this article should be initiated." (See NY CLS Family Ct Act §1034(1)). The statute has been amended throughout the years and it allows ACS to seek an ex-parte court order before filing a neglect/abuse petition, upon showing of "reasonable cause to suspect that a child or children's life or health may be in danger" based on: 1) a report of suspected abuse called into the State Central Registry; and 2) if the caseworker is unable to locate a child or denied access to the child sufficient to determine their safety and 3) after the caseworker speaks to the parent and advices that he/she may consider obtaining an immediate court order without further notice to gain access to the child or children. (See NY CLS Family Ct Act §1034(2)(a)(I)). A court is to assess the actions necessary "in light of the child or children's safety, provided, however, that such actions shall be the least intrusive to the family. (See NY CLS Family Ct Act §1034(2)(e)).

The above three requirements set forth a road map to guide the court when assessing the need to overrule a parent's refusal. However, since at least 1968, parents "are under no obligation to cooperate with a child protective agency's investigation of them." (See In re Smith, 26 Misc3d 826, at 832-833 [NY Family Court 2009] quoting In Matter of Vulon, 56 Misc2d 19 [Family Ct Bronx Cty, 1968]). The case of In re Smith, which quoted Matter of Vulon, reviews the court's tasks when overruling a parent's refusal to allow access to the children and to obtain the production of the child or children to a CAC Center or to a particular person for an interview. (See NY CLS Family Ct Act §1034(2)(a)(ii)). The CAC provides services to children who have suffered sexual abuse or severe physical abuse. It uses a team centered approach that addresses the child's "safety, tending to their physical injuries and emotional needs and bringing abusers to justice." The team consists of medical, legal, and social resources for abused children in a permanent, child-friendly location. Specifically, the CAC is partnered with ACS, the NYPD and the District Attorney's Office, as well as medical providers. (See safehorizon.org/child-advocacy-center/) (last visited March 20, 2017). (See also Matter of Abraham P., 21 Misc 3d 1144(A), 875 NYS2d 818 [NY Fam Ct 2008]).

Motions were filed to vacate the ex-parte order of the Intake Judge and to grant intervening status to the parents and the attorney for the child so I can consider their concerns. Given the Mother's refusal to comply with the ex-parte initial order, I also assigned a lawyer to the Father and a separate lawyer for the other children. I granted intervening status to the Mother/Father and the child as their interests were implicated by the ex-parte order. The lawyer for the Mother reported on each court appearance, undisputed by ACS, that the assigned caseworker had an opportunity to observe the children and they were no signs of physical abuse or behavioral issues. The only evidence offered by ACS in their case in chief was the testimony of the assigned caseworker. The caseworker's own testimony did not substantiate the allegations of sex abuse even though she saw the video. After full disclosure of the investigation, the attorneys assigned to the children argued there was nothing to establish a prima facie case to override the Mother's objection to having the children interviewed at CAC. The caseworker herself observed the alleged video and testified that she wrote in her notes there was no sign of sexual abuse.

Detrimental to the Petitioner agency's case is the fact that the video was never introduced into evidence for me to make my own assessment. I was bound by the evidence presented and every reasonable inference

that can be afforded after a prima facie presentation of the case, which does not require me to find that the parents were culpable. Rather, it merely established a rebuttable presumption of parental culpability which I may or may not accept based upon all the evidence in the record. ACS still maintains the burden of proof. Based on my assessment of the caseworker's testimony, the Mother and the Father acted responsibly concerning the children.

Upon close examination and in light of the circumstances of the CAC interview being requested, the assigned caseworker's description of what she observed in the video was very unconvincing. Her testimony was not enough to disturb the fair and reasonable balance between a parent's right to care for the children and the child's right to be free from harm. The omissions made during the first appearance/before the full hearing was held, and in the supporting Affidavit, makes the current Application appear as being used as a tool to force the parents and the child to comply further with ACS. There is nothing on the record that would justify disturbing this family's ability to create a stronger unit and move forward. The Mother nor the Father should be forced to cooperate on an untimely application as ACS waited approximately eight months after the report was filed, more than 60 days after the investigation was to have been completed and well over the 90 days contemplated in Matter of Macario (119 Misc2d 204 [NY Family Ct 1983] [application denied as untimely]). Moreover, the "ORT" nor the Application alleges neglect or any acts or omissions against the Mother or the Father.

In my case, the severity of the allegations demanded quicker action and more attention to detail by the agency. The lack of evidence presented, and based on the concerns raised by both attorneys for the children, due to a possible violation of one of the children's due process rights, I was left with no other choice than to deny ACS' application. It disturbed me that the video was never presented into evidence and the detective who initially spoke to the caseworker did not testify. The shelter staff who observed the video also did not testify. This case had the potential to leave permanent scars in the lives of these children and yet such valuable evidence was not submitted for my consideration. Overall, based on the evidence, I found it was not in these children's best interest, given their vulnerability and young age, to be subjected to such an intrusive interview by a CAC. (See NY CLS Family Ct Act §1034(2)(d)). Moreover, the law enforcement personnel would be present via a two-way mirror which could lead to charges being filed against one of the children. Cases like these have to be reviewed with the deepest of care and this untimely Application should not be allowed to be used as a routine practice (See In re Smith, supra). The legislature should contemplate changes in Section 1034 to address procedures that can provide protection to children facing circumstances where they can be charged with a crime on due process grounds. Overlooking the concerns I raise in this article, in my opinion, erodes a parent's constitutional rights and does not protect a child's best interest.

The legislature should contemplate changes in Section 1034 to address procedures that can provide protection to children facing circumstances where they can be charged with a crime on due process grounds.

Hon. Fiordaliza A. Rodriguez is a Judge in the Family Court. She has worked in the family law area for almost 20 years and has worked as a prosecutor, a parent's attorney and as an attorney for the child. Prior to her appointment to the bench, she was a Court Attorney Referee. Judge Rodriguez holds a Masters Degree in Urban Policy Analysis and is a graduate of CUNY School of Law.

The Unavoidable Entanglement of Finances With Shared Parenting Time

Brianna Denney, Esq.

In a case that proceeds to Supreme Court, special attention is paid to resolving custody and visitation before financial issues such as support and property division. This is done for many reasons, including: knowing which parent will be the custodial parent to determine who is entitled to receive support; having custody and visitation determined permits referral of financial matters to a Special Referee for a hearing; because the appointment of a forensic and the issuance of a forensic report can take months and that process must get underway while financial discovery proceeds; or, simply, to prevent mixing apples and oranges by separating the issues of a child's well-being from the issues of the ultimate property distribution or counsel fee award.

In the Family Court, there is no question that support and custody/visitation will be resolved separately with custody/visitation heard by a Family Court Judge and support by a Support Magistrate.

However, in equal parenting time schedules, the issue of finances and parenting time are inexorably linked. Attorneys often determine that without resolving one issue, they will not be able to resolve the other since the difference between a 40% and a 50% schedule could mean a difference of tens of thousands or hundreds of thousands of dollars over the term of support.

The simple fact is that an equal parenting schedule is more expensive for both parents than the "traditional" visitation schedule. It is a "generally accepted fact that [although] shared custody… reduces certain costs for the custodial parent, [it] actually increases the total cost to support a child by necessitating duplication of certain household costs in each parent's home." While a parent may be accepting of sharing equal time, he or she may not want to share in this increased financial cost. As will be discussed, a parent may be sacrificing a higher support award (or foregoing it altogether) if there is an equal schedule, and a parent who desires an equal schedule may end up paying the same amount of child support with a 50% schedule as a parent who only has 20% schedule. Presently, there is no way to assure a parent that the equal schedule will not "be held against them" in support or that shared custody will definitively be considered in determining the amount of support to be paid unless the issues are resolved in tandem. The current formulaic child support law does not work well in shared parenting time cases and therefore, the 50/50 schedule creates uncertainty for both parents of the ultimate support amount.

The Law

The Child Support Standard Act ("CSSA"), incorporated within the Domestic Relations Law and Family Court Act, is a formulaic approach to child support outcomes and was implemented to provide predictability as to child support. In summary, the application is as follows:

1. **Determine who is the custodial and noncustodial parent;**
2. **Determine each party's income, taking into account appropriate additions and deductions;**
3. **Combine the custodial income;**
4. **Multiply the combined income by the appropriate percentage (based on number of children) up to the minimum support amount (presently $143,000);**
5. **Assign each parent the pro rata share of support based upon each parent's share of the total combined income – this is the "presumptively appropriate amount" of child support.**
6. **Each parent is also responsible for a pro rata share of childcare that enables the custodial parent to work and unreimbursed medical expenses for the child, in addition to discretionary "add-on's" such as education and extracurricular activities.**

Case law is clear that "child support in a shared custody case should be calculated as it is in any other case." A "true" 50/50 schedule is to be determined by overnights but should also be "based on the reality of the situation," not merely what is written in an agreement. In a shared custody case, the higher-earning parent is deemed the non-custodial parent for child support purposes and is subject to pay the presumptive amount of child support to the lower-earning parent. This is a bright line rule. For example, if Parent A earns $10,000 per year is awarded 45% of the time and Parent B earns $500,000 per year and is awarded 55% of the time, in no event can Parent B be ordered to pay Parent A child support. However, if Parent A is awarded 50% (or more) of the time, Parent B will be ordered to pay support to Parent A. The presumptive amount based on one child, up to the current income cap, is approximately $24,000 per year. As will be discussed, if a deviation occurs, support could be as high as $85,000 per year or support could be less than the presumptive amount.

The parties or the Court may deviate from a presumptive amount – upward or downward - provided the parties by agreement, or the Court in a written decision, detail the

reasons that the presumptive amount of child support is "unjust or inappropriate." Once it is determined (by the parties or the Court) that the presumptive amount of child support is "unjust or inappropriate," then the paragraph "f" factors of the statute, which are 10 different factors to be considered, including the catch-all of "Any other factors the court determines are relevant in each case" may be utilized to fashion an "appropriate" child support award. The deviation from the formula gives the parties – or the Court – the absolute discretion in setting a different, discretionary amount, as long as presumptive amount calculations have been made first.

Even though "It has been suggested that the requirement of a written order is a 'device intentionally designed to deter the court from varying from the level of support," the majority of published decisions in which there is a shared schedule deviate from the presumptive amount and order a lower amount of child support. The predictability of the CSSA formula no longer provides such predictability in the situation of shared parenting. Indeed, the same set of facts will yield varied responses from experienced practitioners about what the support amount will be as support will likely be within the discretionary "f factor" zone and will therefore be left to that particular judge's discretion. It would therefore be abnormal for a parent not to have anxiety about what will happen with support if he or she agrees to an equal parenting time schedule.

Modification of Support If a Schedule Becomes 50/50 Post-Judgment

The equal parenting schedule also presents ongoing issues regarding modification of support. There are dozens of reported cases of parties seeking modification or termination of support awards because the parenting schedule changed by Court Order or in practice by the parents. For instance, the Court modified a prior schedule which then became a 50/50 schedule and the payor of child support, who previously had less time, was now entitled to support from the other parent who was now the non-custodial parent because she was the higher-earner . Or when the right of first refusal existed and a parent had to work, the 50/50 agreed schedule was no longer 50/50. In a case in which the schedule changes with the noncustodial parent originally receiving 30% of the time and that increasing to 40% of the time, there is no basis for a modification as the bright line only exists between 49% and 50% (or 51%). While there are benefits to having a bright-line rule regarding the CSSA being applied to shared custody cases, these are just some examples of the long-term drawbacks fueling continual modification requests based around which parent had 182 overnights versus 183 overnights per year. It should be noted that 365 nights per year cannot be evenly divided, which fact serves as bait for high-conflict parents.

The Court and Forensics Must Address the Financial Motivations and Consequences of a Shared Parenting Schedule

While disputes regarding a shared parenting schedule should be limited almost exclusively to each parent's beliefs about what is best for his or her child, finances can be an equal or even greater motivation in these disputes. Rarely is it so obvious as what an opposing attorney conveyed to me in the hallway of Court recently: "The difference between a 50% schedule and a 48% schedule equates to hundreds of thousands of dollars to my client. Of course she is seeking sole custody. What does she have to lose?"

This intersection of parenting time and support presents issues for the judiciary in making determinations regarding custody and support, not only in the immediate, but for the long term including the resources of the parents and continual modification requests. Forensics who are tasked with determining what motivations may underlie a parent's desire (or disagreement with) a particular schedule should also be aware of these financial implications. The fears and motivations regarding the interplay of an equal parenting schedule and the lack of formulaic support are, to some extent, present in every case.

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Carlino v. Carlino, 277 AD 897, 716 NYS2d 272 (4th Dept. 2000) (downward deviation based on shared schedule); Shamp v. Shamp, 133 AD3d 1213, 20 NYS3d 265 (remitted for determination of "f" factors – strict application of CSSA formula not necessarily appropriate); Disidoro v. Disidoro, 81 AD3d 1228 , 917 NYS2d 436 (3d Dept. 2011) (downward modification of presumptive amount of child support appropriate); Riemersma v. Riemersa, 84 AD3d 1474 (3d Dept. 2011). However, there are also cases that do not deviate based upon a shared schedule – e.g., ALB v. ALB, 50 Misc.3d 424 (Sup. Ct., Queens Cty. 2015) (approximately the presumptive amount awarded); Ryan v. Ryan, 110 AD3d 1176, 1181, 973 NYS2d 377, 380-381 (3d Dept. 2013).

Conway v. Gartmond, 144 AD3d 795, 41 NYS3d 90 (2d Dept. 2016)

Matter of Mitchell v. Mitchell, 134 AD3d 1213, 21 NYS3d 438 (3d Dept. 2015) (Court declined to modify support award to mother when father's visitation time was increased to more than equal parenting time.)

The New Rights of Non-Biological Parents

Sherri Donovan, Esq.

The following article is a follow-up to the AFCC 2017 Program, WILL THE "REAL" PARENT PLEASE STAND UP? THE CONUNDRUM OF THE BIOLOGICAL, PSYCHOLOGICAL, AND DE-FACTO PARENT

The struggle against discrimination for same sex families and individuals has been a long road. However, changes have been occurring at a quicker pace since 2015 when the U.S. Supreme Court ruled that same-sex marriage is constitutionally legal across the entire United States in Obergefell v. Hodges.

For the last twenty-five years, under a case, entitled Allison D., a parent was only recognized by biology or adoption. Many children suffered and were cut off by a person they called "mommy" and who raised them from birth because that parent did not go through an expensive and time-consuming adoption or did not give physical birth to them. On August 30th, 2016 the highest court in New York, the Court of Appeals remedied the injury.

In The Matter of Brooke S.B. v. Elizabeth A. C.C, the Court of Appeals in an opinion written by Hon. Abdus-Salaam ruled, "that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law §70."

Brooke and Elizabeth met and started a relationship in 2006. The following year they moved in together in upstate New York. Brooke gave Elizabeth an engagement ring. It was a symbolic gesture since same sex marriage was not legally recognized at the time. The parties started a family immediately. Elizabeth became pregnant via an anonymous donor in 2008. Brooke was present when their son was born and even cut the umbilical cord. Brooke's last name was placed on his birth certificate, birth announcements and baptism certificate. Brooke engaged in caretaking and custodial responsibilities including feeding and bathing.

When Brooke and Elizabeth decided to terminate their relationship in 2010, Brooke continued to parent. She had regular and consistent parenting time with her son and he spent major holidays with Brooke and her family. Brooke continued to bring him to medical appointments, his school, and supported him financially. Three years later, Elizabeth ceased contact between Brooke and their son. The Court of Appeals ruled that Brooke had standing to seek custody and visitation. The Court recognized the varied modern families of today and that the old case law was unworkable. It cited numerous social science studies about the damage to children by being cut off from a primary caretaker, also known, as a parent to the child.

Once the criteria according to Brooke S.B. are met there is no limit. Thus, a parent who was previously denied standing for custody and visitation should be able to seek standing now after Brooke S.B. As Judge Piggot of the Court of Appeals pointed out, the previous improper deprivation of a right is a change in circumstances. The change in case law may also be seen as a change in circumstances. Retroactivity is generally applied by the Court of Appeals and lower courts when there is a new interpretation of previously existing law. New York courts broadly construe a new interpretation of an existing rule. The Courts have broad discretion to apply a decision retroactively. There is a trend in New York courts to apply decisions retroactively. In addition, res judicata (i.e., a previous decision holds for the future as settled law) usually does not apply in custody and visitation cases. Parenting decisions and plans are modifiable in accordance with the best interests of the child.

The Court of Appeals left open for the future, expansion of the definition of parent and recognition of non-biological and non-adoptive families where there is not a pre-conception agreement. Future cases or legislation may provide for a functional definition of a parent based on de facto and psychological factors for post-birth partners.

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The Future Is Here And We Are It

Teresa Ombres, Esq., AFCC Executive Board

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New York AFCC Chapter is an interdisciplinary, international association of professionals dedicated to improving the lives of children and families through the resolution of family conflict. The New York AFCC Chapter promotes an interdisciplinary approach to serving the needs of children among those who work in and with family law systems, encouraging education, research and innovation and identifying best practices.

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A justice system in which all professionals work collaboratively through education, support, and access to services to achieve the best possible outcome for children and families.

A Little History

In the Beginning: AFCC in the 1960s

AFCC's founding members had a different focus from those working in family courts and court services today. The job title for many court service staff members was "marriage counselor." The work of the counselors focused on reconciliation between husbands and wives. Conference programs and Review articles emphasized the role of the court as a provider of short-term marriage counseling services and the use of husband-wife agreements to resolve marital disputes and promote reconciliation. The use of trial separation agreements as a way to effect reconciliation was discussed as a novel, albeit controversial, technique. Around 1967 AFCC went on record encouraging then California Governor Ronald Reagan to continue the Blue Ribbon Commission on the Family and "to begin a concerted assault on the high incidence of divorce in our society and its tragic consequences." Blueprint for a Successful Marriage, a brochure developed by the Los Angeles Conciliation Court, was made available to other courts through AFCC."

The tide is rising. And this rising tide is lifting even hardened litigators who are admitting that the court system is broken and doesn't serve families well.

By the 1970s the focus shifted from reconciliation to conciliation and Divorce with Dignity. To learn more about the history of AFCC please visit website referenced at the end of this article.

In the fall of 1980, when I was a student at New York Law School, as part of an independent study on the "Psychological Abuse of Children," I interviewed a retired Family Court Judge who advised it was unlikely under the soon-to-begin Reagan Presidency, with its emphasis on less government interference, that we would find any traction getting agencies to address psychological abuse.

The idea that there was an organization in the 1960s already concerned about the emotional effects of divorce is, sadly, a little mind-boggling, especially for New Yorkers. California had no-fault divorce in the sixties. It took more than forty years for New York to "get it". And it took almost as long to start a chapter of AFCC in New York. At AFCC'S annual conference in Chicago in May 2001 Lauren Behrman started talking about forming a New York Chapter. An AFCC Regional Conference was scheduled in New York City for September 13, 2001. Attendees from New York were invited to meet after that conference to discuss forming a New York chapter. (For reasons you will all understand that conference was postponed to March of 2012). Over 60 people showed up! We have been working on changing the climate and promoting our mission and vison ever since.

I am ecstatic to report that New York is finally "getting it". What AFCC stands for has long been accepted, understood and practiced in what have been, up until now, "alternative processes", e.g. mediation and collaborative divorce. And up until now the majority of those in the trenches of matrimonial and family

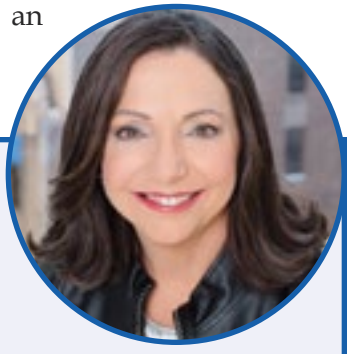
practice have been largely oblivious to our mission and vision, our research, protocols and recommendations. But change is afoot. On March 10, 2017 Hofstra Law School, under the auspices of the Hon. A. Gail Prudenti, who was recently named Dean of the Law School, and the Center for Children Families and the Law hosted a Matrimonial Summit. The Summit goals, as detailed in Judge Prudenti's welcoming letter to the attendees, were to bring "together thought leaders form a cross-section of the family law bar with the purpose of engaging practitioners individually, and the bar as a whole, in the larger movement to facilitate change in the system for resolving family conflict and parenting disputes." Many of those in attendance were already bearers of the torch, i.e. mediators, collaborative professionals, and child advocates. There were also just as many (or more) well-known and highly accomplished and respected litigators. All sharing ideas; all talking about how the system is broken; all brainstorming ways to fix it; all, to varying degrees, recognizing the value of broadening our concept of what works and what doesn't work for families. This is our dream come true.

Participants were divided into six groups of six to seven. Each had a different topic for the morning and afternoon sessions. They were:

1. ***Role of the Family Law Attorney;***
2. ***Education of a Family Law Attorney;***
3. ***A Holistic Center for Out-of-Court Divorce;***
4. ***Judicial Review of Divorce Agreements;***
5. ***Triage and Differentiated Case Management;***
6. ***Litigation Management and Cost Containment;***
7. ***Trial Practice;***
8. ***Self-Represented Litigants;***
9. ***Early Neutral Evaluation***
10. ***Children of Divorce, the cost and process for contested cases;***
11. ***Domestic Violence;***
12. ***Unmarried Parents.***

At the end of each session we all came together to report the ideas that were generated by each group. As different scenarios engendered thoughts of integrating other services, sometimes even replacing traditional lawyer tasks with other professionals, such as hiring mental health professionals to craft parenting plans, and neutral financial specialists for some of the support and asset challenges, lively discussions were had about process, appropriateness and ethical considerations. Even before we broke into groups Andrew Perlman, Dean of Suffolk Law School and founding director of its Institute on Law Practice Technology and Innovation, and the Legal Technology and Innovation Concentration gave the keynote address: The Future Is Before Us: Innovation in Legal Practice in the 21st Century. He offered some insight into how technology can begin to make changes in the way we practice from streamlining to automating. One recurring concern of the Summit was the cost of divorce and how it adds to the family's stress and effects children as well as parents. Hiring neutrals to perform certain tasks, instead of two lawyers, and automating others can save money for firms as well as clients. In the end both of these innovations will better serve the families and deliver a better experience.

AFCC is a leader in how to better serve families. It has been pioneering its mission and vision for over fifty years. The tide is rising. And this rising tide is lifting even hardened litigators who are admitting that the court system is broken and doesn't serve families well. Let's continue to educate and foster best practices and think of new ways to reach an expanding audience.



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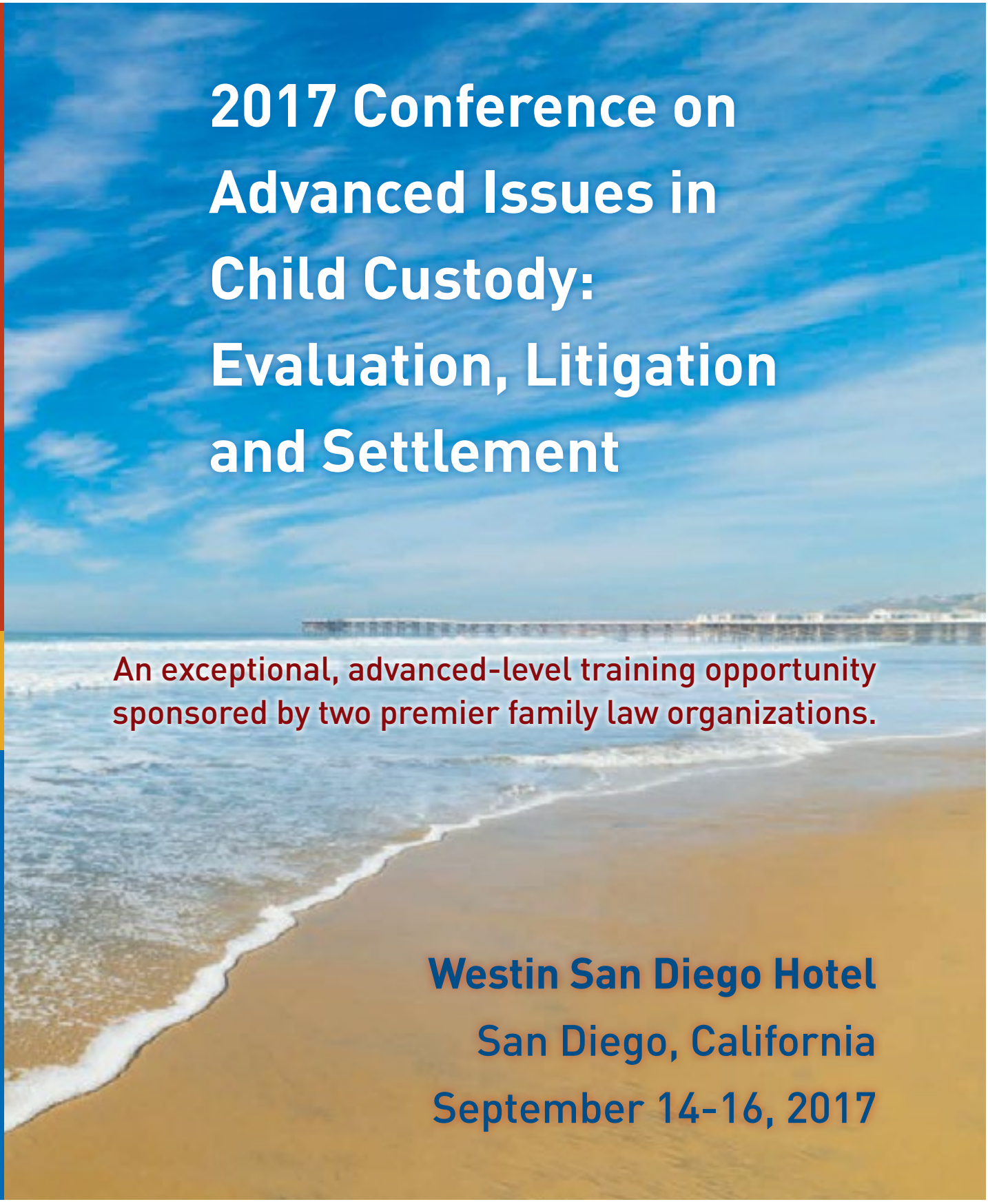

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