

Court of Appeals to Decide the 'Soul' of Sole Custody

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In *Fuentes v. Board of Education of the City of New York*, *New York Law Journal*, Sept. 2, 2008, pp 23-24, the U.S. Court of Appeals for the Second Circuit certified a question to the New York Court of Appeals, stating that that Court needs to decide whether a noncustodial parent has the right to participate in educational decisions relating to a child where the divorce decree and custody order do no more than grant sole custody to the other parent.

Conventional wisdom - which was not cited in the decision - has been that "sole custody" means the right of one parent to make decisions in certain areas (one of them being education) without the other parent having that right.

In *Elk Grove Unified School District v. Newdow*¹ the U.S. Supreme Court denied a child's father standing to sue the government and a local school district on behalf of his child (claiming they should not be allowed to force his daughter to recite the Pledge of Allegiance and the included words "under God") on the grounds that the mother had sole custody.

The Supreme Court sidestepped the constitutional question, basing its decision on California law, which allows only custodial parents proper standing to sue on behalf of their children, noting "there is a vast difference between Newdow's right to communicate with his child . . . and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order."

'*Fuentes v. Board of Educ.*'

New York's highest court has not ruled on this issue and is now being given the opportunity to clarify a parent's residual rights following the granting of custody to the other parent. We can only hope that the Court will take it.

When a divorced parent loses or gives up custody, what, if any, parental rights are lost? This issue has troubled practitioners for some time and the lack of definitive answers has fueled significant litigation.

Parents are generally charged with the responsibility to supervise, educate, protect, and, in accordance with their financial means, support their children. Absent fault or omission that seriously affects the welfare of a child, parents have the right to the care and control of their children. Absent surrender, abandonment, persistent neglect, unfitness, or other similar circumstances, parents are also entitled to custody of their children.

In an intact family, there is no presumption that either parent has custody. At that stage there is a true de facto joint custody with either parent having the right to make decisions. Upon divorce, however, the de facto joint custody arrangement disintegrates and must be replaced by a custody arrangement decreed by court order. It is thought that it is generally in children's best interests to have both parents involved in their lives, except in the most extreme cases. Even when one parent is awarded sole custody, this grant does not preclude an important role for the noncustodial parent in the child's life.

Custody generally has two aspects: residential custody (where a child spends time) and legal custody (which parent has the responsibility for decision making). Custody disagreements relating to decision making have to do with a parent's perception that involvement (responsibility) in the process of decision-making somehow elevates that parent's image and gives that parent power.

Second-Class Parent

The "noncustodial parent" is sometimes perceived to be a second-class parent.

Parents with legal custody of their children are empowered to make central decisions about a child's life which generally include the child's education, religious upbringing, nonemergency medical care, and extracurricular activities. To avoid the exclusion of one parent in a situation where joint custody might not be appropriate, courts in New York have been breaking down legal custody into "zones of responsibility" (or "spheres of influence"). In cases where a judge has ordered zones (or the parties have agreed upon them), the particular areas of responsibility are clearly designated.² But every area of decision making will not be covered, regardless of how specific a court may try to be.

Custodial decision making in the areas of education, medical, religion, after-school activities and summer programs usually arises at special times in a child's life and is clearly significant. While parents fight one another to be able to make these decisions, they are not necessarily the ones that truly shape a child's development. After all, whether a child goes to Dalton or Columbia Grammar, takes piano lessons or guitar, or attends camp in Maine or Rhode Island will not dramatically affect a child's personality or character.

What about lifestyle decisions and other determinations that actually and significantly affect upbringing? For example, does a noncustodial parent have the right to cut or dye the child's hair, consent to pierce or tattoo the child's body, allow the child to watch restricted movies, expose the child to adult literature, let the child stay up beyond the normal bed time, allow the child to bathe nude on a beach and the like. Should, and to what extent can, courts intervene between parents concerning noncustodial decisions that significantly affect a child's development?

In 1973, in "Beyond the Best Interests of the Child," Joseph Goldstein, Anna Freud and Albert J. Solnit argued that courts should not intervene in those matters unless a child's health or safety was clearly at risk. The book was controversial at the time because of its position that the custodial parent should make all decisions, including how much time the noncustodial parent should spend with a child. Essentially, the authors argued that a caring parent was less likely to make serious parental judgment errors than a judicial officer. This was not to say that a parent would not make mistakes, only that it would be better for the child if the mistakes were made by a parent.

'No Micromanagement Rule'

Although courts have been unwilling to adopt a "hands-off" policy, there is a line of cases in New York establishing the "no micromanagement rule." These cases, in essence, adopt some of the reasoning in "Beyond the Best Interests of the Child" and stand for the proposition that all controversies cannot be brought to the court system; some parental disagreements will just have to be worked out in the best ways possible.³

On the other hand numerous decisions go the other way. Judges are regularly asked to intercede in matters of parental disagreement which, on the surface, appear to be best resolved in some other manner. There have been reported decisions relating to whether a parent may smoke cigarettes, drink alcohol or maintain a pet in a child's presence. There have been numerous unreported decisions relating to matters of seemingly less import, but no less importance to the families involved.

Legal Entitlements

While having custody may not give a parent the right to make every important decision, the nomination as custodial parent brings with it various legal entitlements that are not only significant but also, in the hands of a vengeful, vindictive or irresponsible parent, capable of doing mischief. It has been long known that "(c)ustody carries the implications of personal power. Visitation implies the acquiescence to that power."⁴ The custodial parent can usually travel anywhere in the world with the child. The noncustodial parent requires permission.⁵

In New York there are two crimes that involve custody: custodial interference and kidnaping. The custodial parent cannot be convicted of either one. The custodial parent is in the position of accusing the other parent of violating a custody decree or visitation schedule, even to the extent of warranting a contempt order resulting in incarceration, on each occasion when the noncustodial parent is late or otherwise violates a visitation order. The custodial parent can often exert influence over the child's school relating to the child's release or access to school records.⁶

A minor is incapable of giving consent. Is it only the custodial parent who can consent on behalf of a child? Eavesdropping is committed when a person records the conversation of two individuals without the consent of at least one.

In *I.K. v. M.K.*,⁷ the father recorded phone conversations between the children and their mother while the children were in his care. The recorded conversations bore upon the father's claim of parental alienation. The court denied the father's claim that he consented on behalf of the children to the taping, maintaining that the father's consent on behalf of the children was invalid in that context because his decision to tape record "was inextricably intertwined with his self-interest in obtaining evidence for [the] custody trial. Since his personal interests cannot be separated from his decision to 'consent' on the children's behalf, it has no legal significance in this context." The specific language of the court thereby left open the possibility that a parent could give such consent on behalf of the children in a different context that did not involve the parent's self-interest.⁸ This "self-interest" disqualification also holds true when a parent involved in a child abuse case seeks to consent on behalf of the child to a waiver of the patient client privilege.⁹

A slightly different issue bearing on that point is that a parent who is directed to pay for services relating to a child will generally be given the right to challenge the value of those services,¹⁰ regardless of who has custody.

A correlative point might be that a parent who is called upon to pay for educational services on behalf of a child might be entitled to assert a claim for government funded services to which the child might be entitled, regardless of who has custody.

'Parenting Rights'

Some states have done away with the term "custody," choosing instead labels such as "parenting rights".¹¹ This enlightened trend would certainly solve some of the problems occasioned by the situation - but not the one under discussion. Clearly we are operating in an area that is unclear. Perhaps New York's highest court will use the current opportunity to shed some light on one of custody's dark passageways.

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Endnotes:

1. 542 U.S. 1,124 S.Ct. 2301 (2004).

2. See, Dobrish, Robert Z. and Gross, Nina S., "Zones of Responsibility: A Judicial Beacon in Custody's Dark Passageway", vol. 36, NYSBA Family Law Review, No. 1, Spring 2002; C v. C, Aug. 26, 2008 NYLJ 26 (col.1) (Lobis, J) and the cases and discussion therein.

3. See, *Anonymous v. Anonymous*, March 12, 2002, NYLJ, p. 21 (col. 5), *Anonymous v. Anonymous*, 264 AD2d 308, 695 NYS2d 6 (N.Y. Sup. 1999); *People ex rel. Sisson v. Sisson*, 271 NY 285, 2 NE2d 660.
4. See, *O'Shea v. Brennan*, 88 Misc2d 233, 235, 387 NYS2d 212 (N.Y. Sup. Ct., Queens Co. 1976).
5. See, Brandes, J.R., "Passport Clauses in Custody Agreements," April 8, 2002, NYLJ, p. 3 (col. 1).
6. Erlich, J., "Rights of the Non Custodial Parent," March 6, 2007, NYLJ, p.20, col.1.
7. 194 Misc.2d 608, 753 N.Y.S.2d 828 (N.Y. Sup. 2003).
8. There are other decisions that have led to different results. See, *Harry R. v. Esther R.*, 134 Misc.2d 404, 510 N.Y.S.2d 792 (N.Y. Fam. Ct. 1986); See, *Johnson v. Johnson*, 235 AD2d 217 (1st Dept. 1997).
9. See, e.g., *People v. Buchholz*, 23 A.D.3d 1093, 805 N.Y.S.2d 763 (4th Dept. 2005).
10. See, *Mars v. Mars*, 19 AD3rd 198, 797 NYS2d 49 (1st Dept. 2005), allowing a parent to raise malpractice issues against the child's attorney.
11. Shepard, Andrew, "Words: From 'Custody' (Negative), to 'Parenting' (Positive)," Jan. 15, 2003, NYLJ, p. 3 (col. 1).

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