Solving the Hearing Problems in Custody Litigation

By **Robert Z. Dobrish and Elodie E. de Bethmann** | December 23, 2021

One of the most vexing issues in custody litigation is the amount of time it takes to obtain relief from the courts. There is an old adage that “the wheels of justice grind slowly, but exceedingly fine.” “Slowly” is a relative term. To a small child, six months may be the equivalent of a decade; two years might seem an eternity. In today’s court system, one would be lucky to obtain a decision on a motion in less than six months. Before the pandemic, in light of all the procedural obstacles and delays, the estimated wait time for obtaining a custody decision was two years. Today, it is anyone’s guess.

The pandemic has slowed the processing of cases, particularly those that require judicial intervention and especially those that require a hearing. Custody determinations require both. These procedural obstacles are amplified in Supreme Court where custody issues are only decided by a judge; custom dictates that they cannot be delegated to a referee, special master, or arbitrator. In Family Court, on the other hand, custody issues can be heard by a judge or by a referee on consent or, in certain instances, on motion. See CPLR §4317.

In *Obey v. Degling*, the Court of Appeals held that custody determinations must be made following a full plenary hearing. See 37 N.Y.2d 768, 770 (N.Y. 1975). For nearly five decades the law has remained unchanged, providing only narrow exceptions when material facts underlying the custody petition are not in dispute and when the court possesses sufficient information with which to make an informed and provident decision in the best interest of the child. When these exceptions are presented to appellate courts, one finds inexplicable variations.

In *Luis H. v. Latima P.*, the First Department held that the Family Court possessed sufficient information to grant the father legal and physical custody of the parties’ child without conducting a hearing, citing the mother’s drug use and neglect of her other child. See 143 A.D.3d 469, 469-70 (1st Dept. 2016).

In *Lela G. v. Shoshanah B.*, however, despite the fact that the judicial hearing officer had presided over the matter for years, the First Department found that the Family Court improperly modified the mother’s parenting time and restricted her access to information regarding the child’s health and education without conducting a hearing, stating that a hearing is necessary for such modification absent an emergency. See 151 A.D.3d 593, 594 (1st Dept. 2017).

Inconsistencies such as these are also found in the Second Department. In *Matter of Knauss v. Elman*, the Second Department held that the Family Court properly limited the father to supervised visitation with his child without a hearing, as there remained no unresolved factual issues in need of determination. See 171 A.D.3d 1067, 1067-68 (2d Dept. 2019).

However, in *Merchant v. Caldwell*, the Second Department held that the Family Court erred in dismissing the father's petition seeking to modify a prior order of custody and visitation without conducting a hearing because "the record shows that there were disputed factual issues regarding the child's best interests." See 2021 WL 4763114 1, 2 (2d Dept. Oct. 2021).

Similar inconsistencies are apparent in the Third and Fourth Departments, as well as in the lower courts. In a recent Supreme Court decision, Judge Matthew Cooper suspended the father's in-person parental access without conducting a hearing, citing the exigency of the circumstances, due to the risk of imminent harm to the child precipitated by the COVID-19 pandemic, and the court's familiarity with the parties and the issues pertaining to the father's parental access. See *C.B. v. D.B.*, 2021 WL 4696606 1, 3 (Sup. Ct. N.Y. Cty. Oct. 2021). In *S.A. v. R.H.*, however, Judge Cooper conducted a hearing prior to modifying parental access despite being familiar with the parties and the issues after a near decade-long litigation and despite being faced with the same exigent circumstances present in *C.B. v. D.B.*. See 67 Misc.3d 1227(A) 1 (Sup. Ct. N.Y. Cty. 2020).

These variations demonstrate that there is presently no clear standard as to when a court possesses sufficient information with which to make an informed and provident decision in the best interests of the child without conducting a hearing. The reasoning in support of courts' decisions at the appellate level, however, suggests that certain types of prior testimony and evidence satisfy the "sufficient information" exception.

Regarding testimony, case law suggests that a court should be able to decide custody without a hearing where it has access to testimony by the parties, the attorney for the child, or the forensic evaluator, adduced at previous court appearances and proceedings, such that it has detailed knowledge of the case, the parties, and the issues.

As to evidence, the court should be able to decide custody without a hearing where the record demonstrates that a party is incapable of fulfilling the obligations of a custodial parent, thereby rendering co-parenting inappropriate, due to the parent's severe mental illness, acts of violence against the other parent, incarceration, substance abuse, child neglect, or other behavior that poses a safety risk to the child.

There is one feasible solution to our hearing problem. While the issue could be mitigated by increasing the number of judges or by granting other judicial officers the authority to make child custody determinations, these are romantic propositions. A more feasible solution is to clarify and perhaps expand the applicability of the currently narrow exception to the hearing requirement. In custody cases where material facts are not in dispute and where the court possesses sufficient information to make an informed and provident decision in the child's best interests, the court should be able to decide custody without conducting a hearing. Where a custody matter has dragged on for multiple years and the court has detailed knowledge of the case and its issues by virtue of having overseen multiple court appearances, the judge surely possesses sufficient information with which to make a determination without conducting a full plenary hearing.

Likewise, where the record demonstrates that the opposing party is incapable of fulfilling the obligations of a custodial parent because they have perpetrated acts of violence against the other parent, which pose a safety risk to the child and render co-parenting inappropriate, the judge likely

possesses sufficient information to decide custody without a hearing. It should be noted that the hearing problem will likely be intensified if Assembly Bill A5398 (currently pending, establishing “Kyra’s Law”) is enacted in its present form. In such a case, the Legislature will mandate that a hearing be conducted within sixty days if a party alleges that the other parent committed child abuse or acts of domestic violence. If passed, the number of hearings will likely soar, as such allegations need only be “based on a reasonable belief” and the nonoffending parent need not pay the other party’s litigation expenses regardless of outcome.

Irrespective of this law, judges need to be more consistent and expansive in their application of the narrow hearing exception in order to ease the backlog. Since judges derive their authority to determine custody cases from custom, rather than statute, regulation, or appellate case law, they have the ability to customize their approach. In reducing the number of custody hearings on the calendar, many custody cases will be able to be determined more quickly, children will no longer wait indefinitely, and the wheels of justice may grind a little less slowly.

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