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Family Law

Revisiting Child Custody Issues

Be vigilant and open to revisions which may be a benefit

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There is no aspect of divorce and Family Law that is more emotionally charged, more difficult for a judge to decide and more significant to the parties than matters involving the custody of children.

The intensity of the emotions very often distorts the substantive issues and drives the case to trial. At the same time, the substantive issues are often the most difficult for a trial judge to decide.

Because trial time, energy and expense is focused on custody issues, we should all be vigilant and open to revisions which may benefit counsel, the courts and the people we serve.

There are three areas of custody law which may benefit from a current review. Perhaps some tweaking of current concepts may ease the tension on the trial courts and, at the same time, better serve the families involved in the process.

Relocation

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The New Jersey Supreme Court, our Appellate Division and our trial courts have long attempted to develop an equitable framework within which to address a custodial parent's request to relocate with the children either during the pendency of an action for divorce or subsequent to the entry of a Divorce Judgment and have, in fact, been one of the jurisprudential leaders in this difficult area of child custody law.

One need only track our Appellate and Supreme Court decisions from the early case of *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 352 (App. Div. 1976), in which the court held that the new family unit consists only of the children and the custodial parent (then most often the mother), to *Holder v. Polanski*, 111 N.J. 344 (1988)/*Levine v. Bacon*, 152 N.J. 436 (1998), with their concerns about the move's impact upon the remaining parent (most often the father), to Justice Long's 2001 seminal opinion in *Baures v. Lewis*, 67 N.J. 91 (2001), to see how our courts have traced the evolving societal trends from decade to decade.

In 2004, Mark Biel, a well-respected Certified Matrimonial Law Attorney and Fellow of the American Academy of Matrimonial Lawyers, rightfully complimented our Supreme Court as being "an open-minded, activist Court willing to craft decisions and modify them based on changing social moors" but urged the Court to "revisit *Baures* and establish a

standard consistent with recent empirical data." Biel, "Revisiting the Baures Paradigm" (See New Jersey Family Lawyer).

Mr. Biel concluded his 2004 article observing that "the Legislature could modify N.J.S.A. 9:2-2 to provide that the relocation should be determined solely by the best interests of the child." Almost 10 years before Mr. Biel's article, Judge Michael A. Diamond, a vastly experienced matrimonial lawyer prior to his appointment to the Bench and one of our most experienced Family Court Trial Judges, addressed the question of relocation within the State of New Jersey. Acknowledging that N.J.S.A. 9:2-2 addresses only the issue of removal from the state, Judge Diamond looked past the technical terms of the statute, and focused upon the "best interests" of the children. (*Knepper v. Knepper*, unreported, decided by Judge Diamond on October 4, 1996.)

Thus, in two very different contexts, both Mark Biel, an experienced matrimonial lawyer, and Judge Diamond, a very experienced matrimonial jurist, advocate for the simplification to a simple "best interests of the children" test.

Perhaps, the time has come for our Supreme Court to accept certification on appropriate cases, revisit the *Baures* paradigm and revisit the intrastate relocation of children and to reconsider whether we should simply base all custody related determinations on a simple "best interests" of the children standard.

Arbitration of Custody of Matters

For the past several years, there has

been a significant emphasis on Alternative Dispute Resolution for all Family Court matters. In fact, the policy has now been codified in the Court Rules which require counsel to explain and discuss Alternative Dispute Resolution mechanisms with all clients.

For a variety of reasons, it would seem that Alternative Dispute Resolution is particularly well suited to parenting and custody issues. Not only is the family's privacy better protected, but a mediator or arbitrator who is uniquely skilled in the areas of parenting and custody issues can be selected.

However, New Jersey's long-standing commitment to the doctrine of *parens patriae* seemingly precludes the resolution of custody issues through alternative means.

It has been reasoned by our Appellate Courts that the state's standing with regard to children pursuant to its *parens patriae* responsibilities precludes the delegation of the decision making with regard to such matters from a state agency to a nonstate agency.

Over 20 years ago, our Supreme Court in *Faherty v. Faherty*, 97 N.J. 99 (1984), observed that "in recent years arbitration has been used more frequently as a viable means of resolving domestic disputes" and observed that "rather than frowning on arbitration" public policy supports its use in resolving "many cases of matrimonial disputes."

The court, however, went on to observe that "commentators have suggested that arbitration is unsatisfactory to resolve disputes concerning child support or custody because of the Court's traditional role as *parens patriae*" and that the arbitration of custody matter must be subject to *de novo* review by the Court.

In conclusion, however, the court observed that "as we gain experience in the arbitration of child support and custody

disputes, it may become evident that a child's best interests are as well protected by an arbitrator as by a Judge. If so, there would be no necessity for our *de novo* review. However, because of the court's *parens patriae* tradition, at this time, we prefer to err in favor of the child's best interest" (which they held to be a *de novo* review of any arbitrated decision).

Unfortunately, however, it appears that at least the Appellate Division is not yet ready to release the state's *parens patriae* responsibility as to permit the binding arbitration of parenting issues.

On June 17, the Appellate Division, in *Fawzy v. Fawzy*, held that even if the parents consent to binding arbitration of a custody issue, binding arbitration of custody issues violates the state's *parens patriae* responsibility and is not enforceable.

It is most respectfully suggested that the Supreme Court should accept certification of a case which re-frames the issue and permits them to review *Fawzy*. It is entirely possible that upon review, the court may find that "a child's best interest" may be as well-protected by an arbitrator as a judge. If so, the time and cost savings to litigants and the system could be dramatic.

Alternative Unions, Including Same-Sex Marriages, Domestic Partnerships and Civil Unions

In *Chambers v. Ormstein*, 935 Atlantic 2d 956 (Rhode Island 2007), the Rhode Island Supreme Court issued what could be a rather troublesome opinion regarding a state's ability to dissolve a same-sex marriage, domestic partnership or civil union properly entered into in a state which permits such unions if the state of jurisdiction does not permit such unions.

The Rhode Island Supreme Court held that because Rhode Island did not authorize same-sex marriages and because their

divorce statute only permits a Judgment of Divorce to be rendered in the case of a "marriage," its court had no jurisdiction to dissolve a same-sex marriage albeit validly entered into in a state permitting such marriages.

If the reasoning of the Rhode Island Supreme Court becomes the accepted standard, a "pandora's box" which may, in part, impact upon parenting and custody issues, may be opened.

As states across the country permit same-sex unions as having "marital status" and as more persons enter into such unions, it cannot be disputed that such persons will travel, relocate and find themselves living years later in a state which may not permit such a union.

It is more than reasonable to further assume that more and more children will be a part of such family units.

Under the reasoning of the Rhode Island Supreme Court, persons may be placed in an untenable position of not being able to dissolve their union in their state of their then residence.

Although they may be able to seek interim relief regarding the children pursuant to the UCCJEA, they may have to return to the state in which their union was sanctioned in order to seek further relief. If required to do so, such persons may be required to forfeit their employment, sell their homes and relocate to the state of their original union not only to their own, but their children's, disadvantage and economic hardship.

As and when such cases reach a New Jersey Appellate or Supreme Court, it is urged that the court carefully consider the ramifications of their decision and craft their remedies to meet the changing societal norm and appropriately identify and serve the needs of persons then legitimately residing within our jurisdiction. ■