Zones of Responsibility/A Judicial Beacon in Custody's Dark Passageway

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One of the most difficult areas of decision making for judges, and one of the most heart wrenching areas for parents is the determination of the custodial arrangement. In the absence of agreement, where the decision is left to the Court, the tools which are available to the system for constructing the right decision are clearly inadequate to the task. Neither the skills of a trial attorney in uncovering important facts, nor the prognosticative abilities of the mental health professionals in making recommendations, are sufficiently calibrated so that judges may feel comfortable that their custodial construct rests on a firm foundation. Moreover, the lack of follow up studies places all of the participants in the position of being able to learn almost nothing from the mistakes which are inevitably made.

In intact families the decision making process is a fluid one, with one parent deciding certain things -- or no things – at certain times and each parent lending to the process whatever he or she is capable of. In divided families, particularly where the division has involved high conflict, there is little cooperation and significant animosity. Thus, the Courts in New York have traditionally been given only two choices: sole custody - with decision making in the hands of one parent, or joint custody - where decisions must be agreed upon by both. For decades New York Courts have operated with only this choice and have been restricted significantly by the Court of Appeals decision in *Braiman v. Braiman*[1] which made it clear that joint custody was not an alternative when the parties were antagonistic to one another and demonstrated an inability to parent cooperatively. While most trial courts have adhered strictly to this rule, it was known that every now and then a trial judge would depart from it and "suggest" or even "order" a joint custodial arrangement when it was believed that the inability to get along had been occasioned by the litigation itself and that the parties would be able to make joint decisions once the litigation came to an end. These decisions were rare and there is no way of knowing whether they were efficacious.

Judges, mental health professionals and attorneys who toil in the fields of custody litigation have been frustrated by the limited available choices and the paucity of studies relevant to the decision making process. Now, New York Courts, in the forefront, seem to be prepared to consider a new choice for custody determination – a choice which blends the elements of sole and joint custody.

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[1] 44 NY2d 584, 407 NYS2d 449, 378 NE2d 1019 (1978)

F v. F, reported in the October 19, 2001 NYLJ, p.21, col. 5, involved parents who "demonstrated an unwillingness to agree on many things and have allowed the tensions between them to become the focus of their relations"-- a situation that is not uncommon in contested divorces involving minor children. There Justice Barbara Panepinto declined to follow the *Braiman* rule. Rather than choose between two otherwise "good enough" parents and grant sole custody to one, the court granted the parents joint custody "modified by an award of split-decision making, or what has come to be known as "zones" or "spheres" of decision making." Specifically, the court carved out certain areas in which each parent would have final decision making authority[2]. In arriving at this determination, the court expressed its concern that "awarding one parent sole decision making power will only impair [the child's] relationship with either or both of her parents," whereas this "zones" approach would "balanc[e] each parent's weaknesses with the other parent's strengths . . . so that the needs of the child would remain the focus of the parties." The use of a "zones" approach to custody determinations seems to be an emerging trend in custody cases–a trend which suggests that the New York courts are attempting to find better, more sensitive solutions for high conflict families.

Guidelines for Custody Determinations

Where divorcing parents cannot reach an agreement regarding custodial arrangements it is left to the court to restructure the parents rights and responsibilities. There are few firm guidelines for the court in rendering custody determinations. Pursuant to DRL § 240, neither parent has a prima facie right to custody. Rather, such determinations are to be made "as in the court's discretion justice requires, having regard to the circumstances of the case and the respective parties and the best interest of the child." The statutory basis for custody determinations is deliberately broad, allowing courts to decide each individual case on its own facts and to tailor the decision to fit the particular circumstances.[3] As Justice Panepinto noted in *F.v. F.* "nothing in New York's law prevents a court from making any reasonable allocation of the parental rights and obligations, so long as the determination is in the best interest of the child."

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[2] The court determined that the father would have final decision making authority in the spheres of medical and dental treatment for the child, and the mother would have final decision making authority in the spheres of education and extracurricular activities

[3] *See Mc Kinney's Consolidated Laws of New York,* Book 14, DRL C240:6.

Legal custody[4] refers to the right to make decisions regarding issues concerning the child's life. A court may award sole custody to one parent which means that one parent is vested with sole discretion to make all final decisions regarding the child–the non custodial parent does not have ultimate decision making authority although (s)he may have the right to be consulted.[5] In the alternative, the court may award joint legal custody, which generally means that the parents share the right to make major decisions regarding the children. In considering joint custody, court's have been wary of the difficulties inherent in compelling parties who are engaged in ongoing conflict to work together and agree--not only is there a risk that the parents would never reach an agreement and no decision would be made, but such a situation invites opportunities for ongoing conflict. In its decision in *Braiman*, the New York Court of Appeals determined that joint custody should be "encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion"[6], and that "entrusting the custody of young children to their parents jointly . . . is insupportable when the parents are severely antagonistic and embattled."[7]

Custody Determinations post-*Braiman*

In the post-*Braiman* era, the basic "rule" has been that where the parents' extreme hostility makes it impossible for them to agree to work together, an award of joint custody is impracticable. However, some have questioned whether it is best for the child if one parent has no input where that parent is otherwise capable and concerned. Is it best to deprive a child of parental influence, simply out of fear of exposing the child to conflict? Are children not entitled to love, concern and input from their parents as well as protection from exposure to parental conflict which can be so painful? In addressing these issues, some courts have found that it is possible to split decision making–and thereby maintain input

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[4] There are two prongs to custody determinations: physical custody, which refers to the time that the child spends with each parent, and legal custody, which refers to the right to make decisions concerning the child, regarding such areas as education, medical care, recreational activities, and religious upbringing.

[5] But the non-custodial parents always has the right to challenge the determination of the custodial parent if that determination is harmful to the mental, moral or physical condition of the child. See e.g. *Marjorie G. v. Stephen G.*, 592 NYS2d 209 (Sup. Ct. N.Y. Co. 1992)(the custodial parent has absolute right to determine children's religious upbringing absent evidence that such determination was so bad as to seriously affect the health and morals of the children)

[6] *Braiman*, *supra* at 451.

[7] *Braiman, supra* at 449.

from both parents-- and still remain consistent with *Braiman.* For example, in *Trapp*[8], the First Department modified a joint custody award, stating that given the animosity between the parties, joint custody was "fraught with the potential for further and continuing discord and thus, is inimical to the best interest of the children." However, notwithstanding the inter-parental discord, the Court upheld that portion of the order directing joint decision making in the areas of religion and citizenship which "form a profound part of a child's heritage", suggesting that the complete exclusion of one parent from influence in the child's life is also inimical to the child's best interest. In addition, courts have used split decision making as a remedy in situations in which the custodial parent has not exercised decision making appropriately and vested the non-custodial parent with decision making authority in that area. See e.g. *Frize*[9], (order of trial court awarding father sole decision making in the area of education for the parties' multiply handicapped child was upheld where the mother's "role in the child's education has at times been a hindrance") see also *Tran*[10] (order granting father decision making authority regarding the child's therapy where the mother violated the custody/visitation agreement regarding therapy was upheld).

While *Braiman* spoke to the issue of protecting the child from conflict, it did not address the significance of continuing a parent's input in the child's life in situations where vesting either parent with sole custody would likely lead to alienation and exclusion of the non-custodial parent from the child's life. It is generally accepted that children do better when both parents are involved.[11] Thus, it is consistent with the best interests of a child to establish a custodial relationship which encourages the participation of both parents. It is in this context that the "zones" approach, which seems to have been introduced by Justice William Rigler in *Winslow*[12], has gained increasing attention. Thus, in *Hugh L. v. Fhara L.*[13], Justice Laura Drager awarded each parent "spheres of decision-making responsibility," stating, "[e]ach parent shall be responsible for the ultimate decision in certain areas, but will be required to consult with the other parent". The court then went on to delineate the specific areas over which each parent has the final say. The court noted that although both parents were "caring, responsible parents", "enormous tension" existed between them. In awarding each parent "spheres" of legal decision making responsibility, the court reasoned as follows:

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[8] *Trapp v. Trapp,* 136 A.D.2d 178, 526 N.Y.S.2d 95 (1st Dept. 1988)

[9] *Frize v. Frize,* 266 AD2d 753, 698 NYS2d 764 (3rd Dept 1999)

[10] *Tran v. Tran,* 277 AD2d 49, 716 NYS2d 5 (1st Dept 2000)

[11] *See, e.g. Judith S. Wallerstein and Joan B. Kelly, Surviving the Breakup,* (Basic Books, 1996)

[12] *Winslow v. Winslow,* 613 NYS2d 216 (2nd Dept. 1994)

[13] *Hugh L. v. Fhara L.*, NYLJ, June 1, 2000, p. 29, col. 6

> It is clear that joint custody cannot succeed because the parties are incapable of working together. It is equally clear, as noted by the social worker, that if the Wife had sole custody she would use this control to exclude the Husband from involvement with the child. The evidence reveals that this has been the pattern of the Wife's behavior both as this case has proceeded and is consistent with her behavior during and after her first marriage. Equally problematic would be to award sole legal custody to the Husband. He has the capacity to act impulsively and might use his authority to inappropriately control the Wife.

Similarly, in an unpublished decision dated May 14, 2001, Justice Joan Lobis, faced with parents who were "so embattled in the course of this divorce . . . that they are not capable of jointly making decisions," assigned different areas of decision making to each parent, where the parents had "very different strengths and weaknesses" and where the court indicated that "the son is the product of both of [the parents'] personalities and both should be able to influence and guide him in the future."

Support for dividing decision making is not merely found at the trial level. With its August 2, 2001 decision in *Mars*[14], the First Department has offered further support for this approach. In *Mars,* an extremely contentious divorce, the father had sought zones of decision making, on the basis that such an arrangement would promote his continued involvement in the lives of the children without placing the extremely combative parents in the untenable position of having to reach an agreement. The trial court did not accept the father's argument, and awarded the mother sole legal custody and ultimate decision making authority in all areas. In modifying the order of the trial court the First Department observed that

> "it is undisputed that each parent takes an active interest in the children's lives and that it is in the children's best interest that both parents remain involved with them, notwithstanding the parents' present intolerance for each other. Under these circumstances, the trial court should not have vested all decision making authority in one parent in a situation where it appears that neither parent can be trusted not to obstruct the other's relationship with the children. . . . We are aware of no precedent for completely depriving a non-custodial parent-who

[14] *Mars v. Mars,* 729 NYS2d 20 (1st Dept. 2001)

> is otherwise to remain fully involved with the children's lives, of decision-making in all areas."

Appellate courts are generally reluctant to substitute their own evaluation of the factors for that of the trial court and only do so where it is determined that the trial court's determination lacks a sound and substantial evidentiary basis[15]. Until *Mars,* the appellate review of cases in this area had either resulted in affirming an award of split custody, or modifying a joint custody award upon the determination that such an arrangement was inimical to the best interest of the child. The appellate decision in *Mars* marks the first instance in which an appellate court has modified an award of sole custody, to carve out certain areas of decision making for each parent.

The divorce process has a traumatic effect on the entire family. Although it is hoped that parents will be able to deal reasonably with each other, particularly regarding issues involving their children, often this is simply not possible because of the anger and disappointment that the parents experience. However, in situations where it is clear that there are two parents who love and are loved by the child, and where each has something good to give to the child and where the child is obviously taking from each, the custodial arrangement should encourage the participation of both parents. In these situations, the "zones" approach is likely to be the only way to ensure that both parents will continue to have an impact on decisions regarding their children. If each parent is granted certain areas over which he or she will have final decision making authority the parties would always have an incentive to consult with one another in a timely and forthright manner, and, perhaps, neither parent would be inclined to exclude the other from a decision for fear of being subsequently excluded from a decision over which the other parent has the final say. As the parties' children deserve to benefit from the strengths of both parents, affording each parent decision making authority may be the appropriate way to encourage both parents to work together for the good of their children and to ensure that all of the decisions are made with the children's welfare being of paramount concern.

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[15] *Sheinkman, Practice Commentary, Mc Kinney's Consolidated Laws of New York,* Book 14, DRL C240:6.