

McKinney's Consolidated Laws of New York Annotated  
Domestic Relations Law (Refs & Annos)  
Chapter 14. Of the Consolidated Laws (Refs & Annos)  
Article 13. Provisions Applicable to More Than One Type of Matrimonial Action (Refs & Annos)

McKinney's DRL § 240

§ 240. Custody and child support; orders of protection

Effective: March 16, 2013

[Currentness](#)

1. (a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child and subject to the provisions of subdivision one-c of this section. Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section and state on the record how such findings, facts and circumstances factored into the direction. If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child, and shall state on the record how such findings were factored into the determination. An order directing the payment of child support shall contain the social security numbers of the named parties. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction shall make provision for child support out of the property of either or both parents. The court shall make its award for child support pursuant to subdivision one-b of this section. Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties. Such direction as it applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act, or pursuant to an instrument approved under [section three hundred fifty-eight-a of the social services law](#), shall be enforceable pursuant to part eight of article ten of the family court act and [sections three hundred fifty-eight-a](#) and [three hundred eighty-four-a of the social services law](#) and other applicable provisions of law against any person having care and custody, or temporary care and custody, of the child. Notwithstanding any other provision of law, any written application or motion to the court for the establishment, modification or enforcement of a child support obligation for persons not in receipt of public assistance and care must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in [section one hundred eleven-g of the social services law](#); or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to [section one hundred eleven-g of the social services law](#) have been declined that the applicant understands that an income deduction order

may be issued pursuant to [subdivision \(c\) of section fifty-two hundred forty-two of the civil practice law and rules](#) without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought or from the party ordered to pay child support to the other party. Such direction may require the payment of a sum or sums of money either directly to the custodial parent or to third persons for goods or services furnished for such child, or for both payments to the custodial parent and to such third persons; provided, however, that unless the party seeking or receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in [section one hundred eleven-h of the social services law](#). Every order directing the payment of support shall require that if either parent currently, or at any time in the future, has health insurance benefits available that may be extended or obtained to cover the child, such parent is required to exercise the option of additional coverage in favor of such child and execute and deliver to such person any forms, notices, documents or instruments necessary to assure timely payment of any health insurance claims for such child.

(a-1)(1) Permanent and initial temporary orders of custody or visitation. Prior to the issuance of any permanent or initial temporary order of custody or visitation, the court shall conduct a review of the decisions and reports listed in subparagraph three of this paragraph.

(2) Successive temporary orders of custody or visitation. Prior to the issuance of any successive temporary order of custody or visitation, the court shall conduct a review of the decisions and reports listed in subparagraph three of this paragraph, unless such a review has been conducted within ninety days prior to the issuance of such order.

(3) Decisions and reports for review. The court shall conduct a review of the following:

(i) related decisions in court proceedings initiated pursuant to article ten of the family court act, and all warrants issued under the family court act; and

(ii) reports of the statewide computerized registry of orders of protection established and maintained pursuant to [section two hundred twenty-one-a of the executive law](#), and reports of the sex offender registry established and maintained pursuant to [section one hundred sixty-eight-b of the correction law](#).

(4) Notifying counsel and issuing orders. Upon consideration of decisions pursuant to article ten of the family court act, and registry reports and notifying counsel involved in the proceeding, or in the event of a self-represented party, notifying such party of the results thereof, including any court appointed attorney for children, the court may issue a temporary, successive temporary or final order of custody or visitation.

(5) Temporary emergency order. Notwithstanding any other provision of the law, upon emergency situations, including computer malfunctions, to serve the best interest of the child, the court may issue a temporary emergency order for custody or visitation in the event that it is not possible to timely review decisions and reports on registries as required pursuant to subparagraph three of this paragraph.

(6) After issuing a temporary emergency order. After issuing a temporary emergency order of custody or visitation, the court shall conduct reviews of the decisions and reports on registries as required pursuant to subparagraph three of this paragraph within twenty-four hours of the issuance of such temporary emergency order. Should such twenty-four hour period fall on a day when court is not in session, then the required reviews shall take place the next day the court is in session. Upon reviewing decisions and reports the court shall notify associated counsel, self-represented parties and attorneys for children pursuant to subparagraph four of this paragraph and may issue temporary or permanent custody or visitation orders.

(7) Feasibility study. The commissioner of the office of children and family services, in conjunction with the office of court administration, is hereby authorized and directed to examine, study, evaluate and make recommendations concerning the feasibility of the utilization of computers in courts which are connected to the statewide central register of child abuse and maltreatment established and maintained pursuant to [section four hundred twenty-two of the social services law](#), as a means of providing courts with information regarding parties requesting orders of custody or visitation. Such commissioner shall make a preliminary report to the governor and the legislature of findings, conclusions and recommendations not later than January first, two thousand nine, and a final report of findings, conclusions and recommendations not later than June first, two thousand nine, and shall submit with the reports such legislative proposals as are deemed necessary to implement the commissioner's recommendations.

(a-2) Military service by parent; effect on child custody orders. (1) During the period of time that a parent is activated, deployed or temporarily assigned to military service, such that the parent's ability to continue as a joint caretaker or the primary caretaker of a minor child is materially affected by such military service, any orders issued pursuant to this section, based on the fact that the parent is activated, deployed or temporarily assigned to military service, which would materially affect or change a previous judgment or order regarding custody of that parent's child or children as such judgment or order existed on the date the parent was activated, deployed, or temporarily assigned to military service, shall be subject to review pursuant to subparagraph three of this paragraph. Any relevant provisions of the Service Member's Civil Relief Act <sup>1</sup> shall apply to all proceedings governed by this section.

(2) During such period, the court may enter an order to modify custody if there is clear and convincing evidence that the modification is in the best interests of the child. An attorney for the child shall be appointed in all cases where a modification is sought during such military service. Such order shall be subject to review pursuant to subparagraph three of this paragraph. When entering an order pursuant to this section, the court shall consider and provide for, if feasible and if in the best interests of the child, contact between the military service member and his or her child, including, but not limited to, electronic communication by e-mail, webcam, telephone, or other available means. During the period of the parent's leave from military service, the court shall consider the best interests of the child when establishing a parenting schedule, including visiting and other contact. For such purposes, a "leave from military service" shall be a period of not more than three months.

(3) Unless the parties have otherwise stipulated or agreed, if an order is issued pursuant to this paragraph, the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances. Upon the request of either parent, the court shall determine on the basis of the child's best interests whether the custody judgment or order previously in effect should be modified.

(4) This paragraph shall not apply to assignments to permanent duty stations or permanent changes of station.

(b) As used in this section, the following terms shall have the following meanings:

(1) “Health insurance benefits” means any medical, dental, optical and prescription drugs and health care services or other health care benefits that may be provided for a dependent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans.

(2) “Available health insurance benefits” means any health insurance benefits that are reasonable in cost and that are reasonably accessible to the person on whose behalf the petition is brought. Health insurance benefits that are not reasonable in cost or whose services are not reasonably accessible to such person, shall be considered unavailable.

(3) When the person on whose behalf the petition is brought is a child in accordance with paragraph (c) of this subdivision, health insurance benefits shall be considered “reasonable in cost” if the cost of health insurance benefits does not exceed five percent of the combined parental gross income. The cost of health insurance benefits shall refer to the cost of the premium and deductible attributable to adding the child or children to existing coverage or the difference between such costs for self-only and family coverage. Provided, however, the presumption that the health insurance benefits are reasonable in cost may be rebutted upon a finding that the cost is unjust or inappropriate which finding shall be based on the circumstances of the case, the cost and comprehensiveness of the health insurance benefits for which the child or children may otherwise be eligible, and the best interests of the child or children. In no instance shall health insurance benefits be considered “reasonable in cost” if a parent's share of the cost of extending such coverage would reduce the income of that parent below the self-support reserve. Health insurance benefits are “reasonably accessible” if the child lives within the geographic area covered by the plan or lives within thirty minutes or thirty miles of travel time from the child's residence to the services covered by the health insurance benefits or through benefits provided under a reciprocal agreement; provided, however, this presumption may be rebutted for good cause shown including, but not limited to, the special health needs of the child. The court shall set forth such finding and the reasons therefor in the order of support.

(c) When the person on whose behalf the petition is brought is a child, the court shall consider the availability of health insurance benefits to all parties and shall take the following action to ensure that health insurance benefits are provided for the benefit of the child:

(1) Where the child is presently covered by health insurance benefits, the court shall direct in the order of support that such coverage be maintained, unless either parent requests the court to make a direction for health insurance benefits coverage pursuant to paragraph two of this subdivision.

(2) Where the child is not presently covered by health insurance benefits, the court shall make a determination as follows:

(i) If only one parent has available health insurance benefits, the court shall direct in the order of support that such parent provide health insurance benefits.

(ii) If both parents have available health insurance benefits the court shall direct in the order of support that either parent or both parents provide such health insurance. The court shall make such determination based on the circumstances of the case, including, but not limited to, the cost and comprehensiveness of the respective health insurance benefits and the best interests of the child.

(iii) If neither parent has available health insurance benefits, the court shall direct in the order of support that the custodial parent apply for the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law and

the medical assistance program established pursuant to title eleven of article five of the social services law. A direction issued under this subdivision shall not limit or alter either parent's obligation to obtain health insurance benefits at such time as they become available, as required pursuant to paragraph (a) of this subdivision. Nothing in this subdivision shall alter or limit the authority of the medical assistance program to determine when it is considered cost effective to require a custodial parent to enroll a child in an available group health insurance plan pursuant to [paragraphs \(b\) and \(c\) of subdivision one of section three hundred sixty-seven-a of the social services law](#).

(d) The cost of providing health insurance benefits or benefits under the state's child health insurance plan or the medical assistance program, pursuant to paragraph (c) of this subdivision, shall be deemed cash medical support, and the court shall determine the obligation of either or both parents to contribute to the cost thereof pursuant to subparagraph five of paragraph (c) of subdivision one-b of this section.

(e) The court shall provide in the order of support that the legally responsible relative immediately notify the other party, or the other party and the support collection unit when the order is issued on behalf of a child in receipt of public assistance and care or in receipt of services pursuant to [section one hundred eleven-g of the social services law](#), of any change in health insurance benefits, including any termination of benefits, change in the health insurance benefit carrier, premium, or extent and availability of existing or new benefits.

(f) Where the court determines that health insurance benefits are available, the court shall provide in the order of support that the legally responsible relative immediately enroll the eligible dependents named in the order who are otherwise eligible for such benefits without regard to any seasonal enrollment restrictions. Such order shall further direct the legally responsible relative to maintain such benefits as long as they remain available to such relative. Such order shall further direct the legally responsible relative to assign all insurance reimbursement payments for health care expenses incurred for his or her eligible dependents to the provider of such services or the party actually having incurred and satisfied such expenses, as appropriate.

(g) When the court issues an order of child support or combined child and spousal support on behalf of persons in receipt of public assistance and care or in receipt of services pursuant to [section one hundred eleven-g of the social services law](#), such order shall further direct that the provision of health care benefits shall be immediately enforced pursuant to [section fifty-two hundred forty-one of the civil practice law and rules](#).

(h) When the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance and care or in receipt of services pursuant to [section one hundred eleven-g of the social services law](#), the court shall also issue a separate order which shall include the necessary direction to ensure the order's characterization as a qualified medical child support order as defined by section six hundred nine of the employee retirement income security act of 1974 ([29 USC 1169](#)). Such order shall: (i) clearly state that it creates or recognizes the existence of the right of the named dependent to be enrolled and to receive benefits for which the legally responsible relative is eligible under the available group health plans, and shall clearly specify the name, social security number and mailing address of the legally responsible relative, and of each dependent to be covered by the order; (ii) provide a clear description of the type of coverage to be provided by the group health plan to each such dependent or the manner in which the type of coverage is to be determined; and (iii) specify the period of time to which the order applies. The court shall not require the group health plan to provide any type or form of benefit or option not otherwise provided under the group health plan except to the extent necessary to meet the requirements of a law relating to medical child support described in [section one thousand three hundred and ninety-six g of title forty-two of the United States code](#).

(i) Upon a finding that a legally responsible relative wilfully failed to obtain health insurance benefits in violation of a court order, such relative will be presumptively liable for all health care expenses incurred on behalf of such dependents from the first date such dependents were eligible to be enrolled to receive health insurance benefits after the issuance of the order of support directing the acquisition of such coverage.

(j) The order shall be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall, except as provided for herein, be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to [subdivision \(b\) of section fifty-two hundred forty-one of the civil practice law and rules](#). When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to [section one hundred eleven-g of the social services law](#), the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in [subdivision \(b\) of section fifty-two hundred forty-one of the civil practice law and rules](#), or in such periodic payments as would have been authorized had such an execution been issued. In such case, the courts shall not direct the schedule of repayment of retroactive support. Where such direction is for child support and paternity has been established by a voluntary acknowledgement of paternity as defined in [section forty-one hundred thirty-five-b of the public health law](#), the court shall inquire of the parties whether the acknowledgement has been duly filed, and unless satisfied that it has been so filed shall require the clerk of the court to file such acknowledgement with the appropriate registrar within five business days. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the custodial parent under this section with any amount payable to such parent under [section two hundred thirty-six](#) of this article. Upon the application of either parent, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party, parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of [section two hundred forty-four](#) of this article, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. Such modification may increase such child support nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to [subdivision \(b\) of section fifty-two hundred forty-one of the civil practice law and rules](#).

1-a. In any proceeding brought pursuant to this section to determine the custody or visitation of minors, a report made to the statewide central register of child abuse and maltreatment, pursuant to title six of article six of the social services law, or a portion thereof, which is otherwise admissible as a business record pursuant to [rule forty-five hundred eighteen of the civil practice law and rules](#) shall not be admissible in evidence, notwithstanding such rule, unless an investigation of such report conducted pursuant to title six of article six of the social services law has determined that there is some credible evidence of the alleged abuse or maltreatment and that the subject of the report has been notified that the report is indicated. In addition, if such report has been reviewed by the state commissioner of social services or his designee and has been determined to be unfounded, it shall not be admissible in evidence. If such report has been so reviewed and has been amended to delete any finding, each such

deleted finding shall not be admissible. If the state commissioner of social services or his designee has amended the report to add any new finding, each such new finding, together with any portion of the original report not deleted by the commissioner or his designee, shall be admissible if it meets the other requirements of this subdivision and is otherwise admissible as a business record. If such a report, or portion thereof, is admissible in evidence but is uncorroborated, it shall not be sufficient to make a fact finding of abuse or maltreatment in such proceeding. Any other evidence tending to support the reliability of such report shall be sufficient corroboration.

1-b. (a) The court shall make its award for child support pursuant to the provisions of this subdivision. The court may vary from the amount of the basic child support obligation determined pursuant to paragraph (c) of this subdivision only in accordance with paragraph (f) of this subdivision.

(b) For purposes of this subdivision, the following definitions shall be used:

(1) "Basic child support obligation" shall mean the sum derived by adding the amounts determined by the application of subparagraphs two and three of paragraph (c) of this subdivision except as increased pursuant to subparagraphs four, five, six and seven of such paragraph.

(2) "Child support" shall mean a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.

(3) "Child support percentage" shall mean:

(i) seventeen percent of the combined parental income for one child;

(ii) twenty-five percent of the combined parental income for two children;

(iii) twenty-nine percent of the combined parental income for three children;

(iv) thirty-one percent of the combined parental income for four children; and

(v) no less than thirty-five percent of the combined parental income for five or more children.

(4) "Combined parental income" shall mean the sum of the income of both parents.

(5) "Income" shall mean, but shall not be limited to, the sum of the amounts determined by the application of clauses (i), (ii), (iii), (iv), (v) and (vi) of this subparagraph reduced by the amount determined by the application of clause (vii) of this subparagraph:

(i) gross (total) income as should have been or should be reported in the most recent federal income tax return. If an individual files his/her federal income tax return as a married person filing jointly, such person shall be required to prepare a form, sworn to under penalty of law, disclosing his/her gross income individually;

(ii) to the extent not already included in gross income in clause (i) of this subparagraph, investment income reduced by sums expended in connection with such investment;

(iii) to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the amount of income or compensation voluntarily deferred and income received, if any, from the following sources:

(A) workers' compensation,

(B) disability benefits,

(C) unemployment insurance benefits,

(D) social security benefits,

(E) veterans benefits,

(F) pensions and retirement benefits,

(G) fellowships and stipends, and

(H) annuity payments;

(iv) at the discretion of the court, the court may attribute or impute income from, such other resources as may be available to the parent, including, but not limited to:

(A) non-income producing assets,

(B) meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirectly<sup>2</sup> confer personal economic benefits,

(C) fringe benefits provided as part of compensation for employment, and

(D) money, goods, or services provided by relatives and friends;

(v) an amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support;

(vi) to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the following self-employment deductions attributable to self-employment carried on by the taxpayer:

(A) any depreciation deduction greater than depreciation calculated on a straight-line basis for the purpose of determining business income or investment credits, and

(B) entertainment and travel allowances deducted from business income to the extent said allowances reduce personal expenditures;

(vii) the following shall be deducted from income prior to applying the provisions of paragraph (c) of this subdivision:

(A) unreimbursed employee business expenses except to the extent said expenses reduce personal expenditures,

(B) alimony or maintenance actually paid to a spouse not a party to the instant action pursuant to court order or validly executed written agreement,

(C) alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, provided the order or agreement provides for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse,

(D) child support actually paid pursuant to court order or written agreement on behalf of any child for whom the parent has a legal duty of support and who is not subject to the instant action,

(E) public assistance,

(F) supplemental security income,

(G) New York city or Yonkers income or earnings taxes actually paid, and

(H) federal insurance contributions act (FICA) taxes actually paid.

(6) “Self-support reserve” shall mean one hundred thirty-five percent of the poverty income guidelines amount for a single person as reported by the federal department of health and human services. For the calendar year nineteen hundred eighty-nine, the self-support reserve shall be eight thousand sixty-five dollars. On March first of each year, the self-support reserve shall be revised to reflect the annual updating of the poverty income guidelines as reported by the federal department of health and human services for a single person household.

(c) The amount of the basic child support obligation shall be determined in accordance with the provision of this paragraph:

(1) The court shall determine the combined parental income.

(2) The court shall multiply the combined parental income up to the amount set forth in [paragraph \(b\) of subdivision two of section one hundred eleven-i of the social services law](#) by the appropriate child support percentage and such amount shall be prorated in the same proportion as each parent's income is to the combined parental income.

(3) Where the combined parental income exceeds the dollar amount set forth in subparagraph two of this paragraph, the court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage.

(4) Where the custodial parent is working, or receiving elementary or secondary education, or higher education or vocational training which the court determines will lead to employment, and incurs child care expenses as a result thereof, the court shall determine reasonable child care expenses and such child care expenses, where incurred, shall be prorated in the same proportion as each parent's income is to the combined parental income. Each parent's pro rata share of the child care expenses shall be separately stated and added to the sum of subparagraphs two and three of this paragraph.

(5) the court shall determine the parties' obligation to provide health insurance benefits pursuant to this section and to pay cash medical support as provided under this subparagraph.

(i) “Cash medical support” means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by a parent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans, and/or for other health care expenses not covered by insurance.

(ii) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be available, the cost of providing health insurance benefits shall be prorated between the parties in the same proportion as each parent's income is to the combined parental income. If the custodial parent is ordered to provide such benefits, the non-custodial parent's pro rata share of such costs shall be added to the basic support obligation. If the non-custodial parent is ordered to provide such benefits, the custodial parent's pro rata share of such costs shall be deducted from the basic support obligation.

(iii) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be unavailable, if the child or children are determined eligible for coverage under the medical assistance program established pursuant to title eleven of article five of the social services law, the court shall order the non-custodial parent to pay cash medical support as follows:

(A) In the case of a child or children authorized for managed care coverage under the medical assistance program, the lesser of the amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents or the premium paid by the medical assistance program on behalf of the child or children to the managed care plan. The court shall separately state the non-custodial parent's monthly obligation. The non-custodial parent's cash medical support obligation under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(B) In the case of a child or children authorized for fee-for-service coverage under the medical assistance program other than a child or children described in item (A) of this clause, the court shall determine the non-custodial parent's maximum annual cash medical support obligation, which shall be equal to the lesser of the monthly amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents times twelve months or the number of months that the child or children are authorized for fee-for-service coverage during any year. The court shall separately state in the order the non-custodial parent's maximum annual cash medical support obligation and, upon proof to the court that the non-custodial parent, after notice of the amount due, has failed to pay the public entity for incurred health care expenses, the court shall order the non-custodial parent to pay such incurred health care expenses up to the maximum annual cash medical support obligation. Such amounts shall be support arrears/past due support and shall be subject to any remedies as provided by law for the enforcement of support arrears/past due support. The total annual amount that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(C) The court shall order cash medical support to be paid by the non-custodial parent for health care expenses of the child or children paid by the medical assistance program prior to the issuance of the court's order. The amount of such support shall be calculated as provided under item (A) or (B) of this clause, provided that the amount that the non-custodial parent is ordered to pay under this item shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less, for the year when the expense was incurred. Such amounts shall be support arrears/past due support and shall be subject to any remedies as provided by law for the enforcement of support arrears/past due support.

(iv) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be unavailable, and the child or children are determined eligible for coverage under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, the court shall prorate each parent's share of the cost of the family contribution required under such child health insurance plan in the same proportion as each parent's income is to the combined parental income, and state the amount of the non-custodial parent's share in the order. The total amount of cash medical support that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(v) In addition to the amounts ordered under clause (ii), (iii), or (iv), the court shall pro rate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program established pursuant to title eleven of article five of the social services law, or the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, in the same proportion as each parent's income is to the combined parental income, and state the non-custodial parent's share as a percentage in the order. The non-custodial parent's pro rata share of such health care expenses determined by the court to be due and owing shall be support arrears/past due support and shall be subject to any remedies provided by law

for the enforcement of support arrears/past due support. In addition, the court may direct that the non-custodial parent's pro rata share of such health care expenses be paid in one sum or in periodic sums, including direct payment to the health care provider.

(vi) Upon proof by either party that cash medical support pursuant to clause (ii), (iii), (iv), or (v) of this subparagraph would be unjust or inappropriate pursuant to paragraph (f) of this subdivision, the court shall:

(A) order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child; and

(B) set forth in the order the factors it considered, the amount calculated under this subparagraph, the reason or reasons the court did not order such amount, and the basis for the amount awarded.

(6) Where the court determines that the custodial parent is seeking work and incurs child care expenses as a result thereof, the court may determine reasonable child care expenses and may apportion the same between the custodial and non-custodial parent. The non-custodial parent's share of such expenses shall be separately stated and paid in a manner determined by the court.

(7) Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.

(d) Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month, provided, however, that if the court finds that such basic child support obligation is unjust or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater, in addition to any amounts that the court may, in its discretion, order in accordance with subparagraphs four, five, six and/or seven of paragraph (c) of this subdivision.

(e) Where a parent is or may be entitled to receive non-recurring payments from extraordinary sources not otherwise considered as income pursuant to this section, including but not limited to:

(1) Life insurance policies;

(2) Discharges of indebtedness;

(3) Recovery of bad debts and delinquency amounts;

(4) Gifts and inheritances; and

(5) Lottery winnings,

the court, in accordance with paragraphs (c), (d) and (f) of this subdivision may allocate a proportion of the same to child support, and such amount shall be paid in a manner determined by the court.

(f) The court shall calculate the basic child support obligation, and the non-custodial parent's pro rata share of the basic child support obligation. Unless the court finds that the non-custodial parents' <sup>2</sup> pro-rata share of the basic child support obligation is unjust or inappropriate, which finding shall be based upon consideration of the following factors:

(1) The financial resources of the custodial and non-custodial parent, and those of the child;

(2) The physical and emotional health of the child and his/her special needs and aptitudes;

(3) The standard of living the child would have enjoyed had the marriage or household not been dissolved;

(4) The tax consequences to the parties;

(5) The non-monetary contributions that the parents will make toward the care and well-being of the child;

(6) The educational needs of either parent;

(7) A determination that the gross income of one parent is substantially less than the other parent's gross income;

(8) The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision, and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action;

(9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and

(10) Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision.

(g) Where the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation. Such written order may not be waived by either party or counsel; provided, however, and notwithstanding any other provision of law, the court shall not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that such share exceeds the portion of a public assistance grant which is attributable to a child or children. Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

(h) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded. In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section. Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(i) Where either or both parties are unrepresented, the court shall not enter an order or judgment other than a temporary order pursuant to [section two hundred thirty-seven](#) of this article, that includes a provision for child support unless the unrepresented party or parties have received a copy of the child support standards chart promulgated by the commissioner of the office of temporary and disability assistance pursuant to [subdivision two of section one hundred eleven-i of the social services law](#). Where either party is in receipt of child support enforcement services through the local social services district, the local social services district child support enforcement unit shall advise such party of the amount derived from application of the child support percentage and that such amount serves as a starting point for the determination of the child support award, and shall provide such party with a copy of the child support standards chart.

(j) In addition to financial disclosure required in [section two hundred thirty-six](#) of this article, the court may require that the income and/or expenses of either party be verified with documentation including, but not limited to, past and present income tax returns, employer statements, pay stubs, corporate, business, or partnership books and records, corporate and business tax returns, and receipts for expenses or such other means of verification as the court determines appropriate. Nothing herein shall affect any party's right to pursue discovery pursuant to this chapter, the civil practice law and rules, or the family court act.

(k) When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order child support based upon the needs or standard of living of the child, whichever is greater. Such order may be retroactively modified upward, without a showing of change in circumstances.

(l) In any action or proceeding for modification of an order of child support existing prior to the effective date of this paragraph, brought pursuant to this article, the child support standards set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order; provided, however, that (1) where the circumstances warrant

modification of such order, or (2) where any party objects to an adjusted child support order made or proposed at the direction of the support collection unit pursuant to [section one hundred eleven-h](#) or [one hundred eleven-n of the social services law](#), and the court is reviewing the current order of child support, such standards shall be applied by the court in its determination with regard to the request for modification, or disposition of an objection to an adjusted child support order made or proposed by a support collection unit. In applying such standards, when the order to be modified incorporates by reference or merges with a validly executed separation agreement or stipulation of settlement, the court may consider, in addition to the factors set forth in paragraph (f) of this subdivision, the provisions of such agreement or stipulation concerning property distribution, distributive award and/or maintenance in determining whether the amount calculated by using the standards would be unjust or inappropriate.

1-c. (a) Notwithstanding any other provision of this chapter to the contrary, no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of any child who is the subject of the proceeding. Pending determination of a petition for visitation or custody, such child shall not visit and no person shall visit with such child present, such person who has been convicted of murder in the first or second degree in this state, or convicted of and <sup>3</sup> offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of a child who is the subject of the proceeding without the consent of such child's custodian or legal guardian.

(b) Notwithstanding paragraph (a) of this subdivision a court may order visitation or custody where:

(i) (A) such child is of suitable age to signify assent and such child assents to such visitation or custody; or

(B) if such child is not of suitable age to signify assent, the child's custodian or legal guardian assents to such order; or

(C) the person who has been convicted of murder in the first or second degree, or an offense in another jurisdiction which if committed in this state, would constitute either murder in the first or second degree, can prove by a preponderance of the evidence that:

(1) he or she, or a family or household member of either party, was a victim of domestic violence by the victim of such murder; and

(2) the domestic violence was causally related to the commission of such murder; and

(ii) the court finds that such visitation or custody is in the best interests of the child.

(c) For the purpose of making a determination pursuant to clause (C) of subparagraph (i) of paragraph (b) of this subdivision, the court shall not be bound by the findings of fact, conclusions of law or ultimate conclusion as determined by the proceedings leading to the conviction of murder in the first or second degree in this state or of an offense in another jurisdiction which, if committed in this state, would constitute murder in either the first or second degree, of a parent, legal guardian, legal custodian,

sibling, half-sibling or step-sibling of a child who is the subject of the proceeding. In all proceedings under this section, an attorney shall be appointed for the child.

2. (a) <sup>4</sup> An order directing payment of money for child support shall be enforceable pursuant to [section fifty-two hundred forty-one](#) or [fifty-two hundred forty-two of the civil practice law and rules](#) or in any other manner provided by law. Such orders or judgments for child support and maintenance shall also be enforceable pursuant to article fifty-two of the civil practice law and rules upon a debtor's default as such term is defined in [paragraph seven of subdivision \(a\) of section fifty-two hundred forty-one of the civil practice law and rules](#). The establishment of a default shall be subject to the procedures established for the determination of a mistake of fact for income executions pursuant to [subdivision \(e\) of section fifty-two hundred forty-one of the civil practice law and rules](#). For the purposes of enforcement of child support orders or combined spousal and child support orders pursuant to [section five thousand two hundred forty-one of the civil practice law and rules](#), a “default” shall be deemed to include amounts arising from retroactive support.

b. (1) When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to [section one hundred eleven-g of the social services law](#), the court shall direct that the child support payments be made to the support collection unit. Unless (i) the court finds and sets forth in writing the reasons that there is good cause not to require immediate income withholding; or (ii) when the child is not in receipt of public assistance, a written agreement providing for an alternative arrangement has been reached between the parties, the support collection unit shall issue an income execution immediately for child support or combined maintenance and child support, and may issue an execution for medical support enforcement in accordance with the provisions of the order of support. Such written agreement may include an oral stipulation made on the record resulting in a written order. For purposes of this paragraph, good cause shall mean substantial harm to the debtor. The absence of an arrearage or the mere issuance of an income execution shall not constitute good cause. When an immediate income execution or an execution for medical support enforcement is issued by the support collection unit, such income execution shall be issued pursuant to [section five thousand two hundred forty-one of the civil practice law and rules](#), except that the provisions thereof relating to mistake of fact, default and any other provisions which are not relevant to the issuance of an income execution pursuant to this paragraph shall not apply; provided, however, that if the support collection unit makes an error in the issuance of an income execution pursuant to this paragraph, and such error is to the detriment of the debtor, the support collection unit shall have thirty days after notification by the debtor to correct the error. Where permitted under federal law and where the record of the proceedings contains such information, such order shall include on its face the social security number and the name and address of the employer, if any, of the person chargeable with support; provided, however, that failure to comply with this requirement shall not invalidate such order. When the court determines that there is good cause not to immediately issue an income execution or when the parties agree to an alternative arrangement as provided in this paragraph, the court shall provide expressly in the order of support that the support collection unit shall not issue an immediate income execution. Notwithstanding any such order, the support collection unit shall issue an income execution for support enforcement when the debtor defaults on the support obligation, as defined in [section five thousand two hundred forty-one of the civil practice law and rules](#).

(2) When the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance or in receipt of services pursuant to [section one hundred eleven-g of the social services law](#), the court shall issue an income deduction order pursuant to [subdivision \(c\) of section five thousand two hundred forty-two of the civil practice law and rules](#) at the same time it issues the order of support. The court shall enter the income deduction order unless the court finds and sets forth in writing (i) the reasons that there is good cause not to require immediate income withholding; or (ii) that an agreement providing for an alternative arrangement has been reached between the parties. Such agreement may include a written agreement or an oral stipulation, made on the record, that results in a written order. For purposes of this paragraph, good cause shall mean substantial harm to the debtor. The absence of an arrearage or the mere issuance of an income deduction order shall not constitute good cause. Where permitted under federal law and where the record of the proceedings contains such information, such order shall include on its face the social security number and the name and address of the

employer, if any, of the person chargeable with support; provided, however, that failure to comply with this requirement shall not invalidate the order. When the court determines that there is good cause not to issue an income deduction order immediately or when the parties agree to an alternative arrangement as provided in this paragraph, the court shall provide expressly in the order of support the basis for its decision and shall not issue an income deduction order.

c. Any order of support issued on behalf of a child in receipt of family assistance or child support enforcement services pursuant to [section one hundred eleven-g of the social services law](#) shall be subject to review and adjustment by the support collection unit pursuant to [section one hundred eleven-n of the social services law](#). Such review and adjustment shall be in addition to any other activities undertaken by the support collection unit relating to the establishment, modification, and enforcement of support orders payable to such unit.

3. Order of protection. a. The court may make an order of protection in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by any party. Such an order may require any party:

(1) to stay away from the home, school, business or place of employment of the child, other parent or any other party, and to stay away from any other specific location designated by the court;

(2) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

(3) to refrain from committing a family offense, as defined in [subdivision one of section 530.11 of the criminal procedure law](#), or any criminal offense against the child or against the other parent or against any person to whom custody of the child is awarded or from harassing, intimidating or threatening such persons;

(4) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in a proceeding or action under this chapter or the family court act; or

(5) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety or welfare of a child.

(6) to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order of the person who is protected by such order if such order is issued or enforced.

(7) to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the person protected by the order or a minor child residing in such person's household. "Companion animal," as used in this section, shall have the same meaning as in [subdivision five of section three hundred fifty of the agriculture and markets law](#).

(8) to observe such other conditions as are necessary to further the purposes of protection.

b. An order of protection entered pursuant to this subdivision shall bear in a conspicuous manner, on the front page of said order, the language “Order of protection issued pursuant to section two hundred forty of the domestic relations law”. The absence of such language shall not affect the validity of such order. The presentation of a copy of such an order to any peace officer acting pursuant to his or her special duties, or police officer, shall constitute authority, for that officer to arrest a person when that person has violated the terms of such an order, and bring such person before the court and, otherwise, so far as lies within the officer's power, to aid in securing the protection such order was intended to afford.

c. An order of protection entered pursuant to this subdivision may be made in the final judgment in any matrimonial action or in a proceeding to obtain custody of or visitation with any child under this section, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. The order of protection may remain in effect after entry of a final matrimonial judgment and during the minority of any child whose custody or visitation is the subject of a provision of a final judgment or any order. An order of protection may be entered notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding.

d. The chief administrator of the courts shall promulgate appropriate uniform temporary orders of protection and orders of protection forms, applicable to proceedings under this article, to be used throughout the state. Such forms shall be promulgated and developed in a manner to ensure the compatibility of such forms with the statewide computerized registry established pursuant to [section two hundred twenty-one-a of the executive law](#).

e. No order of protection may direct any party to observe conditions of behavior unless: (i) the party requesting the order of protection has served and filed an action, proceeding, counter-claim or written motion and, (ii) the court has made a finding on the record that such party is entitled to issuance of the order of protection which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order is issued has given knowing, intelligent and voluntary consent to its issuance. The provisions of this subdivision shall not preclude the court from issuing a temporary order of protection upon the court's own motion or where a motion for such relief is made to the court, for good cause shown. In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss an application for such an order, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the application or the conclusion of the action. The duration of any temporary order shall not by itself be a factor in determining the length or issuance of any final order.

f. In addition to the foregoing provisions, the court may issue an order, pursuant to [section two hundred twenty-seven-c of the real property law](#), authorizing the party for whose benefit any order of protection has been issued to terminate a lease or rental agreement pursuant to [section two hundred twenty-seven-c of the real property law](#).

g. Any party moving for a temporary order of protection pursuant to this subdivision during hours when the court is open shall be entitled to file such motion or pleading containing such prayer for emergency relief on the same day that such person first appears at such court, and a hearing on the motion or portion of the pleading requesting such emergency relief shall be held on the same day or the next day that the court is in session following the filing of such motion or pleading.

h. Upon issuance of an order of protection or temporary order of protection or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms in accordance with [sections eight hundred forty-two-a and eight hundred forty-six-a of the family court act](#), as applicable. Upon issuance of an order of protection pursuant to this section or upon a finding of a violation thereof, the court also may direct payment of restitution in an amount not to exceed ten thousand

dollars in accordance with subdivision (e) of section eight hundred forty-one of such act; provided, however, that in no case shall an order of restitution be issued where the court determines that the party against whom the order would be issued has already compensated the injured party or where such compensation is incorporated in a final judgment or settlement of the action.

3-a. [As amended by [L.2010, c. 261](#). See, also, subd. 3-a, below.] Service of order of protection. a. If a temporary order of protection has been issued or an order of protection has been issued upon a default, unless the party requesting the order states on the record that she or he will arrange for other means for service or deliver the order to a peace or police officer directly for service, the court shall immediately deliver a copy of the temporary order of protection or order of protection to a peace officer, acting pursuant to his or her special duties and designated by the court, or to a police officer as defined in paragraph (b) or (d) of [subdivision thirty-four of section 1.20 of the criminal procedure law](#), or, in the city of New York, to a designated representative of the police department of the city of New York. Any peace or police officer or designated person receiving a temporary order of protection or an order of protection as provided hereunder shall serve or provide for the service thereof together with any associated papers that may be served simultaneously, at any address designated therewith, including the summons and petition or complaint if not previously served. Service of such temporary order of protection or order of protection and associated papers shall, insofar as practicable, be achieved promptly. An officer or designated person obliged to perform service pursuant to this subdivision, and his or her employer, shall not be liable for damages resulting from failure to achieve service where, having made a reasonable effort, such officer or designated person is unable to locate and serve the temporary order of protection or order of protection at any address provided by the party requesting the order. A statement subscribed by the officer or designated person, and affirmed by him or her to be true under the penalties of perjury, stating the papers served, the date, time, address or in the event there is no address, place, and manner of service, the name and a brief physical description of the party served, shall be proof of service of the summons, petition and temporary order of protection or order of protection. When the temporary order of protection or order of protection and other papers, if any, have been served, such officer or designated person shall provide the court with an affirmation, certificate or affidavit of service and shall provide notification of the date and time of such service to the statewide computer registry established pursuant to [section two hundred twenty-one-a of the executive law](#).

b. Notwithstanding any other provision of law, all orders of protection and temporary orders of protection filed and entered along with any associated papers that may be served simultaneously may be transmitted by facsimile transmission or electronic means for expedited service in accordance with the provisions of this subdivision. For purposes of this subdivision, “facsimile transmission” and “electronic means” shall be as defined in [subdivision \(f\) of rule twenty-one hundred three of the civil practice law and rules](#).

3-a. [As amended by [L.2010, c. 446](#). See, also, subd. 3-a, above.] Service of order of protection. (a) If a temporary order of protection has been issued or an order of protection has been issued upon a default, unless the party requesting the order states on the record that she or he will arrange for other means for service or deliver the order to a peace or police officer directly for service, the court shall immediately deliver a copy of the temporary order of protection or order of protection together with any associated papers that may be served simultaneously including the summons and petition, to a peace officer, acting pursuant to his or her special duties and designated by the court, or to a police officer as defined in paragraph (b) or (d) of [subdivision thirty-four of section 1.20 of the criminal procedure law](#), or, in the city of New York, to a designated representative of the police department of the city of New York. Any peace or police officer or designated person receiving a temporary order of protection or an order of protection as provided in this section shall serve or provide for the service thereof together with any associated papers that may be served simultaneously, at any address designated therewith, including the summons and petition or complaint if not previously served. Service of such temporary order of protection or order of protection and associated papers shall, insofar as practicable, be achieved promptly. An officer or designated person obliged to perform service pursuant to this subdivision, and his or her employer, shall not be liable for damages resulting from failure to achieve service where, having made a reasonable effort, such officer or designated person is unable to locate and serve the temporary order of protection or order of protection at any address provided by the party requesting the order.

(b) When the temporary order of protection or order of protection and associated papers, if any, have been served, such officer or designated person shall provide the court with an affirmation, certificate or affidavit of service when the temporary order of protection or order of protection has been served, and shall provide notification of the date and time of such service to the statewide computer registry established pursuant to [section two hundred twenty-one-a of the executive law](#). A statement subscribed by the officer or designated person, and affirmed by him or her to be true under the penalties of perjury, stating the papers served, the date, time, address or in the event there is no address, place, and manner of service, the name and a brief physical description of the party served, shall be proof of service of the summons, petition and temporary order of protection or order of protection.

(c) Where an officer or designated person obliged to perform service pursuant to this section is unable to complete service of the temporary order of protection or order of protection, such officer or designated person shall provide the court with proof of attempted service of the temporary order of protection or order of protection with information regarding the dates, times, locations and manner of attempted service. An affirmation, certificate or affidavit of service with a statement subscribed by the officer or designated person, and affirmed by him or her to be true under the penalties of perjury, stating the name of the party and the papers attempted to be served on said person, and for each attempted service, the date, time, address or in the event there is no address, place, and manner of attempted service, shall be proof of attempted service.

(d) Any peace or police officer or designated person performing service under this subdivision shall not charge a fee for such service, including, but not limited to, fees as provided under [section eight thousand eleven of the civil practice law and rules](#).

3-b. Emergency powers; local criminal court. If the court that issued an order of protection or temporary order of protection under this section or warrant in connection thereto is not in session when an arrest is made for an alleged violation of the order or upon a warrant issued in connection with such violation, the arrested person shall be brought before a local criminal court in the county of arrest or in the county in which such warrant is returnable pursuant to article one hundred twenty of the criminal procedure law and arraigned by such court. Such local criminal court shall order the commitment of the arrested person to the custody of the sheriff, admit to, fix or accept bail, or release the arrested person on his or her recognizance pending appearance in the court that issued the order of protection, temporary order of protection or warrant. In making such order, such local criminal court shall consider the bail recommendation, if any, made by the supreme or family court as indicated on the warrant or certificate of warrant. Unless the petitioner or complainant requests otherwise, the court, in addition to scheduling further criminal proceedings, if any, regarding such alleged family offense or violation allegation, shall make such matter returnable in the supreme or family court, as applicable, on the next day such court is in session.

3-c. Orders of protection; filing and enforcement of out-of-state orders. A valid order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be accorded full faith and credit and enforced as if it were issued by a court within the state for as long as the order remains in effect in the issuing jurisdiction in accordance with [sections two thousand two hundred sixty-five and two thousand two hundred sixty-six of title eighteen of the United States Code](#).

a. An order issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be deemed valid if:

(1) the issuing court had personal jurisdiction over the parties and over the subject matter under the law of the issuing jurisdiction;

(2) the person against whom the order was issued had reasonable notice and an opportunity to be heard prior to issuance of the order; provided, however, that if the order was a temporary order of protection issued in the absence of such person, that notice had been given and that an opportunity to be heard had been provided within a reasonable period of time after the issuance of the order; and

(3) in the case of orders of protection or temporary orders of protection issued against both a petitioner and respondent, the order or portion thereof sought to be enforced was supported by: (i) a pleading requesting such order, including, but not limited to, a petition, cross-petition or counterclaim; and (ii) a judicial finding that the requesting party is entitled to the issuance of the order, which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order was issued had give<sup>5</sup> knowing, intelligent and voluntary consent to its issuance.

b. Notwithstanding the provisions of article fifty-four of the civil practice law and rules, an order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, accompanied by a sworn affidavit that upon information and belief such order is in effect as written and has not been vacated or modified, may be filed without fee with the clerk of the court, who shall transmit information regarding such order to the statewide registry of orders of protection and warrants established pursuant to [section two hundred twenty-one-a of the executive law](#); provided, however, that such filing and registry entry shall not be required for enforcement of the order.

4. One-time adjustment of child support orders issued prior to September fifteenth, nineteen hundred eighty-nine. Any party to a child support order issued prior to September fifteenth, nineteen hundred eighty-nine on the behalf of a child in receipt of public assistance or child support services pursuant to [section one hundred eleven-g of the social services law](#) may request that the support collection unit undertake one review of the order for adjustment purposes pursuant to [section one hundred eleven-h of the social services law](#). A hearing on the adjustment of such order shall be granted upon the objection of either party pursuant to the provisions of this section. An order shall be adjusted if as of the date of the support collection unit's review of the correct amount of child support as calculated pursuant to the provisions of this section would deviate by at least ten percent from the child support ordered in the current order of support. Additionally, a new order shall be issued upon a showing that the current order of support does not provide for the health care needs of the child through insurance or otherwise. Eligibility of the child for medical assistance shall not relieve any obligation the parties otherwise have to provide for the health care needs of the child. The support collection unit's review of a child support order shall be made on notice to all parties to the current support order. Nothing herein shall be deemed in any way to limit, restrict, expand or impair the rights of any party to file for a modification of a child support order as is otherwise provided by law.

(1) Upon mailing of an adjustment finding and where appropriate a proposed order in conformity with such finding filed by either party or by the support collection unit, a party shall have thirty-five days from the date of mailing to submit to the court identified thereon specific written objections to such finding and proposed order.

(a) If specific written objections are submitted by either party or by the support collection unit, a hearing shall be scheduled by the court on notice to the parties and the support collection unit, who then shall have the right to be heard by the court and to offer evidence in support of or in opposition to adjustment of the support order.

(b) The party filing the specific written objections shall bear the burden of going forward and the burden of proof; provided, however, that if the support collection unit has failed to provide the documentation and information required by [subdivision](#)

[fourteen of section one hundred eleven-h of the social services law](#), the court shall first require the support collection unit to furnish such documents and information to the parties and the court.

(c) If the court finds by a preponderance of the evidence that the specific written objections have been proven, the court shall recalculate or readjust the proposed adjusted order accordingly or, for good cause, shall remand the order to the support collection unit for submission of a new proposed adjusted order. Any readjusted order so issued by the court or resubmitted by the support collection unit after a remand by the court shall be effective as of the date the proposed adjusted order would have been effective had no specific written objections been filed.

(d) If the court finds that the specific written objections have not been proven by a preponderance of the evidence, the court shall immediately issue the adjusted order as submitted by the support collection unit, which shall be effective as of the date the order would have been effective had no specific written exceptions been filed.

(e) If the court receives no specific written objections to the support order within thirty-five days of the mailing of the proposed order the clerk of the court shall immediately enter the order without further review, modification, or other prior action by the court or any judge or support magistrate thereof, and the clerk shall immediately transmit copies of the order of support to the parties and to the support collection unit.

(2) A motion to vacate an order of support adjusted pursuant to this section may be made no later than forty-five days after an adjusted support order is executed by the court where no specific written objections to the proposed order have been timely received by the court. Such motion shall be granted only upon a determination by the court issuing such order that personal jurisdiction was not timely obtained over the moving party.

5. [As added by [L.1997, c. 398, § 6](#). See, also, subd. 5 below.] Provision of child support orders to the state case registry. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to [subdivision four-a of section one hundred eleven-b of the social services law](#).

5. [As added by [L.1997, c. 398, § 103](#). See, also, subd. 5 above.] On-going cost of living adjustment of child support orders issued prior to September fifteenth, nineteen hundred eighty-nine. Any party to a child support order issued prior to September fifteenth, nineteen hundred eighty-nine on the behalf of a child in receipt of public assistance or child support services pursuant to [section one hundred eleven-g of the social services law](#) may request that the support collection unit review the order for a cost of living adjustment in accordance with the provisions of [section two hundred forty-c](#) of this article.

#### Credits

(Added L.1962, c. 313, § 10. Amended L.1963, c. 685, § 9; L.1976, c. 133, § 1; L.1980, c. 281, § 12; L.1980, c. 530, § 11; L.1980, c. 645, § 4; L.1981, c. 416, § 24; L.1981, c. 695, § 3; L.1983, c. 347, § 3; L.1985, c. 809, § 7; L.1986, c. 849, § 1; L.1986, c. 892, § 6; L.1988, c. 452, § 1; L.1988, c. 457, § 9; L.1989, c. 164, § 3; L.1989, c. 567, §§ 6, 7; L.1990, c. 818, §§ 6 to 9; L.1992, c. 41, §§ 141, 145, 146; L.1993, c. 59, §§ 3, 4, 10, 17, 23, 24; L.1993, c. 354, § 1; L.1994, c. 170, §§ 361 to 363; L.1995, c. 81, §§ 237 to 239; L.1995, c. 349, § 3; L.1995, c. 389, § 1; L.1995, c. 429, § 2; L.1995, c. 538, § 2; L.1995, c. 483, §§ 1, 2; L.1996, c. 12, § 17; L.1996, c. 85, § 2; L.1997, c. 186, § 13, eff. July 8, 1997; L.1997, c. 398, § 6, eff. Oct. 1, 1998; L.1997, c. 398, §§ 94, 95, 102, 103, 142, eff. Jan. 1, 1998; L.1998, c. 150, §§ 1, 2, eff. July 7, 1998; L.1998, c. 214, § 57, eff. Nov. 4, 1998; L.1998, c. 597, §§ 1, 2, eff. Dec. 22, 1998; L.1999, c. 378, § 1, eff. July 27, 1999; L.1999, c. 606, § 1; L.2002, c. 624, § 4, eff. Oct. 2, 2002; L.2003, c. 81, § 11, eff. June 18, 2003; L.2007, c. 616, § 3, eff. Oct. 1, 2007; L.2008, c.

532, § 6, eff. Dec. 3, 2008; L.2008, c. 538, § 1, eff. Sept. 4, 2008; L.2008, c. 595, § 1, eff. January 23, 2009; L.2009, c. 215, §§ 2, 4, 6, 8, eff. Oct. 9, 2009; L.2009, c. 295, § 1, eff. Aug. 11, 2009; L.2009, c. 343, § 7, eff. Jan. 31, 2010; L.2009, c. 473, § 2, eff. Nov. 15, 2009; L.2009, c. 476, § 2, eff. Dec. 15, 2009; L.2010, c. 41, § 7, eff. April 14, 2010; L.2010, c. 261, § 2, eff. July 30, 2010; L.2010, c. 341, § 8, eff. Aug. 13, 2010; L.2010, c. 446, § 2, eff. Aug. 30, 2010; L.2011, c. 436, § 1, eff. Nov. 15, 2011; L.2013, c. 1, § 11, eff. March 16, 2013.)

**Editors' Notes**

**SUPPLEMENTARY PRACTICE COMMENTARIES**

By Alan D. Scheinkman

**2012**

**C240:27A: Basic Child Support**

As of January 31, 2012, the new child support “cap” is \$136,000 . Accordingly, references to \$130,000 (or the originally set \$80,000) should be adjusted accordingly.

**PRACTICE COMMENTARIES**

by Alan D. Scheinkman

**C240:1: Introduction**

**C240:2: Custody--Generally**

**C240:3: Custody Disputes Arising in Matrimonial Actions**

**C240:4: Proceedings in Supreme Court by Petition and Order to Show Cause**

**C240:5: Jurisdiction over Parents and Child**

**C240:6: Criteria for Determining Custody--Generally**

**C240:7: Preference between Parents and Non-Parents**

**C240:8: Preference between Non-Parents**

**C240:9: Preference between Parents**

**C240:10: Fitness of Parents**

**C240:10A: Domestic Violence and Child Abuse**

**C240:10B: No Custody or Visitation to Murderer of Parent or Sibling**

**C240:11: Stability and Long-term Fixation of Custody**

**C240:12: Financial Status of Parents**

**C240:13: Gender and Religion of Children**

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**C240:15: Custodial Preferences of Children**

**C240:16: Maintenance of Contact with Other Parent**

**C240:17: Joint Custody**

**C240:18: Psychiatric and Psychological Reports and Examinations**

**C240:19: Disclosure in Custody Cases**

**C240:20: Parental Visitation Rights**

**C240:21: Necessity for Hearing**

**C240:22: Agreements between Parents**

**C240:23: Jurisdiction to Modify Custody Directions of New York Courts**

**C240:24: Standards for Custody Modification--Generally**

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**C240:27: Child Support**

**C240:27A: Basic Child Support**

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**C240:27D: Child Support Agreements**

**C240:28: Health Insurance and Health Insurance Premiums**

**C240:29: Child Support Enforcement**

**C240:30: Orders of Protection**

**C240:31: Visitation With Children in Foster Care**

**C240:1: Introduction**

DRL Section 240 is one of the most significant sections contained in the Domestic Relations Law. Its coverage is broad, sweeping from child custody and visitation, child support and grandparent visitation to modification, enforcement, and orders of protection. The statute and the interpretative case law is discussed, in relevant categories, in the ensuing set of commentaries. For further elaboration on issues pertaining to child support, jurisdiction to determine child custody, child custody, and modification of support and custody awards, *see* Scheinkman, New York Law of Domestic Relations (West 2nd Ed. Chapters 16 and 20 through 25).

**C240:2: Custody--Generally**

The parents of a child born in wedlock have equal powers, rights and duties towards the guardianship of the child. DRL § 81. Where one parent has died, the surviving parent is prima facie entitled to custody and guardianship of the child, with his or her entitlement defeated only in extraordinary situations. See, e.g., *In re Bock*, 280 N.Y. 349, 21 N.E.2d 186 (1939); *Armstrong v. Grimes*, 70 Misc.2d 549, 334 N.Y.S.2d 558 (Family Court N.Y. County 1972); see also *Matter of Merrit v. Way*, 58 N.Y.2d 850, 460 N.Y.S.2d 20, 446 N.E.2d 776 (1983); *Matter of Dickson v. Lascaris*, 53 N.Y.2d 204, 440 N.Y.S.2d 884, 423 N.E.2d 361 (1981); *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976).

Upon application by a parent, or in the context of matrimonial litigation, the courts may intervene to determine custodial and visitation rights as between the parents of minor children. DRL Section 240 (subd. 1) mandates that the court, in certain designated matrimonial cases, require verification of the status of any child of the marriage with respect to the child's custody and support. Verification means that the court obtain confirmation as to the custodial arrangements, the child's needs for support, and the arrangement between the parents for providing that support, whether those support or custody arrangements were established by prior court order, by formal agreement between the parties or otherwise. The court is also required to enter such orders for the child's custody and support as, in the court's discretion, justice requires, having regard for the circumstances of the case and of the parties and to the best interests of the child. Once the court's jurisdiction to determine custody is invoked, the court may determine what disposition is in the child's best interests and may award custody to a person who did not petition for such relief. *Miller v. Orbaker*, 17 A.D.3d 1145, 793 N.Y.S.2d 840 (4th Dept. 2005), *leave to appeal denied*, 5 N.Y.3d 714 (2005) (though mother petitioned to modify joint custody arrangement with her sister, and sister did not petition for sole custody, court could properly grant sole custody to sister).

In terms of custody, however, the court's use of discretion is curtailed in certain cases involving extreme violence. DRL Section 240, subd. 1, limits the court's discretionary assessment of custody review by imposing a requirement that the court's actions are "subject to the provisions of subdivision one-c of this section". DRL Section 240, subd. 1-c, precludes the awarding of custody or visitation rights to a person who has been convicted of murder of a parent, legal custodian or guardian, or sibling (whether a whole, half or step-sibling) of the child at issue in the proceeding. This limitation is discussed in Practice Commentary C240:10B, *infra*.

Note that the court's discretion in awarding child support is also limited. DRL Section 240, subdivision 1 provides that the court must make its child support award pursuant to the Child Support Standards Act, which is contained in subdivision 1-b of DRL Section 240.

Of great significance, DRL Section 240, subdivision 1, requires the court to inquire into the custody and support arrangements for children in the context of certain matrimonial litigation, whether the parents or other adult litigants raise issues concerning the children or not. The court has an affirmative obligation to assure that children who are within its jurisdiction are placed in the care of the most appropriate custodian and that the persons legally responsible for support are obligated to provide an appropriate level of support, determined in accordance with governing statute.

The types of matters that are swept up within DRL § 240, subd. 1, are: (1) actions for an annulment or declare the validity of a void marriage; (2) separation actions; (3) divorce actions; and (4) custody matters brought on by *habeas corpus* or by petition and order to show cause.

In contested actions, issues like child custody and child support are typically raised by the parties and litigated. However, child custody and support issues may not be flagged for the court's attention where the action is entirely uncontested. Uncontested actions include those in which the parties have made an agreement before the case is filed as well as actions in which the defendant or respondent does not appear and does not contest the issues. The

court's mandate to verify the custody and support status of children and enter appropriate orders does not fall away in uncontested actions. The court's supervisory role to protect the interests of children gives it approval powers over the custodial and support aspects of separation or settlement agreements. That the case is uncontested does not mitigate the court's obligation to assure that proper custodial and support arrangements are in place. If anything, the court needs to be vigilant to assure that children are not prejudiced by a parent's default in responding to parties, just as the court needs to assure that children are not prejudiced by an improvident or unlawful agreement made between parents or custodians.

At one time, DRL § 240 expressly confined the court's power and authority to “minor” children of the parties. Minors or infants are persons under the age of 18 years. [DRL § 2](#); [CPLR 105](#) (subd. j). Once a person has attained age 18, that person can no longer be the subject of a custody order. [Lazaro v. Lazaro](#), 227 A.D.2d 402, 642 N.Y.S.2d 67 (2nd Dept. 1996); [Simpson v. Finnigan](#), 202 A.D.2d 592, 609 N.Y.S.2d 265 (2nd Dept. 1994); [Wibrowski v. Wibrowski](#), 256 A.D.2d 172, 683 N.Y.S.2d 424 (1st Dept. 1998); [People ex rel. Mindari v. Cesnavicius](#), 208 A.D.2d 663, 617 N.Y.S.2d 188 (2nd Dept. 1994). However, even though a custody determination may not be made once a child has attained age 18, the parents of the child remain chargeable for the support of the child until the child attains age 21. [Family Court Act, § 413](#). Thus, the legislative decision to drop the word “minor” from the statute confirms the court's authority to deal with child support matters for children between the ages of 18 to 21. The court still may not determine custody of an adult, i.e., a person who was attained age 18.

An infant whose custody is in dispute is a ward of the court. The court acts as *parens patriae* to do what is best for the interests of the child. The court must place itself in the position of a wise, affectionate, and careful parent and make provision for the child in accordance with the court's view as to what is in the best interests of the child. In determining custody, the court's concern should be for the protection of its ward rather than with the adjudication of a dispute between the parents. [Matter of Finlay](#), 240 N.Y. 429, 433, 148 N.E. 624 (1925); [Agur v. Agur](#), 32 A.D.2d 16, 298 N.Y.S.2d 772 (2nd Dept. 1969), *appeal dismissed*, 27 N.Y.2d 643, 313 N.Y.S.2d 866, 261 N.E.2d 903 (1970), *reargument denied*, 27 N.Y.2d 816, 315 N.Y.S.2d 1031, 264 N.E.2d 127 (1970), *appeal dismissed*, 32 N.Y.2d 703, 343 N.Y.S.2d 607, 296 N.E.2d 458 (1973).

While a parent who is granted physical custody typically is granted legal custody as well, the court may grant the noncustodial parent the right to make selected legal decisions or, conversely, may limit the legal decision-making of the parent with physical custody. Indeed, there has been an increasing tendency in more recent cases, particularly at the trial level, to recognize that the noncustodial parent may have better insight into a particular issue or issues affecting the child and, therefore, divide legal custody into spheres or zones of decision making between the parents while still granting one parent primary physical custody. See [Ferguson v. Ferguson](#), 2 Misc.3d 277, 772 N.Y.S.2d 480 (Sup.Ct. Nassau County 2003). For example, in [Frize v. Frize](#), 266 A.D.2d 753, 698 N.Y.S.2d 764 (3rd Dept. 1999), the court awarded the mother sole legal and physical custody of the parties' 12-year-old son who had multiple disabilities. The court had concerns with the father who, it found, had sexually abused a daughter from a prior marriage. On the other hand, the court also found that the father had been much more involved in the son's schooling, and the mother's role in the son's education had at times been a hindrance. Accordingly, the court granted the father sole decision-making authority with respect to the child's education as well as unsupervised visitation. The Appellate Division, Third Department, while acknowledging that the case presented an “extremely close call” and that some cases are so “unsettling that the law cannot provide a perfect solution,” affirmed the order as an appropriate exercise of discretion.

### C240:3: Custody Disputes Arising in Matrimonial Actions

The first sentence of paragraph 1 of DRL § 240 directs the Supreme Court to determine questions of the custody and support of any child of the parties in certain designated matrimonial actions.

Visitation being a subset of custody, visitation rights and privileges may be also determined in the qualifying matrimonial actions.

The matrimonial actions in which custody and support of children may be determined are actions: (1) to annul a marriage; (2) to declare the nullity of a void marriage; (3) for a separation; and (4) for a divorce. Determination of custody and support of children in such actions are ancillary to the questions of matrimonial status relief. However, jurisdiction to determine custody and support of children in the foregoing matrimonial actions is not dependent upon whether the matrimonial relief requested is granted; the court may provide for child custody and child support even if matrimonial status relief is denied. E.g., *Caldwell v. Caldwell*, 298 N.Y. 146, 81 N.E.2d 60 (1948); *Miller v. Miller*, 10 A.D.2d 796, 198 N.Y.S.2d 320 (4th Dept. 1960); *La Rosa v. La Rosa*, 83 Misc.2d 1059, 373 N.Y.S.2d 985 (Sup.Ct. Nassau County 1975). Indeed, the statutory language mandates that the court, in the designated actions, “shall” enter orders for custody and support.

In one set of cases, decided under a prior but similar version of the current statutory language, *Rodriguez v. Rodriguez*, 79 A.D.2d 550, 434 N.Y.S.2d 22 (1st Dept. 1980), it was held error for the trial court, when it determined applications for uncontested divorces, to strike out from the submitted judgments provisions granting custody to the plaintiffs. Even in an uncontested action, the court has the statutorily imposed duty to decide the issues of custody and child support. More commonly than not, uncontested actions are determined on the basis of submitted papers rather by a record made at an inquest. However, if the court is not convinced that the presentation made in the submitted papers justifies the proposed custody disposition, the court could set the matter down for an inquest at which it could raise the questions it found troublesome or could require the submission of further papers.

The Equitable Distribution Law defines the term matrimonial action to include, in addition to the four categories listed above, actions for the “dissolution of a marriage” (i.e., Enoch Arden proceedings, see DRL §§ 220, 221); for the declaration of the validity or nullity of a foreign judgment of divorce; for the declaration of the validity of a marriage; and proceedings to obtain equitable distribution or maintenance following a foreign judgment of divorce. DRL § 236, Part B, subd. 2; see, also, CPLR 105 (subd. p). While these actions are defined as matrimonial actions for equitable distribution and other economic purposes, no jurisdiction is conveyed to permit custody determinations to be made as ancillary relief in such actions. Cf. *Gontaryk v. Gontaryk*, 20 A.D.2d 633, 246 N.Y.S.2d 270 (1st Dept. 1964). In order to obtain a custody determination, an independent proceeding must be initiated in either Supreme or Family Court. However, subdivision 7 of Part B of Section 236 permits the court to award temporary or permanent child support in “any matrimonial action”. Thus, in any matrimonial action, defined as such by the Equitable Distribution Law, the court may determine child support but may not decide the issue of custody unless the action is one of the types of action specifically identified in DRL Section 240.

Custody determinations must be made by the Supreme Court in the designated matrimonial actions. However, these actions are not the exclusive vehicles for obtaining a Supreme Court child custody determination. DRL Section 70 authorizes a proceeding by writ of habeas corpus to determine custody questions. DRL Section 240 itself allows the court to decide custody questions presented by petition and order to show cause. Thus, a determination of custody of minor children may be sought, if no matrimonial action is pending, by an independent proceeding commenced by writ of habeas corpus or by petition and order to show cause. Indeed, the existence of a matrimonial action does not bar the maintenance of an independent custody proceeding. See *People ex rel. McCanliss v. McCanliss*, 255 N.Y. 456, 175 N.E. 129 (1931). Indeed, where the trial of a matrimonial action is not to be immediately forthcoming due to the need to complete pre-trial proceedings, the habeas corpus remedy offers a particularly effective means for obtaining a prompt custody determination. An application could also be brought by petition and order to show cause but a writ proceeding is apt to move more to a hearing more quickly. However, an independent proceeding, where a matrimonial action is pending in which custody can be decided, should not lightly be maintained. The preference of the court should be to try to avoid fragmenting the litigation into pieces and to resolve as many issues as possible, if not all of them, in a single trial. Furthermore, the simultaneous pendency of a matrimonial action in which custody

can be determined and an independent custody proceeding involves the potential for duplicative litigation and waste of judicial resources.

Generally the issue of custody can be resolved only after a hearing. *See, e.g., Anstett v. Wolcott*, 94 A.D.2d 692, 461 N.Y.S.2d 1022 (2nd Dept. 1983). Thus, as a general rule, custody and visitation determinations may not be made on the basis of conflicting affidavits. *See, e.g., Bowman v. Bowman*, 19 A.D.2d 857, 244 N.Y.S.2d 38 (4th Dept. 1963). However, the right to a hearing can be waived. *See Kuleszo v. Kuleszo*, 59 A.D.2d 1059, 399 N.Y.S.2d 801 (4th Dept. 1977), *appeal denied*, 43 N.Y.2d 647, 403 N.Y.S.2d 1025, 374 N.E.2d 398 (1978). Further, temporary custody may be determined, without a hearing, where adequate facts are shown by uncontroverted affidavits. *Meltzer v. Meltzer*, 38 A.D.2d 522, 326 N.Y.S.2d 831 (1st Dept. 1971).

In a matrimonial action in the Supreme Court, the court may determine the issue of custody as between the parents even though no matrimonial relief is granted. *Caldwell v. Caldwell*, 298 N.Y. 146, 81 N.E.2d 60 (1948); *Miller v. Miller*, 10 A.D.2d 796, 198 N.Y.S.2d 320 (4th Dept. 1960); *La Rosa v. La Rosa*, 83 Misc.2d 1059, 373 N.Y.S.2d 985 (Sup.Ct. Nassau County 1975). That the party who commenced the action does not succeed upon the parents or trial court's finding that the party lacked adequate grounds for seeking to terminate the marriage is not a proper basis for awarding custody of children to the other party. *Richards v. Richards*, 78 A.D.2d 943, 433 N.Y.S.2d 259 (3rd Dept. 1980).

In an action for divorce, separation or annulment, the Supreme Court may refer applications to fix temporary or permanent custody or visitation to the Family Court. [Family Court Act, § 467](#) (subd. a). The referral may be made in an order or in a judgment. An order of referral would be used where the Supreme Court wishes the custody issue to be litigated in Family Court without waiting for a Supreme Court determination on the issue of marital status. The referral may be set forth in the judgment if custody and visitation questions are assigned to Family Court after the Supreme Court has determined whether to grant or deny matrimonial relief.

The Supreme Court is likewise expressly empowered to refer to Family Court custody disputes, arising in proceedings commenced in the Supreme Court by writ of habeas corpus or by petition and order to show cause. [Family Court Act, § 651](#) (subd. a). The Supreme Court could also decline jurisdiction, without prejudice to the commencement of proceedings in Family Court, by refusing the writ of habeas corpus or order to show cause. However, by issuing the writ or order and reserving the issue of referral to the return date, the Supreme Court may await the respondent's appearance and crystallization of the issues before deciding if referral is appropriate.

Whether to refer the issues of custody and visitation to the Family Court is a matter of the Supreme Court's discretion. Consideration should be given to such factors as the relative case loads of the two Courts, the relative access to needed auxiliary services, the extent of prior proceedings in each Court, and the need to avoid duplicative litigation. *See Borkowski v. Borkowski*, 90 Misc.2d 957, 396 N.Y.S.2d 962 (Sup.Ct. Steuben County 1977). In some counties, however, referrals are commonplace, with local practice contemplating that the Supreme Court resolve only issues of marital status and with all other questions being referred to Family Court. In other areas of the State, especially in the New York City area, referrals are more sparingly made, given the heavy original calendars of the Family Court. Practitioners should consult with the clerk of the appropriate court to determine current local practice.

If an order or judgment of referral is made, it must provide that a copy thereof shall be filed by the plaintiff's attorney with the clerk of the Family Court within ten days. *See DRL § 251* and accompanying Practice Commentary.

Original custody and visitation proceedings may also be commenced in the Family Court directly by habeas corpus writ or by petition and order to show cause. [Family Court Act § 651](#) (subd. b). Though such proceedings may be commenced directly in Family Court without first invoking the Supreme Court's jurisdiction, the Family Court

determines the proceedings with its own powers and with the same powers that the Supreme Court would have had if the proceeding had been started there. [Family Court Act § 651](#) (subd. b).

#### **C240:4: Proceedings in Supreme Court by Petition and Order to Show Cause**

In addition to conveying authority for the determination of custody and visitation questions in certain matrimonial actions, DRL Section 240 (subd. 1) allows the Supreme Court to determine custody and visitation questions in proceedings commenced by petition and order to show cause.

Where a petition and order to show cause is employed, the order issued by the court should provide for a return date, for the method and time for service upon the respondent, and may also contain stays, restraining orders and other judicial directives. For example, the order could provide for the production of the child who is the subject of the proceeding in court on the return date.

Special proceedings are commenced by the filing of the petition with the clerk of the court in the county in which the proceeding is brought. [CPLR 304](#). The petition must, in the context of custody litigation, be served with and as authorized by an order to show cause. In order to file the petition, absent an emergency situation, it is necessary to purchase an index number and to have the matter assigned to a judge, and to file a request for judicial intervention (RJI). Fees are charged for both the index number and the RJI. In an emergency, where the court finds that the circumstances preclude an immediate filing (such as where the clerk's office is closed because the order is sought on at a time when the courthouse is closed), the court may sign the order to show cause without the prior filing of the petition, provided that the order requires that the petition be filed at a specific time and date not later than five days thereafter. [CPLR 304](#).

In order to comply with the statute, the petitioner must file the original petition with the clerk of the court and pay the appropriate fees. The clerk is to date stamp the original and maintain a record of the date of filing, while the clerk should also immediately return a copy to the filing party. The clerk to whom the petition is to be delivered, and to whom the fee is to be paid, is the County Clerk of the county in which the proceeding is brought. *See Mendon Ponds Neighborhood Ass'n. v. Dehm*, 98 N.Y.2d 745, 751 N.Y.S.2d 819, 781 N.E.2d 833 (2002).

The order to show cause procedure is the equivalent of a special proceeding. Although DRL Section 240 authorizes proceedings to fix custody by petition and order to show cause, it does not delve deeply into the procedure to be followed in such proceedings. It would appear that the proceeding may be commenced in any county where either of the parties resides ([CPLR 503](#) (subd. a); [CPLR 506](#) [subd. a]) and that the show cause order may be sought from any Supreme Court Justice ([CPLR 2212](#) [subd. b]). However, under court rules, once the proceedings is filed, it would be assigned to specific judge and, unless that judge was unavailable, the issuance of the order to show cause and all other proceedings in the matter would be the responsibility of the assigned judge. [22 N.Y.C.R.R. § 202.3](#).

CPLR Article 4, which is applicable to special proceedings generally, should apply to fill in the procedural details.

It should be noted that the Family Court now has jurisdiction to enforce or modify orders or judgments of the Supreme Court relating to visitation with infants who are in foster care. [Family Court Act § 651\(c\)](#). The jurisdiction of the Family Court is invoked by petition under Part 8 of Article 10 of the [Family Court Act \(§§ 1081 through 1084\)](#) or under [§ 358-a of the Social Services Law](#). Moreover, while [Family Court Act Section 467](#) (subd. b) permits the Supreme Court to exclude the Family Court from exercising jurisdiction to enforce or modify Supreme Court orders, [Family Court Act § 651](#) (subd. d) allows the Family Court, where foster children are concerned, to proceed to modify or enforce, despite any limitation on Family Court jurisdiction imposed in the Supreme Court order.

### C240:5: Jurisdiction over Parents and Child

Questions concerning jurisdiction to make binding custody determinations tend to arise with greater frequency in plenary custody proceedings, such as proceedings by writ of habeas corpus. Issues of custody jurisdiction are less likely to appear in cases where custody is raised as incident to matrimonial status relief, particularly in actions for divorce or separation. In such actions, the need to satisfy the durational residence tests of [Domestic Relations Law Section 230](#) tends to reduce the prospect that the contacts of the parents and children with New York are remote.

Traditionally, it was held that the mere physical presence of a child in this state was sufficient to confer power on the court to make a determination as to custody, even if the infant was not a resident of the state. *See, e.g. Gross v. Kellerman*, 62 A.D.2d 1149, 404 N.Y.S.2d 178 (4th Dept. 1978); *Trampert v. Trampert*, 55 A.D.2d 838, 390 N.Y.S.2d 325 (4th Dept. 1976); *Forbell v. Forbell*, 276 A.D. 785, 93 N.Y.S.2d 1 (2nd Dept. 1949). Under traditional principles, if a child is resident in the state, the New York courts could adjudicate custody, irrespective of the residence or domicile of the parents. *See Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937 (1925).

At one time, it was perceived that the presence of the child in the state was an indispensable requirement, at least in the context of a plenary custody proceeding, such as by writ of habeas corpus. *See Schiller v. Elliot*, 31 A.D.2d 612, 295 N.Y.S.2d 762 (1st Dept. 1968), *affirmed*, 25 N.Y.2d 949, 305 N.Y.S.2d 158, 252 N.E.2d 635 (1969); *People ex rel. Winston v. Winston*, 31 A.D. 121, 52 N.Y.S. 814 (1st Dept. 1898). The fair meaning of those cases, however, was that the mere physical presence of the child in the state was sufficient to confer jurisdiction, even in the absence of any other basis for jurisdiction. Where personal jurisdiction over both parents has been acquired, the court could adjudicate custody, notwithstanding that the child is not present in the state. *State ex rel. Satti v. Satti*, 55 A.D.2d 149, 389 N.Y.S.2d 379 (1st Dept. 1976), *affirmed*, 43 N.Y.2d 671, 400 N.Y.S.2d 817, 371 N.E.2d 535 (1977). The basis for this rule was that, even though the child is not physically before the court, the parents are, and the court can enforce its commands by virtue of its in personam jurisdiction over the parents. *Satti v. Satti, supra*; *May v. May*, 233 A.D. 519, 253 N.Y.S. 606 (1st Dept. 1931); *Guyette v. Haley*, 286 A.D. 451, 144 N.Y.S.2d 493 (3d Dept. 1955).

Today, jurisdiction to determine child custody is not necessarily established by the mere presence of the child or the parents in New York. Neither is jurisdiction necessarily defeated by the absence of the child or the parents from New York. As set forth in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination. [DRL § 76 \(subd. 3\)](#). Jurisdiction to render a binding initial custody determination or a binding modification of custody exists when the criteria met in the UCCJEA and in the federal Parental Kidnapping Prevention Act (PKPA) are satisfied. For further elaboration on these matters, see [Scheinkman, New York Law of Domestic Relations, Chapter 20 \(West 2nd Ed\)](#) and also see Professor Sobie's Practice Commentaries to the UCCJA appearing in Article 5-A to McKinney's New York Domestic Relations Law.

### C240:6: Criteria for Determining Custody--Generally

DRL § 240 (subd. 1) requires the court to enter orders for the custody and support of a child, as in the court's discretion justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child, but subject to certain statutory limitations. *See* DRL § 240 (subd. 1-c) (where contestant for custody or visitation murdered child's parent or guardian); (subd. 1-b) (child support to be determined pursuant to Child Support Standards Act).

The statutory mandate for custody determinations is deliberately broad, enabling the court to approach and decide each individual case on its own facts and to tailor the decision to justly fit the particular circumstances. In determining a child's custody, the court acts as *parens patriae* to do what is best for the child. The court is to place itself in the

position of a “wise, affectionate, and careful” parent and make provision for the child accordingly. *Matter of Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925).

The pivotal question in custody determinations is that of the best interests of the child. *See Tropea v. Tropea*, 87 N.Y.2d 727, 642 N.Y.S.2d 575, 665 N.E.2d 145 (1996); *McIntosh v. McIntosh*, 87 A.D.2d 968, 451 N.Y.S.2d 200 (3rd Dept. 1982). Since the court should always strive to do what is best for the child, the best interest of the child standard does not, on its own, offer much real guidance. Its importance is to stress that the court's concern must be, at all times, for the interest and needs of the child; the interest and needs of the competing adults are, at best, secondary.

Of more real guidance than the statutory best interests test are the criteria that the courts have developed through the litigation of countless custody matters. The custody determination criteria developed by caselaw constitute a set of factors and preferences that the court, in determining custody, should consider. However, the caselaw criteria are not arbitrary and inflexible rules; they are matters to be considered, not matters to be blindly followed. In determining what is in the best interests of a child, there are no absolutes; rather, there are a series of policies designed, not to bind the courts, but to guide them in determining what is in the best interests of the child. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982); *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982). The court must evaluate the child's best interest in light of the totality of the circumstances. *Muller v. Muller*, 221 A.D.2d 635, 634 N.Y.S.2d 190 (2nd Dept. 1995).

The evaluation of the various factors to be taken into account in deciding a custody question is best made by the trial court, which is in the best position to evaluate the testimony, character, and sincerity of the parties. *Eschbach v. Eschbach*, *supra*. Custody matters are ordinarily within the discretion of the trial court and its findings are entitled to the greatest respect. *Matter of Irene O.*, 38 N.Y.2d 776, 381 N.Y.S.2d 865, 345 N.E.2d 337 (1975); *Matter of Ebert v. Ebert*, 38 N.Y.2d 700, 382 N.Y.S.2d 472, 346 N.E.2d 240 (1976); *Bistany v. Bistany*, 66 A.D.2d 1026, 411 N.Y.S.2d 728 (4th Dept. 1978). An appellate court may review whether the trial court, in making its decision, evaluated all relevant considerations. *McIntosh v. McIntosh*, *supra*; *Matter of Richards v. Richards*, 78 A.D.2d 943, 433 N.Y.S.2d 259 (3rd Dept. 1980); *Matter of Saunders v. Saunders*, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3rd Dept. 1977). However, the appellate courts should be reluctant to substitute their own evaluation of those factors for that of the trial court. *People ex rel. Portnoy v. Strasser*, 303 N.Y. 539, 104 N.E.2d 895 (1952); *Eschbach v. Eschbach*, *supra*; *Bistany v. Bistany*, *supra*; *see Walden v. Walden*, 112 A.D.2d 1035, 492 N.Y.S.2d 827 (2nd Dept. 1985). The existence or absence of any single factor is not determinative since the court must consider the totality of the circumstances. *Friederwitzer v. Friederwitzer*, *supra*; *Eschbach v. Eschbach*, *supra*. However, the discretion of the trial court is not absolute; the trial court's determination of custody issues may be set aside when it lacks a sound and substantial evidentiary basis. *Giraldo v. Giraldo*, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dept. 1982); *see also Matter of Alan G. v. Joan G.*, 104 A.D.2d 147, 482 N.Y.S.2d 272 (1st Dept. 1984); *Matter of Gloria S. v. Richard B.*, 80 A.D.2d 72, 437 N.Y.S.2d 411 (2nd Dept. 1981).

The discretion of the trial court is not absolute; the trial court's determination of custody may be set aside when it lacks a sound and substantial evidentiary basis. *Young v. Young*, 212 A.D.2d 114, 628 N.Y.S.2d 957 (2nd Dept. 1995); *Giraldo v. Giraldo*, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dept. 1982). While the trial court may not cast aside the opinion of independent experts without a proper basis, *Muller v. Muller*, 221 A.D.2d 635, 634 N.Y.S.2d 150 (2nd Dept. 1995); *Rentschler v. Rentschler*, 204 A.D.2d 60, 611 N.Y.S.2d 523 (1st Dept. 1994), the trial court should disregard expert opinion which is faulty. *Edgerly v. Moore*, 232 A.D.2d 214, 647 N.Y.S.2d 773 (1st Dept. 1996); *Chait v. Chait*, 215 A.D.2d 238, 638 N.Y.S.2d 426 (1st Dept. 1995).

#### **C240:7: Preference between Parents and Non-Parents**

The court may not, except for the gravest of reasons, transfer custody of a child from a natural parent to any other person. *Matter of Dickson v. Lascaris*, 53 N.Y.2d 204, 440 N.Y.S.2d 884, 423 N.E.2d 361 (1981); *People ex rel.*

*Portnoy v. Strasser*, 303 N.Y. 539, 104 N.E.2d 895 (1952). The natural parents of a child have a right to the care and custody of their child that is superior to the rights of all others unless that right has been abandoned or the natural parents proved to be unfit. *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 113 N.E.2d 801 (1953). This is because neither our law nor our society as a whole is willing to permit judges or social science experts to displace, in the absence of the most urgent or grave circumstances, the primary responsibility of child-raising that naturally and legally falls to those who conceive and bear children. *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976); *Matter of Gomez v. Lozado*, 40 N.Y.2d 839, 387 N.Y.S.2d 834, 356 N.E.2d 287 (1976), *reargument denied*, 40 N.Y.2d 918, 389 N.Y.S.2d 1027, 357 N.E.2d 1033 (1976).

Thus, as between parents and nonparents, the issue is not whether the child would be best raised by one set of contestants or the other. *Matter of Spence-Chapin Adoption Service v. Polk*, 29 N.Y.2d 196, 324 N.Y.S.2d 937, 274 N.E.2d 431 (1971). In a custody contest between a parent and a non-parent, the issue of the child's best interest is not reached unless first it is established that the natural parent surrendered the child, abandoned the child, was unfit, had persistently neglected the child, or that other extraordinary circumstances exist. *Matter of Merrit v. Way*, 58 N.Y.2d 850, 460 N.Y.S.2d 20, 446 N.E.2d 776 (1983); *Matter of Bennett v. Jeffreys*, *supra*; see *Matter of Sanjivini K.*, 47 N.Y.2d 374, 418 N.Y.S.2d 339, 391 N.E.2d 1316 (1979).

Extraordinary circumstances is the substantive threshold issue that a third party must meet in order to even be heard on the issue of the child's best interest. That extraordinary circumstances exist does not create standing for a third person, not a biological or legal parent, to seek custody. Extraordinary circumstances should only be considered if the third person first establishes standing. *But see Matter of H. v. L.*, 16 Misc.3d 1034, 843 N.Y.S.2d 790 (Family Court Nassau County 2007) (former girlfriend of biological mother granted standing to seek custody as against biological mother because of extraordinary circumstances, including child living with petitioner until removed by Department of Social Services and placed in foster care; court appears to have conflated issues of standing and extraordinary circumstances).

In *Guma v. Guma*, 132 A.D.2d 645, 518 N.Y.S.2d 19 (2nd Dept. 1987), the Court held that the paternal grandparents should have been permitted to intervene in the divorce action pending between their son and their daughter-in-law. The court ruled that the grandparents had presented evidence raising a genuine issue as to whether extraordinary circumstances existed which would warrant placing custody in them. As such, the grandparents had a real and substantial interest in the outcome of the custodial issues being litigated in the matrimonial action and their intervention would likely illuminate the court's understanding of the custodial issues. Moreover, such an intervention would be in the interest of judicial economy, since otherwise the grandparents would be constrained to bring a separate proceeding.

The lower court had denied intervention and had awarded the wife a \$2,000 counsel fee, payable by the grandparents, for having to oppose what the trial court viewed as a frivolous motion. Since the Appellate Division held that the intervention should have been allowed, the counsel fee award (made prior to the adoption of a formal sanctions rule) also had to be set aside.

Grandparents are afforded standing to seek custody, whether in Supreme Court (by writ of habeas corpus or by a special proceeding or in Family Court). However, in order for grandparents to reach the issue of what custody arrangement would serve the child's best interest, the grandparents must first convince the court that extraordinary circumstances are present. DRL § 72 (subd. 2). However, grandparents, as nonparents of the child involved, must show the presence of extraordinary circumstances before the issue of best interests is considered. The Legislature did decide to permit exceptional circumstances to be defined so as to include a prolonged separation between the parent and child for at least 24 continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioning grandparent. DRL § 72 (subd. 2[b]). The court may find extraordinary circumstances even if the prolonged separation is less than 24 months. DRL § 72 (subd. 2[b]).

While the prolonged separation is an extraordinary circumstance, the statute does not provide a comprehensive, or even an exclusive, list of what constitute extraordinary circumstances. The Legislature's intention was simply to make prolonged separation, as defined, an extraordinary circumstance.

Extraordinary circumstances were found in one case where the paternal grandmother had been caring for the child from his birth to the commencement of the proceeding, first voluntarily and later by consent order. In awarding custody to the grandmother, the court found that the biological mother had persistently neglected the child and abdicated her parental responsibilities. In contrast, the grandmother (and her late husband) had been the primary providers of the child's financial, physical, educational, medical, and psychological needs, with only very sporadic and minimal involvement by the mother. *McDevitt v. Stimpson*, 1 A.D.3d 811, 767 N.Y.S.2d 507 (3rd Dept. 2003), *leave to appeal denied*, 1 N.Y.3d 509, 777 N.Y.S.2d 19, 808 N.E.2d 1278 (2004). See *Vann v. Herson*, 2 A.D.3d 910, 768 N.Y.S.2d 44 (3rd Dept. 2003) (extraordinary circumstances found where mother suffered from borderline functioning, delusional disorder, persecutory-type, and obsessive-compulsive disorder, and had had two psychiatric hospitalizations; the father was incarcerated and was incapable of providing a home for the daughter upon his release).

In *Matter of Esposito v. Shannon*, 32 A.D.3d 471, 823 N.Y.S.2d 159 (2nd Dept. 2006), a sharply divided panel of the Appellate Division, Second Department, held that extraordinary circumstances did not exist which would warrant granting the child's maternal aunt custody of a 12 year old child ahead of the child's father. Of interest, the child had been in the care of the maternal grandmother since birth. When the child was two years old, the father, who had a drug problem, moved to Florida, though he sought to maintain contact with the child and made regular support payments. When the child was seven years old, the mother, who was not married to father, died. When the child was 11 years old, the maternal grandmother died and the child took up residence with the maternal aunt, who lived with a girlfriend and the girlfriend's two daughters. The father's petition for custody was denied by the Family Court which awarded custody to the maternal aunt. The Second Department, by a 3-2 vote, reversed, holding that extraordinary circumstances did not exist. The majority stated that the father had paid child support, called the child on a regular, though infrequent basis, and sent her cards and gifts. After the mother died, the father traveled to New York several times each year to visit the child and his attempts to bring the child to Florida were impeded by demands of the aunt that the father pay to have the grandmother and the aunt accompany the child. As a result, the majority found that the father had not abandoned the child or otherwise acted to have surrendered or forfeited his parental rights. The majority also found that, even if extraordinary circumstances were found to exist, the father would nonetheless prevail based on a best interest calculus. The majority ruled that the father had recovered from his drug addiction, owned a construction business, and had married. On the other hand, the majority noted that both the maternal aunt and her girlfriend had been convicted of serious crimes. A two judge dissent voted to uphold the Family Court's ruling, arguing that the Law Guardian recommended the custody remain in the maternal aunt, a recommendation predicated upon the child's strong preference. The dissenters were concerned that there was a significant likelihood that the transfer of custody would be detrimental to the child's mental health and well-being. The dissent pointed out that the father did not pay child support until ordered to do so and that the aunt's conditions regarding visits by the child to Florida were based on the child's desire to not go to Florida alone. The dissenters stated that the father had voluntarily surrendered the child to the maternal relatives when the child was three years old and the child had a strong psychological bond with the maternal aunt. The dissenters regarded the aunt's criminal history as both serious and relevant but not noted that there was no evidence that this history related to the aunt's parenting or to the well being of the child. The dissenters were also concerned that the aunt would not even be able to see the child as the aunt would not have standing to petition for visitation.

#### **C240:8: Preference between Non-Parents**

In litigation between competing custody contestants, none of whom are parents of the child at issue, the court must determine custodial placement on the basis of the best interests of the child. See *People ex rel. Teitler v. Haironson*, 38 A.D.2d 949, 331 N.Y.S.2d 461 (2nd Dept. 1972), *affirmed*, 31 N.Y.2d 712, 337 N.Y.S.2d 516, 289 N.E.2d 557

(1972); *Susan FF. v. MaryAnn FF.*, 11 A.D.3d 757, 783 N.Y.S.2d 669 (3rd Dept. 2004) (petitioner grandmother failed to establish prima facie case that awarding her custody of two grandchildren, presently in foster care due to parental neglect, was in children's best interests). Grandparents, or other members of the child's extended biological family, do not have any special rights to the custody of a child that would entitle them to a preference over other custody contestants nor do they have the right to veto a custody decision made by the court or, where appropriate, by an authorized agency. See *Matter of Peter L.*, 59 N.Y.2d 513, 466 N.Y.S.2d 251, 453 N.E.2d 480 (1983); *LaPoint v. Girard*, 74 A.D.2d 656, 424 N.Y.S.2d 857 (3rd Dept. 1980); *Matter of "JJ" v. Family and Childrens Service of Ithaca*, 39 A.D.2d 612, 330 N.Y.S.2d 844 (3rd Dept. 1972). However, grandparents may be allowed reasonable visitation privileges with respect to their grandchild. Further, where a parent has died, the child's grandparents may seek visitation rights pursuant to DRL § 72 and such rights, if granted, may survive the adoption of the child. See *People ex rel. Sibley v. Shepard*, 54 N.Y.2d 320, 445 N.Y.S.2d 420, 429 N.E.2d 1049 (1981).

### C240:9: Preference between Parents

Married persons are regarded as the joint guardians of their children, with equal powers, rights and duties. DRL § 81. Upon the death of one parent, the other parent succeeds to exclusive custody of the children and custody may be denied to the surviving parent only in the most exceptional of circumstances. See *Armstrong v. Grimes*, 70 Misc.2d 549, 334 N.Y.S.2d 558 (Family Court N.Y. County 1972).

DRL Section 240 provides that, when custody of children must be decided as between the parents, neither parent has any prima facie right to custody. There is no absolute rule by which it can be determined which of two contesting parents is entitled to custody. There are only principles designed to guide, not bind, the courts in deciding the question. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982); *Friderwitzer v. Friderwitzer*, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982). Each case involves its own unique fact situation and the decision must be based on the facts presented by the record.

At one time, there was an explicit judicial presumption that the mother is the naturally ordained guardian of young children and that the custody of children of tender years, in the absence of a showing of maternal unfitness, should be awarded to her. See *Application of Bopp*, 58 N.Y.S.2d 190 (Sup.Ct. Steuben County 1944); *Cavalleri v. Cavalleri*, 37 Misc.2d 620, 236 N.Y.S.2d 304 (Sup.Ct. Kings County 1962). This so-called "tender years" presumption was rejected as an unconstitutional gender-based discrimination in *State ex. rel Watts v. Watts*, 77 Misc.2d 178, 350 N.Y.S.2d 285 (Family Court N.Y. County 1973). Likewise, in *Barkley v. Barkley*, 60 A.D.2d 954, 402 N.Y.S.2d 228 (3rd Dept. 1978), *affirmed*, 45 N.Y.2d 936, 411 N.Y.S.2d 561, 383 N.E.2d 1154 (1978), the court rejected the principle that a mother has a presumptive right to custody. It is now established that on an initial custody determination there is no presumption in favor of either parent; the sole criterion being, in a custody dispute between parents, the best interest of the child. See, e.g., *Fountain v. Fountain*, 83 A.D.2d 694, 442 N.Y.S.2d 604 (3rd Dept. 1981), *affirmed*, 55 N.Y.2d 838, 447 N.Y.S.2d 703, 432 N.E.2d 596 (1982); *Dornbusch v. Dornbusch*, 110 A.D.2d 808, 488 N.Y.S.2d 229 (2nd Dept. 1985), *appeal dismissed*, 65 N.Y.2d 1024, 494 N.Y.S.2d 304, 484 N.E.2d 667 (1985); *appeal denied*, 65 N.Y.2d 609, 494 N.Y.S.2d 1029, 484 N.E.2d 672 (1985); *Matter of Nancy II v. Larry II*, 50 A.D.2d 963, 375 N.Y.S.2d 893 (3rd Dept. 1975); *Vincent v. Vincent*, 47 A.D.2d 786, 365 N.Y.S.2d 289 (3rd Dept. 1975), *appeal dismissed*, 37 N.Y.2d 774, 375 N.Y.S.2d 96, 337 N.E.2d 604 (1975).

*Linda R. v. Richard E.*, 162 A.D.2d 48, 561 N.Y.S.2d 29 (2nd Dept. 1990) stresses the importance of maintaining gender neutrality in custody determinations. In particular, the court criticized the approach taken by a trial court which had suggested that a woman was entitled to pursue her own career only insofar as her children are not neglected. The Appellate Division cogently pointed out that a custody-seeking mother, who works outside the home, should not be held to any different standard than a custody-seeking father who also works outside the home. The court stressed that a working mother should not be assumed to be any less committed to the children than a working father. In *Linda R.*, both parents were working outside the home; therefore, it was unfair to fault the mother for doing just what the

father did. [162 A.D.2d at 54-57](#), [561 N.Y.S.2d at 33-34](#). However, it is appropriate to factor career and employment circumstances into the decision insofar as those bear on both parties' past, present, and future interest and ability as caregivers for their children.

In *Linda R.*, the trial court placed undue stress on the mother's relationship with another man when there was no credible proof that the relationship affected the children in any significant way. The trial court also precluded the mother's attorney from examining into parallel activities on the husband's part. As the Appellate Division noted, the sexual behavior of a litigant is relevant if, and to the extent, the children are thereby affected. But mothers and fathers should not be held to different moral, behavioral or sexual standards. [162 A.D.2d at 52](#), [561 N.Y.S.2d at 31](#).

Nevertheless, there remains among some judges a tendency to prefer that custody of young children be placed in the mother. This tendency may, perhaps, be justified, not strictly on the basis of gender but by a confluence of other factors. If both parents are equally fit but the mother is a homemaker who has cared for the children for years and the father is employed outside the home full-time, it may be that, in the absence of other compelling factors, the best interests of the children will be served by maternal custody. But the same would be true if the father was the homemaker and the mother was employed outside the home full-time. This is because custody options which allow for the care and guidance of children directly by a parent, rather than by third persons, are to be preferred.

The decisional law reflects a clear preference in the courts to award custody to the parent who has been the primary caretaker for the children, whether the primary caretaker has been the mother or the father. [Laura A.K. v. Timothy M.](#), [204 A.D.2d 325](#), [611 N.Y.S.2d 284](#) (2nd Dept. 1994); [Lobo v. Muttee](#), [196 A.D.2d 585](#), [601 N.Y.S.2d 322](#) (2nd Dept. 1993); [Synakowski v. Synakowski](#), [191 A.D.2d 836](#), [594 N.Y.S.2d 852](#) (3rd Dept. 1993); [Carr v. Carr](#), [171 A.D.2d 776](#), [567 N.Y.S.2d 495](#) (2nd Dept. 1991). Thus, where both parents were equally fit but the mother is a homemaker who has cared for the children for years and the father is employed full-time, it may be that the best interests of the children will be served by maternal custody. As an example of such a situation, see [Lenczycki v. Lenczycki](#), [152 A.D.2d 621](#), [543 N.Y.S.2d 724](#) (2nd Dept. 1989), where the mother (who was awarded custody) was employed part-time with flexible scheduling and the father was a partner in a New York City law firm. Likewise, where the father's custodial plan involved having his mother care for the child, it was appropriate for the trial court to conclude that it was in the child's best interest to be raised primarily by the mother, rather than the paternal grandmother. [Bains v. Bains](#), [308 A.D.2d 557](#), [764 N.Y.S.2d 721](#) (2nd Dept. 2003).

But in any case, gender of a parent alone is not a proper basis for awarding or denying custody. Rather, custody should be fixed between parents as required by, and in furtherance of, the best interests of the child, as revealed by the factual circumstances of the case and in accordance with the guidelines judicially established. Indeed, it has been observed that custody may not be based on the presumption that the father is a less satisfactory parent than the mother because he is employed and she is not. [Young v. Young](#), [212 A.D.2d 114](#), [628 N.Y.S.2d 957](#) (2nd Dept. 1995).

Further, the preference for the primary caretaker is but one factor to be considered in deciding the case. The fact that one parent has primarily cared for the children will not necessarily override other factors, which may be more determinative or influential than the primary caretaker factor. [Crum v. Crum](#), [122 A.D.2d 771](#), [505 N.Y.S.2d 656](#) (2nd Dept. 1986).

Even where both parents are employed, significant consideration is to be given to which parent has a work schedule that allows for prolonged time periods with the children and whether the persons who would care for the children, during the parent's absence, are suitable. See [Jacobs v. Jacobs](#), [117 A.D.2d 709](#), [498 N.Y.S.2d 852](#) (2nd Dept. 1986). For example, in one case, custody was awarded to the father who, supplemented by his parents, could devote more time to the children, whereas the mother was employed full-time and would have to rely on hired babysitters. See [Matter of FF v. FF](#), [37 A.D.2d 893](#), [325 N.Y.S.2d 291](#) (3rd Dept. 1971). On the other hand, in [Jacobs v. Jacobs](#),

*supra*, the mother had the more flexible work schedule and the father's mother lived a good distance away and was not, in the view of the forensic examiner, an ideal daily caretaker.

In any event, the gender of a parent alone is not a proper basis for awarding or denying custody. Rather, custody should be fixed between parents as required by, and in furtherance of, the best interests of the child, as revealed by the factual circumstances of the case and in accordance with the guidelines judicially established. The primary focus must be upon the ability to provide for the child's emotional and intellectual development, the quality of the home environment, and the parental guidance to be provided. *Matter of Louise E.S. v. W. Stephen S.*, 64 N.Y.2d 946, 488 N.Y.S.2d 637, 477 N.E.2d 1091 (1985).

#### C240:10: Fitness of Parents

It is the duty of the court to award custody to the parent who under all of the circumstances can more adequately serve the child's best interests and promote the welfare, education and well being of the child. The primary focus is upon the ability to provide for the child's emotional and intellectual development, the quality of the home environment, and the parental guidance to be provided. *Matter of Louise E.W. v. W. Stephen S.*, 64 N.Y.2d 946, 488 N.Y.S.2d 637, 477 N.E.2d 1091 (1985). The fitness and conduct of a parent is a proper subject of inquiry where the welfare of the child is concerned but only to that extent. *Application of Richman*, 32 Misc.2d 1090, 227 N.Y.S.2d 42 (Sup.Ct. Kings County 1962). In other words, the conduct of the parents is considered when legally relevant to the determination of grounds for dissolution, custody, and other matters, but not for the purpose of moral vindication or condemnation. There are a number of factors that may be considered in the assessment of parental fitness.

The mental health of a parent is a factor that should be considered by the court. In the most extreme situation, custody will not be awarded to a parent who is judicially declared to be an incompetent, incurably insane, or a resident in a hospital for mental illness. *King v. King*, 243 A.D. 780, 277 N.Y.S. 653 (2nd Dept. 1935). Moreover, even in the absence of formal adjudication or confinement, a parent who suffers from a severe mental illness or infirmity may be denied custody of minor children. *See, e.g., Anderson v. Sparks*, 18 A.D.3d 656, 795 N.Y.S.2d 631 (2nd Dept. 2005) (mother refused to obtain appropriate treatment for her mental health problem; mother had been hospitalized in psychiatric hospital but refused to follow a therapy and medication discharge plan); *Landau v. Landau*, 214 A.D.2d 541, 625 N.Y.S.2d 239 (2nd Dept. 1995) (mother suffered from severe depression, persecutory delusions, extreme emotional lability, distortion of reality); *Freiman v. Freiman*, 99 A.D.2d 765, 471 N.Y.S.2d 870 (2nd Dept. 1984) (mother suffered severe emotional disability); *Thomas J.D. v. Catharine K.D.*, 79 A.D.2d 1015, 435 N.Y.S.2d 338 (2nd Dept. 1981) (mother was manic-depressive, had episodes of severe mood disorder in which she acted irrationally, was under medication and psychotherapy, and needed semi-annual hospitalization for an irreversible condition); *see also Bayer v. Bayer*, 102 A.D.2d 879, 477 N.Y.S.2d 51 (2nd Dept. 1984) (further hearing ordered in view of custodial parent's personality disorder). In *Booth v. Booth*, 8 A.D.3d 1104, 778 N.Y.S.2d 643 (4th Dept. 2004), *leave to appeal denied*, 3 N.Y.3d 607, 785 N.Y.S.2d 25, 818 N.E.2d 667 (2004), custody was awarded to the father who was an appropriate caretaker for the children, even though the mother had been their primary caretaker, in view of the mother's diagnoses with depression and paranoia and her refusal to acknowledge the diagnosis and obtain treatment.

Custody may be awarded to a parent who previously suffered from a mental illness but it must be demonstrated that the illness has been cured or is in a state of complete remission and the award is otherwise in the best interests of the child. *See Matter of Anonymous v. Anonymous*, 34 Misc.2d 444, 226 N.Y.S.2d 704 (Sup.Ct. Queens County 1959); *Application of Reinhart*, 33 Misc.2d 80, 227 N.Y.S.2d 39 (Sup.Ct. N.Y. County 1961); *see also Thomas J.D. v. Catharine K.D.*, *supra* (custody awarded to father where mother had periods of mental illness alternating with periods of complete remission). Custody may be awarded to a mentally impaired parent where the parent's condition does not render him or her unfit and the award is in the child's best interests. *See Yrala v. Yrala*, 181 A.D.2d 972, 581 N.Y.S.2d 460 (3rd Dept. 1992); *Penders v. Penders*, 139 A.D.2d 963, 527 N.Y.S.2d 935 (4th Dept. 1988).

Where the child is in the custody of a parent who suffers from a mental illness, the focus of the court is upon the effect, if any, that the illness has had upon the parent's ability to care for the health and welfare of the child. Where the parent's illness has not had an effect upon the child, or where the child has been well cared for by the parent, despite the illness, custody may be continued in the mentally ill parent. See *Application of Richman*, 32 Misc.2d 1090, 227 N.Y.S.2d 42 (Sup.Ct. Kings County 1962); see also *Bayer v. Bayer*, 102 A.D.2d 879, 477 N.Y.S.2d 51 (2nd Dept. 1984). In a case where the mental health of either the parents or the child is in issue, it is necessary for the court to direct independent psychiatric and psychological testing. *Radigan v. Radigan*, 115 A.D.2d 466, 495 N.Y.S.2d 703 (2nd Dept. 1985); *Giraldo v. Giraldo*, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dept. 1982).

The mental illness of a parent is generally only one of several factors to be considered in determining the issue of child custody. Where the illness is severe, the existence of the illness may be of major significance, and if the other parent is fit, may even be determinative. However, if the mental illness of the parent is relatively insubstantial, the existence of the illness itself will not preclude an award of custody to that parent which is supported by other factors. Likewise, if the mental illness of a parent is not supported by evidence, the mere possibility or allegation of such an illness is entitled to little weight. Thus, where the father had not shown that he was capable of offering an infant a stable home over a long period of time, the award of custody to the mother was in accordance with the child's best interests, though the father argued that the mother was psychotic. *Rieser v. Rieser*, 73 A.D.2d 648, 422 N.Y.S.2d 737 (2nd Dept. 1979), *affirmed*, 50 N.Y.2d 966, 431 N.Y.S.2d 528, 409 N.E.2d 1000 (1980). Likewise, in *Lenczycki v. Lenczycki*, 152 A.D.2d 621, 543 N.Y.S.2d 724 (2nd Dept. 1989), custody was awarded the mother, even though she had squandered marital assets and had "documented psychological problems". The Appellate Division held that the record demonstrated that, despite her emotional problems, the mother was a fit parent and that other factors supported an award of custody to her.

A parent's physical disability, while relevant, is not determinative of his or her fitness as a custody parent. Thus, in *Janus v. Janus*, 239 A.D.2d 712, 657 N.Y.S.2d 256 (3rd Dept. 1997), the fact that the father, as the result of an accident, was paralyzed from the waist down and confined to a wheelchair did not prevent the court from awarding him custody of the children. The court ruled that a parent's physical condition alone cannot be grounds to deny custody to an otherwise qualified parent. The trial court had granted him custody, after having properly focused upon his actual and potential physical capabilities, his adaptation to his disability, his ability to supervise the children and whether his disability impaired his ability to interact with those persons providing education and medical care to them. In addition, it reviewed whether the father was fully able to drive an automobile, take the children to all dental and doctor visits when necessary, attend sessions at their school and attend counseling with them. Upon the record, the Appellate Division concluded that the Family Court had properly found that the father's physical disability had no adverse impact upon his parenting skills and affirmed the order granting him custody.

In determining the issue of custody, each parent's credibility, conduct, stability, lifestyle, morality, financial status, professional achievements, and personal associations are relevant in assessing his or her respective fitness as a proper custodian. See, e.g., *Church v. Church*, 238 A.D.2d 677, 656 N.Y.S.2d 416 (3rd Dept. 1997), *Wallinger v. Wallinger*, 96 A.D.2d 988, 466 N.Y.S.2d 826 (3rd Dept. 1983); *McIntosh v. McIntosh*, 87 A.D.2d 968, 451 N.Y.S.2d 200 (3rd Dept. 1982); *Salk v. Salk*, 89 Misc.2d 883, 393 N.Y.S.2d 841 (Sup.Ct. N.Y. County 1975), *affirmed*, 53 A.D.2d 558, 385 N.Y.S.2d 1015 (1st Dept. 1976).

The past parental performance of the litigants is a relevant factor in determining custody. *Pawelski v. Buchholtz*, 91 A.D.2d 1200, 459 N.Y.S.2d 190 (4th Dept. 1983); *Saunders v. Saunders*, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3rd Dept. 1977); see also *Harrington v. Harrington*, 290 N.Y. 126, 48 N.E.2d 290 (1943), *motion dismissed*, 291 N.Y. 637, 50 N.E.2d 1020 (1943). Thus, where the mother had provided reasonably well for the children, afforded them good home surroundings, and had minimized the trauma to the children attended upon the parents' divorce, the award of custody to the mother was consistent with the children's best interests and was affirmed. *Spada v. Spada*, 47 A.D.2d 586, 363 N.Y.S.2d 161 (4th Dept. 1975). Conversely, where a parent abandoned the child, an award of custody may

be appropriately made to the other parent, if fit. *See, e.g., Kevin M. JJ v. Alice A. JJ*, 50 A.D.2d 959, 376 N.Y.S.2d 649 (3rd Dept. 1975); *Macari v. Macari*, 50 A.D.2d 818, 376 N.Y.S.2d 189 (2nd Dept. 1975). Custody was awarded to a father where the mother failed to display adequate maternal affection and devotion from the time of the child's birth. *Miller v. Miller*, 137 N.Y.S.2d 273 (Sup.Ct. N.Y. County 1954), *affirmed* 284 A.D. 889, 135 N.Y.S.2d 612 (1st Dept. 1954).

The availability of the parents to care for the children is important. Where the mother was accustomed to leaving the house early in the morning and remaining away until the early hours of the following morning, the court characterized her conduct as reflecting immaturity and an unwillingness to accept her maternal responsibilities. An award of custody to the father, who provided stability by having his parents care for the children while he was at work, was held appropriate. *Matter of FF v. FF*, 37 A.D.2d 893, 325 N.Y.S.2d 291 (3rd Dept. 1971); *accord, Zavasnik v. Zavasnik*, 59 A.D.2d 954, 399 N.Y.S.2d 483 (3rd Dept. 1977). On the other hand, where the mother was better able to provide for the daily needs of children and the father lived alone and was away at work all day, an award of custody to the mother was proper. *Snook v. Hall*, 33 A.D.2d 876, 307 N.Y.S.2d 679 (4th Dept. 1969). In *Andrews v. Andrews*, 74 A.D.2d 546, 425 N.Y.S.2d 120 (1st Dept. 1980), *affirmed* 53 N.Y.2d 787, 439 N.Y.S.2d 918, 422 N.E.2d 578 (1981), *reargument dismissed* 54 N.Y.2d 832, 443 N.Y.S.2d 1032, 427 N.E.2d 1192 (1981).

While both parents were fit, the fact that the father was a lawyer who was required to spend many and irregular hours at work and the mother was employed but was regularly able to devote more time during the week toward the rearing of the child warranted an award to the mother. Likewise, where both parents were employed but the mother had a work schedule that permitted her to have prolonged periods of time with the children and the father's proposed arrangements for care of the children in his absence were not satisfactory, custody was awarded to the mother. *Jacobs v. Jacobs*, 117 A.D.2d 709, 498 N.Y.S.2d 852 (2nd Dept. 1986). While prospective day care arrangements are a factor to be considered, the totality of the circumstances must be considered before custody is determined. *Wallinger v. Wallinger*, 96 A.D.2d 988, 466 N.Y.S.2d 826 (3rd Dept. 1983).

In *Caganek v. Caganek*, 233 A.D.2d 701, 650 N.Y.S.2d 365 (3rd Dept. 1996), in granting custody to the husband, the court cited the mother's immaturity and lack of responsibility, based upon her credit purchases of a new car, washer and dryer and television despite the parties' admitted "dire" financial condition, being evicted from her apartment as a result of her issuance of bad checks to the landlord, breaking into the marital residence following the parties' separation to steal food and other items, "going out with the girls" every Saturday night without fail and drinking alcoholic beverages even though she suffers from diabetes and her blood sugar levels had been "out of whack" for the past six months. In contrast, the husband, who had to relocate to Texas with his employer, was a "wonderful father" and his parents, who would likely join him in Texas, had always served as the children's primary caregivers.

A parent's lifestyle or sexual relationships may be relevant. The past conduct of the parties and the unwillingness of one or the other to carry out their marital obligations is relevant. *Harrington v. Harrington*, 290 N.Y. 126, 48 N.E.2d 290 (1943), *motion dismissed* 291 N.Y. 637, 50 N.E.2d 1020 (1943). However, the question is not whether the court approves or condones the parent's activities but whether the children are adversely affected by the parent's activities, i.e., the children's emotional or moral development is adversely affected or the children themselves are not properly cared for due to the parent's lack of attentiveness. *See, e.g., Zavasnik v. Zavasnik*, 59 A.D.2d 954, 399 N.Y.S.2d 483 (3rd Dept. 1977); *Frank F. v. Geraldine F.*, 53 A.D.2d 1000, 386 N.Y.S.2d 127 (3rd Dept. 1976); *S. v. J.*, 81 Misc.2d 828, 367 N.Y.S.2d 405 (Sup.Ct. Kings County 1975).

A single act of adultery does not preclude the erring party from obtaining custody. *People ex. rel Wasserberger v. Wasserberger*, 42 A.D.2d 93, 345 N.Y.S.2d 46 (1st Dept. 1973), *affirmed*, 34 N.Y.2d 660, 335 N.Y.S.2d 580, 311 N.E.2d 651 (1974); *Pawelski v. Buchholtz*, 91 A.D.2d 1200, 459 N.Y.S.2d 190 (4th Dept. 1983); *Saunders v. Saunders*, 60 A.D.2d 701, 400 N.Y.S.2d 588 (3rd Dept. 1977); *Sheil v. Sheil*, 29 A.D.2d 950, 289 N.Y.S.2d 86 (2nd Dept. 1968). However, an affair of an extended duration warrants greater scrutiny and greater consideration. *People*

*ex. rel Wasserberger v. Wasserberger, supra*. Thus, where the wife engaged in an affair for over one year, invited her paramour to spend time in the marital home in the presence of the children, used the marital bedroom with her paramour, falsely denied the affair, and often left the children to be with her paramour, the court concluded that custody should have been awarded to the husband given the wife's inclination to subordinate the children's needs to her own. *Dornbusch v. Dornbusch*, 110 A.D.2d 808, 488 N.Y.S.2d 229 (2nd Dept. 1985), *appeal dismissed*, 65 N.Y.2d 1024, 494 N.Y.S.2d 304, 484 N.E.2d 667 (1985), *appeal denied*, 65 N.Y.2d 609, 494 N.Y.S.2d 1029, 484 N.E.2d 672 (1985); *see also Mollo v. Mollo*, 110 A.D.2d 686, 487 N.Y.S.2d 604 (2nd Dept. 1985); *People ex rel. Newitt v. Newitt*, 117 N.Y.S.2d 711 (Sup.Ct. N.Y. County) (1st Dept. 1952).

In *Church v. Church*, 238 A.D.2d 677, 656 N.Y.S.2d 416 (3rd Dept. 1997), the court affirmed the grant of custody to the father based upon the mother's inappropriate conduct and lifestyle. In that case, the mother had an adulterous affair. After the father moved out of the marital home, he arrived one day and found the mother getting dressed and her paramour in her bedroom getting dressed while the child was sitting in the adjacent hallway. While the mother denied that she was engaged in any sexual activity in the presence of her son, she admitted that she recognizes that the child may have been confused about the fact that another adult male, other than the father, was staying overnight. Further, the mother moved to a new apartment without notifying the father, his parents or her parents of her or the child's whereabouts for approximately two weeks. In addition, the mother's new apartment was unwholesome with dirty dishes, garbage, animal feces and cockroach problems. The Appellate Division held that the Family Court's credibility determination in favor of the father should not be disturbed and that the record supported the conclusion that the mother had placed her own interests ahead of those of the child.

A greater degree of scrutiny is also warranted where extramarital conduct occurred during the marriage as opposed to sexual activity engaged in by a parent who has been formally separated or divorced from the other parent. *See S. v. J.*, 81 Misc.2d 828, 367 N.Y.S.2d 405 (Sup.Ct. Kings County 1975). Indeed, divorced persons have a constitutional right of privacy which encompasses the right to engage in private sexual activities which do not involve or affect their children. *Feldman v. Feldman*, 45 A.D.2d 320, 358 N.Y.S.2d 507 (2nd Dept. 1974); *see also Opferbeck v. Opferbeck*, 57 A.D.2d 1074, 395 N.Y.S.2d 831 (4th Dept. 1977), *appeal denied* 42 N.Y.2d 810, 399 N.Y.S.2d 1025, 369 N.E.2d 774 (1977). On the other hand, extramarital relationships, which are proscribed by criminal law, are not legally sanctioned and have different moral and legal implications.

Where the child is aware of an adulterous relationship and that awareness is deemed detrimental to the child's emotional development, or the child is found to be neglected by reason of the unavailability of the adulterous parent, custody may be denied to that parent. *People ex rel. Bishop v. Bishop*, 34 A.D.2d 834, 312 N.Y.S.2d 87 (2nd Dept. 1970); *Matter of Dawn Marie T.*, 36 A.D.2d 665, 318 N.Y.S.2d 110 (3rd Dept. 1971); *Matter of Anonymous*, 37 Misc.2d 411, 238 N.Y.S.2d 422 (Fam.Ct. Rensselaer County 1962); *see Dornbusch v. Dornbusch*, 110 A.D.2d 808, 488 N.Y.S.2d 229 (2nd Dept. 1985), *appeal dismissed*, 65 N.Y.2d 1024, 494 N.Y.S.2d 304, 484 N.E.2d 667 (1985), *appeal denied* 65 N.Y.2d 609, 494 N.Y.S.2d 1029, 484 N.E.2d 672 (1985). Thus, in *Mollo v. Mollo*, 110 A.D.2d 686, 487 N.Y.S.2d 604 (2nd Dept. 1985), an award of custody to the father was sustained where, among other things, the mother, during the marriage, became reunited with a former boyfriend, and announced her intention to marry the boyfriend and raise his family, and agreed to allow the father to have custody of the parties' daughter. On that record, it was found that the trial court had not unduly concerned itself with the moral implications of the mother's conduct. Likewise, in *Zavasknik v. Zavasknik*, 59 A.D.2d 954, 399 N.Y.S.2d 483 (3rd Dept. 1977), custody was awarded to the father where the mother, at the time the marriage was deteriorating, would go out four or five evenings each week and would not return until the morning hours, the father cared for and attended to the children during that time, and the mother engaged in extra-marital sexual activities with a parolee who had been connected with a felony murder.

Where a parent had a homosexual relationship in the home in which the child also resided, and the child was found to have been emotionally disturbed by this conduct, the parent was found to be unfit. *Matter of Jane B.*, 85 Misc.2d 515, 380 N.Y.S.2d 848 (Sup.Ct. Onondaga County 1976); accord, *DiStefano v. DiStefano*, 60 A.D.2d 976, 401 N.Y.S.2d

636 (4th Dept. 1978). On the other hand, where the evidence disclosed that the children did not see or comment upon sexual explicit material kept in the house by the mother and the children were well provided for emotionally and physically, the atmosphere of the home was happy, the premises were well kept and comfortable, and the mother was sincerely concerned and devoted to the children, she was not regarded as an unfit parent. *Feldman v. Feldman*, 45 A.D.2d 320, 358 N.Y.S.2d 507 (2nd Dept. 1974); see also *Spada v. Spada*, 47 A.D.2d 586, 363 N.Y.S.2d 161 (4th Dept. 1975).

While the foregoing discussion has focused on the impact a parent's sexual conduct may have upon the determination of custody, the way that a parent responds to the child's sexual conduct or issues may impact upon the determination as well. In *Denise AA v. David AA*, 237 A.D.2d 680, 654 N.Y.S.2d 842 (3rd Dept. 1997), the court held that the mother's handling of the sexual relationship of the parties' elder daughter was not so inappropriate as to warrant granting the father custody of the younger daughter. The older daughter, approximately age 14, developed a sexual relationship with a boy a year older whom she had dated several months prior to the parties' separation. The mother allowed the boyfriend to sleep on the living room sofa about once a week while the daughter slept upstairs in her room and occasionally allowed them to sleep in the same room. The mother claimed that she told her daughter that she was too young to be engaging in sexual activity, but because the mother was concerned about the daughter's engaging in unprotected sex, she agreed to take her to the gynecologist. Significantly, the father's own therapist testified that the parent of a sexually active child needs to look into birth control. Although the mother did not exercise prudent judgment in allowing her daughter and her boyfriend to occasionally sleep in the same room, her handling of the discovery of her teenage daughter's sexual activity did not substantiate that the younger child would be at risk in the physical custody of the mother. Of interest, the mother was dating the father of the older daughter's former boyfriend and planned on moving into her boyfriend's home at some point with her two daughters. Clearly, the situation of the older daughter's living in the same house with her former boyfriend might be uncomfortable, a fact cited by the father in seeking custody. However, the court concluded that there was insufficient proof to indicate that any stress caused by the older daughter's living in the same house as her former boyfriend would be so severe as to traumatize the well-being of either of the parties' children.

A parent's addiction to narcotics or alcoholism may be considered in determining the fitness of that parent and the suitability of the home that the parent can provide. Indeed, a parent who suffers from narcotics addiction or alcoholism may be denied custody and past substance abuse may warrant denial of custody even to a parent who has been rehabilitated. See *Matter of F*, 76 Misc.2d 617, 351 N.Y.S.2d 337 (Surr.Ct. N.Y. County 1974); *Matter of "John" Children*, 61 Misc.2d 347, 306 N.Y.S.2d 797 (Fam.Ct. N.Y. City 1969); *Darlington v. Cobb*, 135 Misc. 668, 239 N.Y.S. 301 (Sup.Ct. N.Y. County 1930).

The associations that the parent maintains with third parties may be relevant on the question of fitness. In *Kelly v. Kelly*, 53 A.D.2d 884, 385 N.Y.S.2d 625 (2nd Dept. 1976), although an award of permanent custody to the father was reversed due to a highly prejudicial ex parte communication sent to the court by the husband's counsel, custody was continued temporarily in the father due to the mother's relationship with persons accused of criminal conduct. Likewise, in *Zavasknik v. Zavasknik*, 59 A.D.2d 954, 399 N.Y.S.2d 483 (3rd Dept. 1977), custody was awarded to the father where the mother, among other things, had engaged in an extramarital affair with a parolee who been connected with a felony murder.

#### **C240:10A: Domestic Violence and Child Abuse**

One specific factor that the statute requires be considered is the issue of domestic violence. An emerging trend in custody cases nationally is the recognition that abuse or violence perpetrated by one of the parents against the other or a child is a legitimate factor for the court to consider in making its custody determination. New York has followed suit in its case law and by statute.

Before even making a permanent, or even the initial temporary order of custody or visitation, the court is required to review related decisions in any Family Court Article 10 (child protective) proceedings, review all warrants issued under the Family Court Act, and review the reports of the state-wide computerized registry of orders of protection and the reports of the sex-offender registry. DRL § 240 (subd. a-1)(1, 3). However, if there is an emergency, such as a computer malfunction, the court may make a temporary order, provided it reviews the reports within 24 hours. DRL § 240 (subd. a-1)(5, 6).

It has long been held that a child has been physically or verbally abused by a parent, that parent may be found to be an unfit custodian for the child. *See, e.g., Van Hoesen v. Van Hoesen*, 186 A.D.2d 903, 590 N.Y.S.2d 139 (3rd Dept. 1992); *Hall-Crosby v. Skinner*, 182 A.D.2d 1136, 583 N.Y.S.2d 101 (4th Dept. 1992); *Farnella v. Farnella*, 53 A.D.2d 1047, 386 N.Y.S.2d 161 (4th Dept. 1976); *La Veglia v. La Veglia*, 54 A.D.2d 727, 387 N.Y.S.2d 683 (2nd Dept. 1976). *Mantell v. Mantell*, 45 A.D.2d 918, 357 N.Y.S.2d 307 (4th Dept. 1974). Thus, in *McAteer v. McAteer*, 55 A.D.2d 777, 389 N.Y.S.2d 491 (3rd Dept. 1976), where the mother had pled guilty to sexual abuse of minors, custody was awarded to the father, though the mother's mental and emotional condition had improved. *See also Glantz v. Glantz*, 85 A.D.2d 655, 445 N.Y.S.2d 225 (2nd Dept. 1981); *Meltzer v. Meltzer*, 38 A.D.2d 522, 326 N.Y.S.2d 831 (1st Dept. 1971).

By statute, DRL § 240 (subd. 1), the court is required to consider the effect of domestic violence upon the best interests of the child in determining custody or visitation. In order for domestic violence to be considered under the new statute, the party seeking to have the abuse considered must allege in a sworn pleading that the other party has committed an act of domestic violence against the complaining party or a member of his or her family or household. The allegation standing alone is not enough; the allegation must be proven by a preponderance of the evidence. But, even if the allegations are proven, the fact of the domestic violence is not, by itself, determinative of the custody question. The revised statute requires the court to consider the domestic violence “together with such other facts and circumstances as the court deems relevant in making a direction....” The court must explain in its decision, on the record, how the findings, facts and circumstances factored into the determination.

It appears from the statute that it is not sufficient to merely make a generalized allegation of domestic violence. The allegation should be specific enough to enable the party being charged to have notice of the incident or incidents which are the subject of the charge.

The statute provides for the allegation, if made by a plaintiff or petitioner, to be set forth in a sworn complaint or petition. It also permits the allegation, where made by a defendant or respondent, to be set forth in a sworn answer, cross-petition, counterclaim or “other sworn responsive pleading”. It is apparently not sufficient for either party to make the allegation in an affidavit, such as an affidavit submitting on a *pendente lite* motion. Since allegations may be made in a wide variety of motions, the statutory insistence upon the allegation of domestic violence being asserted in a pleading is to make sure that the attention of the court and the other party is specifically drawn to that claim.

The statute does not specifically prohibit the court from considering acts of domestic violence which have not been specifically alleged in a pleading, or in an affidavit. Since the court's focus is in the best interests of the child, the court should ordinarily permit evidence to be offered, as bearing on that question, even if not properly alleged. In custody matters generally, there is no requirement that evidentiary matters be affirmatively pleaded. In the area of domestic violence, however, it appears that the Legislature was concerned that persons charged with abusive acts be afforded full notice in order to properly defend the charges. In order to balance the need to decide the custody of children with the fullest record with the right of a parent to notice of allegations of abuse, the court should, before receiving evidence of unpleaded domestic violence, require an offer of proof and, only if the acts are of sufficient gravity, should the court allow the evidence. If the court does allow the evidence, the court may grant a continuance to the charged party in order to give him or her time to prepare to meet the charge. Further, it may be that, by the very nature of the charge, the charged party may be aware of the incident or allegation and not require any further notice.

In *E.R. v. G.S.R.*, 170 Misc.2d 659, 648 N.Y.S.2d 257 (Family Court Westchester County 1996), the court, following the statute, took into account domestic violence which had been alleged by the mother in her petition and which the father, to a certain extent, admitted. In *Griffen v. Evans*, 235 A.D.2d 720, 652 N.Y.S.2d 380 (3rd Dept. 1997), the court, without reference to the statute, took into account that the mother had been involved in abusive relationships, one of which resulted in her being physically abused in front of her children and, more disturbingly, led to one of the children's being struck by the individual in question on more than one occasion over a two-year period. *See also P. v. P.*, 240 A.D.2d 583, 659 N.Y.S.2d 55 (2nd Dept. 1997) (sexual abuse by father held to be established; supervised visitation directed).

In *J.D. v. N.D.*, 170 Misc.2d 877, 652 N.Y.S.2d 468 (Family Court Westchester County 1996), the court held that the statutory reference to domestic violence is not confined to physical abuse, but includes psychological assault. In that case, the court concluded that the overwhelming evidence of psychological and other forms of abuse inflicted by the father upon the mother showed that it would not be in the child's best interests to place him in the father's care and custody.

The statute also provides that, if child abuse is established, the court is consider that circumstance in determining visitation. The statute prohibits the court from placing a child in the custody of a parent who presents a substantial risk of harm to the child. The court is to state in its decision, on the record, how the findings of abuse were factored into the determination.

In the past decade, increased attention has focused on the horrors of child abuse and on efforts to effectively deter and prosecute incidents of abuse. As part of the means for addressing the problem of child abuse, the Legislature has encouraged reporting of cases of suspected child abuse and maltreatment. The state has established a statewide central register of child abuse and maltreatment reports. The register is capable of receiving telephone reports, every hour of every day, seven days per week. The operation of the register, the nature of the reports maintained, and the persons and officials to whom the reports may be disclosed is regulated by [Section 422 of the Social Services Law](#). As noted previously, the court is required to review these reports prior to making a permanent or even an initial temporary order of custody.

Records of reports maintained by the central register may be admissible in evidence under the business records exception to the hearsay rule. *See CPLR 4518*. However, not every report to the register is investigated and not every investigated report is found to have merit. Under the provisions of the Social Services Law, a report found to have merit is termed an "indicated" report, meaning that an investigation has determined that there is some credible evidence of the alleged abuse or maltreatment. *See Social Services Law, § 412 (subd. 12)*.

Concern has been expressed that a custody litigant may, without foundation, report a claim of abuse or maltreatment to the register and then use the mere existence of the report to support his or her claim for custody. To counter the possibility that the reporting system might be so abused, the Legislature has established ground rules for the admissibility of child abuse reports made to the central register.

Under DRL § 240, subdivision 1-a, and [Family Court Act § 651-a](#), a report made to the central register is not admissible unless the report has been investigated, and the determination made that the report is supported by some credible evidence, and the subject of the report so notified. This requirement dovetails with the procedures set out in [Section 422 of the Social Services Law](#). Under that Law, when the subject of a report is notified that the report has been found indicated, the subject has the right to seek expungement of the report, a process which may lead to a fair hearing as to the accuracy of the report.

The statutory provisions protect the subject from the danger that an unfounded or uninvestigated charge of abuse will be bolstered by the mere fact that a report of the allegation has been made to the register. The subject loses the statutory shield only if the report is investigated and found to be indicated. However, at that point, the subject may resort to the procedures of the Social Services Law governing expungement and hearings.

The statutes do not bar the receipt into evidence of an indicated report as to which expungement proceedings are pending. Thus, the mere fact that the subject has asked for expungement or a hearing does not preclude the receipt of the report into evidence.

The subject of a report may ask the Commissioner of Social Services to expunge the report. If that request is denied, the subject then has a right to a fair hearing on the accuracy of the report. [Social Services Law, § 422 \(subd. 8\)](#). If the Commissioner, or his or her designee, expunges the report, the report is not admissible in evidence. Dom.Rel.L. § 240 (subd. 1-a). If the Commissioner does not expunge the entire report, but does delete some of the findings, the deleted findings are not admissible, and only the balance of the report is admissible. Conversely, if the Commissioner adds new findings, those new findings, together with any undeleted portions of the original report, are admissible in evidence, if the documents qualify as business records under [CPLR 4518](#).

In some rather ambiguous language, subdivision 1-a of Section 240 provides that, if such a report, or portions of it, are admissible but uncorroborated, the mere making of the report by itself is not sufficient to make a fact finding of abuse or maltreatment. What would be needed is any other evidence tending to support the reliability of the report. This language is murky since the report is admissible only if found to be supported by some credible evidence; the finding that there is some credible evidence to support the report would seemingly be sufficient to corroborate it. What the statute, at bottom, seems to be addressing is the situation where there is a single person as the only source for the report. Where that witness is found credible, the report may be found indicated without corroboration from any other source. Where the only source for the report is a litigant to the custody proceeding, the lack of corroboration presents the danger that the credibility finding made by the investigators will be used to bolster the credibility of the litigant's trial testimony. It is to prevent such bootstrapping that the statute requires some other evidence.

The corroboration requirement is not a heavy one. All that it takes is some other evidence tending to support the reliability of the report. By "other" evidence, the statute has in mind evidence from a source other than the single source upon which the report was founded. The evidence need not corroborate the incident of abuse itself; the corroboration requirement is satisfied if there is evidence that merely tends to support the "reliability" of the report.

All of this pertains only to the admissibility of the abuse or maltreatment report. Competent evidence of the underlying incident is not restricted by this statute.

It has been held that parents who make false allegations of abuse may also be unfit to act as the custodial parent. [Karen P.P. v. Clyde Q.Q.](#), 197 A.D.2d 753, 602 N.Y.2d 709 (3d Dept. 1993) (mother programmed child to make false accusations of abuse so that she would be awarded custody); [Beyer v. Tranelli-Ashe](#), 195 A.D.2d 972, 600 N.Y.S.2d 598 (4th Dept. 1993) (unfounded reports accusing father of physically and sexually abusing the children); *see also* [Young v. Young](#), 212 A.D.2d 114, 628 N.Y.S.2d 957 (2nd Dept. 1995). However, the filing of unfounded petitions charging the other parent of sexual abuse would not, *per se*, result in that parent's loss of custody, particularly where the accusing parent is found to be the better parent and able to provide a better home environment for the children. *See* [Graci v. Graci](#), 187 A.D.2d 970, 590 N.Y.S.2d 377 (4th Dept. 1992). Because parents may be deflected from making *bona fide* reports of abuse out of fear that, if the report is not validated, the reporting parent could be prejudiced in custody or visitation litigation, the statute now provides a safe harbor for good faith allegations. If a parent makes a good faith allegation--that is, has a reasonable belief supported by facts that the child is the victim of child abuse, child neglect or the effects of domestic violence--and the parent acts lawfully and in good in response to that belief

by protecting the child, or seeking treatment for the child, then that parent is not to be deprived of, or restricted in, custody, visitation or contact with the child, based solely on that belief or reasonable actions taken based on that belief.

#### **C240:10B: No Custody or Visitation to Murderer of Parent or Sibling**

Pursuant to subdivision 1-c to Section 240 of the Domestic Relations Law, persons who have murdered a parent, legal custodian or legal guardian, sibling, half-sibling, or step-sibling of a child are precluded from having custody or visitation with the child, unless certain conditions are met. The purpose of the statute is to prevent a person, interested in obtaining custody or visitation with a child, from gaining that objective by killing the other parent or the child's custodian or guardian. This includes preventing a child from having to live or visit with a person who killed his or her brother or sister. The murder of a brother or sister is just as devastating to a child as the murder of a parent, and just as disruptive of the nuclear family.

The preclusion takes effect upon conviction of murder in the first or second degree in New York, or upon conviction in another jurisdiction of an offense which, if committed in New York, would constitute first or second degree murder. Indeed, while custody or visitation proceedings are pending, the convicted murderer may not visit with the child nor may any other person visit with the child if the convicted murderer is present, unless the child's custodian or legal guardian consents.

Custody or visitation may be awarded to the convicted murderer where the child is of suitable age to signify consent and the child does indeed consent or, if the child is not of sufficient age to consent, but the custodian or legal guardian consents. Custody or visitation may also be awarded if the convicted murderer establishes, by a preponderance of the evidence that: (1) he or she, or a family member or household member, was a victim of domestic violence committed by the person who was murdered; (2) the domestic violence was causally related to the commission of the murder; and (3) the court finds that custody or visitation is in the child's best interests. In deciding the last three points, the court is not bound by the findings of fact or conclusions of law in proceedings leading to the conviction. DRL § 240 (subd. 1-c).

#### **C240:11: Stability and Long-Term Fixation of Custody**

In assessing the best interests of children, the New York courts have established a firm policy of fixing custody of children on a long-term basis. E.g., *Obey v. Degling*, 37 N.Y.2d 768, 375 N.Y.S.2d 91, 337 N.E.2d 601, (1975); *Dintruff v. McGreevy*, 34 N.Y.2d 887, 359 N.Y.S.2d 281, 316 N.E.2d 716 (1974); *Aberbach v. Aberbach*, 33 N.Y.2d 592, 347 N.Y.S.2d 456, 301 N.E.2d 438 (1973); *Nierenberg v. Nierenberg*, 43 A.D.2d 717, 350 N.Y.S.2d 437 (2nd Dept. 1973), *affirmed* 36 N.Y.2d 850, 370 N.Y.S.2d 915, 331 N.E.2d 693 (1975); *Application of Lang*, 9 A.D.2d 401, 193 N.Y.S.2d 763 (1st Dept. 1959), *affirmed* 7 N.Y.2d 1029, 200 N.Y.S.2d 71, 166 N.E.2d 861 (1960); *Becker v. Ball*, 61 A.D.2d 884, 403 N.Y.S.2d 373 (4th Dept. 1978). The purpose of this principle is to prevent children from being shuttled back and forth between divorced parents. *Obey v. Degling*, *supra*. Raising a child requires greater stability than a “roller-coaster treatment of custody”. *Dintruff v. McGreevy*, *supra*. There is an abundance of case law holding that stability in a child's life is of paramount concern and is in the best interests of the child. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982); *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982); *Dintruff v. McGreevy*, *supra*; *Corradino v. Corradino*, 64 A.D.2d 320, 410 N.Y.S.2d 174, (3rd Dept. 1978), *affirmed* 48 N.Y.2d 894, 424 N.Y.S.2d 886, 400 N.E.2d 1338 (1979). However, while stability is an important consideration, the disruption that change would bring about is not necessarily conclusive. *See Matter of Louise E.S. v. W. Stephen S.*, 64 N.Y.2d 946, 488 N.Y.S.2d 637, 477 N.E.2d 1091 (1985).

While application of this principle is of particular relevance in the modification context, the principle bears upon initial determinations as well. Thus, in *People ex. rel Wasserberger v. Wasserberger*, 42 A.D.2d 93, 345 N.Y.S.2d

46 (1st Dept. 1973), *affirmed* 34 N.Y.2d 660, 335 N.Y.S.2d 580, 311 N.E.2d 651 (1974), where the children resided with the father for only three months pursuant to a voluntary agreement, it was held to be error to change custody absent proof of the unfitness of the father. Likewise, in *Meirowitz v. Meirowitz*, 96 A.D.2d 1030, 466 N.Y.S.2d 434 (2nd Dept. 1983), the court held that the husband, by moving out of the marital residence and leaving the child with the wife, had implicitly agreed that the wife should be the custodial parent and, therefore, custody would not be transferred to him absent proof of her unfitness as a parent.

#### **C240:12: Financial Status of Parents**

In determining the issue of custody, each parent's financial position and status may be considered. See *Wallinger v. Wallinger*, 96 A.D.2d 988, 466 N.Y.S.2d 826 (3rd Dept. 1983); *McIntosh v. McIntosh*, 87 A.D.2d 968, 451 N.Y.S.2d 200 (3rd Dept. 1982); see also *Salk v. Salk*, 89 Misc.2d 883, 393 N.Y.S.2d 841 (Sup.Ct. N.Y. County 1975), *affirmed* 53 A.D.2d 558, 385 N.Y.S.2d 1015 (1st Dept. 1976). Thus, custody may be awarded to the parent who is better financially equipped to care for the child's upbringing and education. *Ex parte Kordes*, 52 N.Y.S.2d 410 (Sup.Ct. Nassau County 1944). However, that one parent can offer the child more material advantages than the other parent is not controlling. *People ex rel. Mahoff v. Matsoui*, 139 Misc. 21, 247 N.Y.S. 112 (Sup.Ct. N.Y. County 1931). Thus, in one case, it was held that the fact that the father's fortune was large, or that he could afford to provide his nine year old daughter with expensive aids to education and social opportunities beyond what the mother could furnish was not a sufficient reason, by itself, to award him custody. *Lester v. Lester*, 178 A.D. 205, 165 N.Y.S. 187 (2nd Dept. 1917), *affirmed* 222 N.Y. 546, 118 N.E. 1065 (1917). Where one parent can provide the child with proper support and an award of custody to that parent is in the child's best interests, that the other parent can provide more economic, social, and educational advantages is not determinative. *D'Alessandro v. Parisi*, 60 A.D.2d 897, 401 N.Y.S.2d 531 (2nd Dept. 1978); *Metz v. Morley*, 29 A.D.2d 462, 289 N.Y.S.2d 364 (4th Dept. 1968).

Financial advantages offered by one parent are entitled to relatively little weight, where the less affluent spouse is capable of providing at least an adequate home for the child. This is because the best interests of the child is not primarily determined by a luxurious standard of living but by subjective influences which have no dollar value. *Matter of Alaimo*, 36 Misc.2d 759, 233 N.Y.S.2d 508 (Sup.Ct. Monroe County 1962). Furthermore, the less affluent spouse may be able to obtain additional funds for the support of the child and for his or her own support by means of an award of child support and maintenance. Moreover, with the advent of equitable distribution, marital property may be equitably divided between the spouses. In *Davis v. Davis*, 240 A.D.2d 928, 658 N.Y.S.2d 548 (3rd Dept. 1997), the court affirmed an award of custody to the less affluent parent based on the totality of the circumstances.

The foregoing discussion has concerned the situation where one parent offers economic advantages that surpass the more modest, but adequate, environment that the other parent can provide. Where one parent lacks the ability to provide a permanent or suitable home for the child or lacks a firm source of income, custody may be denied that parent. *Young v. Roe*, 265 A.D. 858, 37 N.Y.S.2d 714 (2nd Dept. 1942), *affirmed* 290 N.Y. 823, 50 N.E.2d 235 (1943). However, economic inadequacy may be less significant where the other factors warrant placement of custody in the more economically disadvantaged spouse and a child support award can be made to assure proper support for the child. See *Salk v. Salk*, 89 Misc.2d 883, 393 N.Y.S.2d 841 (Sup.Ct. N.Y. County 1975), *affirmed*, 53 A.D.2d 558, 385 N.Y.S.2d 1015 (1st Dept. 1976). The lack of a suitable home environment, thus, may be more critical where caused by emotional or psychological ailments rather than by a lack of funds.

#### **C240:13: Gender and Religion of Children**

Although there is no *prima facie* right to custody in either parent and the former presumption that custody of children of tender years should be granted to the mother has been eroded, there was remaining tendency to consider the gender of the children in determining the issue of custody. In particular, there had been a pronounced preference toward

awarding custody of daughters to their mothers. See *People ex rel. Mahoff v. Matsoui*, 139 Misc. 2d 21, 247 N.Y.S. 112 (Sup.Ct. N.Y. County 1931). The rationale for this preference was that, where the mother is otherwise a fit parent, a female child should have the guidance and assistance of her female parent during her formative years of development. Moreover, there was some tendency to conclude that a male parent may not be as capable of understanding and providing guidance to a female child as the female parent would be. In more contemporary times, such considerations are now longer appropriate. Generalizations which are based upon gender should be eschewed; the focus should be on the particular needs of the child at issue and the particular abilities of the parents at issue. Where other factors support the initial award of custody of a female child to her father, the award may be made without having to establish that the mother is unfit. See *Arcarese v. Monachino*, 58 A.D.2d 1030, 397 N.Y.S.2d 284 (4th Dept. 1977), appeal denied 42 N.Y.2d 810, 399 N.Y.S.2d 1025, 369 N.E.2d 774; *Pact v. Pact*, 70 Misc.2d 100, 332 N.Y.S.2d 940 (Family Ct. Queens County 1972).

There was, historically, less sensitivity regarding the award of custody of male children to the female parent. However, the need of a male child for masculine identification, it was said, together with other factors, to warrant the grant of custody to the father. See *Lee v. Lee*, 92 Misc.2d 551, 400 N.Y.S.2d 680 (Sup.Ct. N.Y. County 1977). However, such considerations are no longer appropriate, with the proper focus being on the particular needs of the child at issue and the particular abilities of the parents involved.

In *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879 (1984), the Court held that it was constitutionally impermissible to base a custody determination solely on race.

Prior to *Palmore*, in *Farmer v. Farmer*, 109 Misc.2d 137, 439 N.Y.S.2d 584 (Sup.Ct. Nassau County 1981) presented a dispute over the custody of a six year old girl who was the product of the inter-racial marriage between her white mother and black father. The father argued that custody should be awarded to him since society would perceive the child as black and, therefore, her best interests required that she be raised by the black parent. The court concluded that race was merely one of many factors to be considered and was not a dominant, controlling or crucial factor. The court found the mother to be the more stable parent, both emotionally and economically. She was found to be a competent, caring, warm and stable parent who had met the child's educational and emotional needs. Further, both probation and forensic reports by governmental agencies recommended that custody be placed in the mother. Accordingly, the court awarded custody to the mother.

*Farmer* was cited with approval in *Davis v. Davis*, 240 A.D.2d 928, 658 N.Y.S.2d 548 (3rd Dept. 1997), which involved a similar set of facts. In *Davis*, a black husband contended that his home, consisting of himself, his white paramour, and their biracial son, would be the more appropriate environment for the biracial child he had with his wife, as opposed to his wife's all-white household. However, the father's expert witness opined that, although it makes sense for a child to be raised in an environment that reflects his or her cultural heritage, a biracial child could just as easily be raised in a white household as long as the parent was loving and nurturing. The Appellate Division held that the Family Court had correctly evaluated the child's best interests in awarding custody to the mother based on the totality of the circumstances. While the father had positive attributes, including his superior financial situation, the mother was held to be the better choice as custodian. According to the Appellate Division, the evidence showed that the father had a low tolerance for frustration, was somewhat controlling, was unwilling to compromise and was easily agitated. On the other hand, the mother was found to be more flexible in dealing with the child's day-to-day requirements, had a strong attachment to him and had provided him with a greater continuity of care.

The general policy of the law with respect to the religious upbringing of children is one of noninterference with the determination of the child, if of suitable age and intelligence. If the child is not of sufficient age and intelligence, the parent having custody of the child, either by agreement or court order, is entitled to determine the child's religious upbringing. *Paolella v. Phillips*, 27 Misc.2d 763, 209 N.Y.S.2d 165 (Sup.Ct. Suffolk County 1960). Thus, the parent having custody, in the absence of special circumstances, may be allowed to raise the children in his or her own

religion, even after the custodial parent has converted to another religion. See, e.g., *Jabri v. Jabri*, 193 A.D.2d 782, 598 N.Y.S.2d 535 (2nd Dept. 1993); *DeArakie v. DeArakie*, 172 A.D.2d 398, 568 N.Y.S.2d 778 (1st Dept. 1991); *Mester v. Mester*, 58 Misc.2d 790, 296 N.Y.S.2d 193 (Sup.Ct. Nassau County 1969); *Romano v. Romano*, 54 Misc.2d 969, 283 N.Y.S.2d 813 (Family Ct. Kings County 1967). Once the child has attained sufficient age and intelligence, however, the right of the child to make a choice for himself or herself must be respected. See *Martin v. Martin*, 308 N.Y. 136, 123 N.E.2d 812 (1954). The particular religious views of the parent do not generally preclude a custody determination. However, the court may change custody, or impose conditions upon a grant of custody, where the moral, mental, and physical conditions are such as to adversely affect the health and well-being of the child. *Paolella v. Phillips*, *supra*; *Mester v. Mester*, *supra*; *Weiss v. Weiss*, 53 Misc.2d 262, 278 N.Y.S.2d 61 (Sup.Ct. Rockland County 1967). Thus, in one case, custody of a child was awarded to a mother who was a Christian Scientist, on condition that the child have monthly examinations by a physician and receive necessary medical and surgical care. *Gluckstern v. Gluckstern*, 4 N.Y.2d 521, 176 N.Y.S.2d 352, 151 N.E.2d 897 (1958).

In determining the issue of custody, the religious faiths of the child and of the parties has a strong bearing on the issue of custody. However, it is not determinative; the court must also consider the other factors appropriate in a custody determination, such as the emotional stability of the parents, the place of rearing and the education of the child. *Agur v. Agur*, 32 A.D.2d 16, 298 N.Y.S.2d 772 (2nd Dept. 1969), *appeal dismissed*, 27 N.Y.2d 643, 313 N.Y.S.2d 866, 261 N.E.2d 903 (1970), *appeal dismissed*, 32 N.Y.2d 703, 343 N.Y.S.2d 607, 296 N.E.2d 458 (1973); *Aldous v. Aldous*, 99 A.D.2d 197, 473 N.Y.S.2d 60 (3 Dept. 1984), *appeal dismissed*, 63 N.Y.2d 674, 479 N.Y.S.2d 1029, 468 N.E.2d 713, *cert. denied* 105 S.Ct. 786, 83 L.Ed.2d 780. Article 6, section 32 of the New York State Constitution provides that when any court having jurisdiction over a child shall place it in the custody of any person, the child shall be placed, when practicable, in the custody of a person of the same religious persuasion as the child. However, this constitutional directive does not mandate that the child be placed with persons of the same religion as the child in every case. See *Starr v. De Rocco*, 24 N.Y.2d 1011, 302 N.Y.S.2d 835, 250 N.E.2d 240 (1969). In the cited case, the father of the children killed the mother and himself, and custody was sought both by father's brother and sister in law and by the mother's brother and sister in law. Custody was awarded to the father's relatives since they were of the same religious persuasion as the child.

When considering the question of a child's religious upbringing as a factor in a child custody determination or when called upon to interfere with the custodial parent's choice of religious upbringing for a child, the courts will consider the prior religious training of the child and the terms of any agreement between the parents relating to religious upbringing of their children. However, the child's prior religious upbringing and the terms of any agreement between the parents, while entitled to consideration, are not determinative. As always, the standard is the best interests of the child. *Ross v. Ross*, 4 Misc.2d 399, 149 N.Y.S.2d 585 (Sup.Ct. Erie County 1956); *Barry v. Glynn*, 59 Misc.2d 75, 297 N.Y.S.2d 786 (Family Court Bronx County 1969). Thus, in *Garver v. Faltings*, 54 A.D.2d 971, 389 N.Y.S.2d 32 (2nd Dept. 1976), where the father sought enforcement of a stipulation, incorporated by reference in but not merged into a judgment of divorce, which required the mother to use her best efforts to make the children practice Catholicism, the court denied enforcement, holding that the primary concern was the welfare of the children. Similarly, in *Schwarzman v. Schwarzman*, 88 Misc.2d 866, 388 N.Y.S.2d 993 (Sup.Ct. Nassau County 1976), the mother, a Catholic, converted to Judaism as a precondition to her marriage to the father and agreed to raise the children in the Jewish faith. The subsequent divorce between the parties awarded custody of the children to the mother. Upon the mother's remarriage to a Catholic, she disavowed her conversion to Judaism. The children then began to attend church and receive Catholic religious instruction. The husband applied to enjoin the mother from changing the religion of the children. The court, in denying relief, noted that the parties' pre-marriage oral agreement did not contemplate the situation presented by a divorce. Further, pre-marriage agreements regarding religious upbringing of children are enforceable only to the extent that the agreement provides for the best interests of the children and the terms of such agreements may be modified where the welfare of the child is not best served. As the mother was a fit and proper custodian, under the circumstances, it was appropriate for her to determine the religious education of the children. Additionally, it is to be noted that to grant the father the relief requested, without changing custody, would result in requiring the children

to be raised in a religion different from the rest of the members of their household. Such an arrangement would be, at best, awkward and possibly detrimental to the stability of the children, particularly if the mother and her second husband had children of their own.

Where an agreement is in place concerning the religious upbringing of the children, it is the burden of the party who wishes to avoid the agreement to demonstrate that the enforcement of the agreement does not accord with child's best interests. In *Perlstein v. Perlstein*, 76 A.D.2d 49, 429 N.Y.S.2d 896 (1st Dept. 1980), the father sought custody on the ground that the mother had failed to comply with the provisions of a separation agreement concerning the child's religious upbringing. The Appellate Division held that the trial court, in requiring the father to demonstrate that a change in custody was required by material change in circumstances, had misplaced the burden of proof. Rather, the Appellate Division ruled, the mother was required to show that observance of the religious guidelines specified in the agreement was detrimental to the child. See also *Gruber v. Gruber*, 87 A.D.2d 246, 451 N.Y.S.2d 117 (1st Dept. 1982).

Likewise, in *Spring v. Glawon*, 89 A.D.2d 980, 454 N.Y.S.2d 140 (2nd Dept. 1982), the court affirmed the granting of the father's application to enforce a divorce judgment which incorporated a stipulation which provided that the child would have no religious upbringing without the express written consent of both parties. Also affirmed was an order which directed the mother to remove the child from parochial school and to place the child either in public school or in a nonsectarian private school. Agreements, said the court, with respect to the religious and moral upbringing of children are valid, particularly when confirmed in a judgment of the court. While such agreements are not inviolate, the burden is on the party who would avoid the agreement to demonstrate that enforcement would not be in the child's best interest.

An order directing a divorced custodial parent to enroll her son in an after-school Hebrew school was held to be in the best interests of the child in *Grayman v. Hession*, 84 A.D.2d 111, 446 N.Y.S.2d 505 (3rd Dept. 1982). Although the custodial mother was a nonpracticing Catholic, she had consented to or acquiesced in Jewish religious training that the child had received since birth. In the absence of such continued religious training, the child would receive no religious instruction and the law guardian and investigating caseworker recommended the continuation of the religious training.

Where a custodial parent has established a choice of religious instruction for children which is consistent with the children's best interest, that choice may not be undermined by the noncustodial parent during periods of visitation. Thus, in *Bentley v. Bentley*, 86 A.D.2d 926, 448 N.Y.S.2d 559 (3rd Dept. 1982), the court affirmed an order prohibiting the father from instructing the children in the teachings of Jehovah's Witnesses and from taking the children to the sect's religious or social functions during visitation. The custodial mother was Catholic and the trial court found that the children were emotionally strained and torn as a result of being positioned between conflicting religious beliefs. Since it is the general rule that the custodial parent is the appropriate person to determine the religious upbringing of children, the trial court was found not to have abused its discretion by deciding that the children's best interests required that they be reared in only one religion.

Likewise, religious upbringing was an important consideration in *Matter of Friedman*, 84 A.D.2d 258, 446 N.Y.S.2d 267 (1st Dept. 1982), which involved a custody dispute between a mother and grandparents over a 15-year-old boy. The grandparents were not unfit, the boy desired to live with his grandparents and follow their religious beliefs, and the only real objection to the placement of the boy with the grandparents was their orthodox beliefs as against the mother's more worldly approach.

#### **C240:14: Separation of Siblings**

A factor in a custody determination is whether the custody arrangements under consideration would separate siblings. Courts should be reluctant to separate siblings since young brothers and sisters need each other's strengths and

association in their everyday and often common experiences and to separate them unnecessarily would likely be traumatic and harmful. *Obey v. Degling*, 37 N.Y.2d 768, 375 N.Y.S.2d 91, 337 N.E.2d 601 (1975); see also *Fountain v. Fountain*, 83 A.D.2d 694, 442 N.Y.S.2d 604 (3rd Dept. 1981), *affirmed*, 55 N.Y.2d 838, 447 N.Y.S.2d 703, 432 N.E.2d 596 (1982). Thus, while it is not absolutely required that siblings remain together, the stability and companionship to be gained by keeping them together is an important factor for the court to consider. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982); see *Walden v. Walden*, 112 A.D.2d 1035, 492 N.Y.S.2d 827 (2nd Dept. 1985). Accordingly, split custody of siblings is not warranted unless the necessity for the separation of siblings is clearly demonstrated by the specific circumstances of individual cases. *Ebert v. Ebert*, 38 N.Y.2d 700, 382 N.Y.S.2d 472, 346 N.E.2d 240 (1976); *Application of Lang*, 9 A.D.2d 401, 193 N.Y.S.2d 763 (1st Dept. 1959), *affirmed*, 7 N.Y.2d 1029, 200 N.Y.S.2d 71, 166 N.E.2d 861 (1960); *Klat v. Klat*, 176 A.D.2d 922, 575 N.Y.S.2d 536 (2nd Dept. 1991); *Bistany v. Bistany*, 66 A.D.2d 1026, 411 N.Y.S.2d 728 (4th Dept. 1978).

Split custody will not be ordered absent “overwhelming need”. *White v. White*, 209 A.D.2d 949, 619 N.Y.S.2d 428 (4th Dept. 1994). Specifically, separation of siblings is indicated where such separation is in their best interests or where the product of the expressed wishes of children, provided that they are of sufficient age and intelligence. See *Johnson v. Johnson*, 202 A.D.2d 584, 609 N.Y.S.2d 81 (2nd Dept. 1994); *Mitzner v. Mitzner*, 209 A.D.2d 487, 619 N.Y.S.2d 51 (2nd Dept. 1994); *People ex rel Repetti v. Repetti*, 50 A.D.2d 913, 377 N.Y.S.2d 571 (2nd Dept. 1975); *Sandman v. Sandman*, 64 A.D.2d 698, 407 N.Y.S.2d 563 (2nd Dept. 1978), *appeal denied*, 46 N.Y.2d 705, 413 N.Y.S.2d 1026, 385 N.E.2d 1303; *Porges v. Porges*, 63 A.D.2d 712, 405 N.Y.S.2d 115 (2nd Dept. 1978), *appeal denied*, 45 N.Y.2d 710, 409 N.Y.S.2d 1029, 381 N.E.2d 616. Thus, while it is generally best to keep siblings together, the stability inherent in continuing a custodial arrangement which has fostered a happy, intelligent child who was thriving in school, has held to override the consideration of sibling companionship. *People ex. rel Selbert v. Selbert*, 60 A.D.2d 692, 400 N.Y.S.2d 586 (3rd Dept. 1977); see, also, *Wurm v. Wurm*, 87 A.D.2d 590, 447 N.Y.S.2d 758 (2nd Dept. 1982), *appeal denied*, 56 N.Y.2d 886, 453 N.Y.S.2d 429, 438 N.E.2d 1145. Splitting custody may be appropriate where one child presents a danger to another. See *Matter of Dickinson v. Woodley*, 44 A.D.3d 1165, 843 N.Y.S.2d 854 (3rd Dept. 2007) (father awarded primary physical custody, although mother had been primary caretaker, because child's half brother, who resided with mother, had behavioral problems which resulted in police intervention and other measures to remove the child from his half-brother's presence). Separation of siblings may be directed where the child lacked a close relationship with the sibling. *Matter of Nikolic v. Ingrassia*, 47 A.D.3d 819, 850 N.Y.S.2d 539 (2nd Dept. 2008) (child had an older brother who had plans to college and who, therefore, would not be in the residence full-time anyway).

In *Copeland v. Copeland*, 232 A.D.2d 822, 648 N.Y.S.2d 805 (3rd Dept. 1996), the court upheld a determination which placed the custody of two boys with the father and the custody of the parties' daughter with the mother. The Family Court had determined that the father would be better suited to be the boys' custodial parent by reason of their special educational needs and the experience and knowledge he had gained in his job as a child development program assistant at a child development center. While the father had engaged in two indicated instances of child abuse, his past conduct did not appear to the court to be a precursor to his future behavior inasmuch as the father's testimony disclosed that he had acknowledged his past mistakes and had developed a more appropriate approach toward the discharge of his parental responsibilities, particularly in the area of discipline. The court viewed the case as involving an exception to the general rule against splitting siblings since the siblings in this case had been separated prior to the commencement of the proceeding and the youngest boy had indicated a strong desire to live with the father. The Law Guardian concluded that both boys have a strong relationship with the father, who spent more time with them than the petitioner. Moreover, the mother had agreed that the youngest boy could live with the father when he became 11 years old. Notably, while she claimed that the child was too insecure to live with the father at the time of the proceeding, she supported her claim with generalized testimony that was at variance with the younger boy's description of their relationship as related to the Law Guardian, who recommended that custody of the boys be awarded to the father.

Likewise, an order splitting siblings was affirmed in *Deyo v. Deyo*, 240 A.D.2d 781, 658 N.Y.S.2d 153 (3rd Dept. 1997). In that case, the father was granted physical residence of one of the parties' daughters, a nine-year-old, because she had a strong attachment to petitioner and preferred to live with him. More significant, this daughter was found to have a special learning disability and the father proved most capable and willing to help her by working with her teachers, taking her to specialists, encouraging her to read up to six books each month and helping her learn how to do her homework on her own. In contrast, the mother was unable to deal with the child's special needs and in fact acknowledged that she always had a problem parenting. On the other hand, the court held that it was appropriate to allow the mother to retain primary residence of two younger twins, given the initial agreement that the children were to live with the mother, the twins' expressed desires, the Law Guardian's recommendation and the general preference for maintaining stability by continuing the existing residential arrangement when appropriate.

Where siblings are apart, they may seek visitation rights with each other. DRL § 71 permits siblings, either of the half or whole blood, to seek visitation rights.

### C240:15: Custodial Preferences of Children

The expressed wishes of a child of sufficient age and discretion as to custody are a factor to be considered by the court. *Bullotta v. Bullotta*, 43 A.D.2d 847, 351 N.Y.S.2d 704 (2nd Dept. 1974). While the child's attitude is not determinative, the preference of a child of satisfactory maturity should at least be given consideration. *Ebert v. Ebert*, 38 N.Y.2d 700, 382 N.Y.S.2d 472, 346 N.E.2d 240 (1976); *Dintruff v. McGreevy*, 34 N.Y.2d 887, 359 N.Y.S.2d 281, 316 N.E.2d 716 (1974). The child's wishes are an important factor in the overall determination as to what is in the child's best interests. *Gant v. Higgins*, 203 A.D.2d 23, 609 N.Y.S.2d 243 (1st Dept. 1994); *Hughes v. Hughes*, 37 A.D.2d 606, 323 N.Y.S.2d 621 (2nd Dept. 1971). Indeed, a failure to consult a child of sufficient age and understanding may, by itself, seriously affect the child's emotional and mental health. *Repetti v. Repetti*, 50 A.D.2d 913, 377 N.Y.S.2d 571 (2nd Dept. 1975). However, the child's desires are not controlling and will not bar the court from making a contrary determination, if the court concludes that the child's interest would be best served thereby. *Ebert v. Ebert*, *supra*; *Dintruff v. McGreevy*, *supra*; *Darema-Rogers v. Rogers*, 199 A.D.2d 456, 606 N.Y.S.2d 15 (2nd Dept. 1993); *O'Connor v. O'Connor*, 146 A.D.2d 909, 536 N.Y.S.2d 903 (3rd Dept. 1989); *Calder v. Woolverton*, 50 A.D.2d 587, 375 N.Y.S.2d 150 (2nd Dept. 1975), *affirmed*, 39 N.Y.2d 1042, 387 N.Y.S.2d 252, 355 N.E.2d 306. The court should consider whether the age and maturity of the child is such that taking proof of his or her wishes is appropriate and, if those desires are made known to the court, to give to those expressions such weight as the court deems proper. *People ex. rel Brussel v. Brussel*, 279 A.D. 859, 110 N.Y.S.2d 335 (1st Dept. 1952).

The child's expressed preference in some indication of what is in the child's best interest. In weighing the child's preference, the court must consider the age and maturity of the child and the potential for influence having been exerted on the child. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982); *Zelnik v. Zelnik*, 196 A.D.2d 700, 601 N.Y.S.2d 701 (1st Dept. 1993); *Zucker v. Zucker*, 187 A.D.2d 507, 589 N.Y.S.2d 908 (2nd Dept. 1992). The court must be sensitive to the fact that the desires of young children, capable of distortive manipulation by a bitter, or even a well meaning, parent do not always reflect the long-term best interests of the children. *Matter of Nehra v. Uhlar*, 43 N.Y.2d 242, 401 N.Y.S.2d 168, 372 N.E.2d 4 (1977). Thus, the wishes of a 15 year old child must be considered in awarding custody, but are not necessarily dispositive. The trial court must be convinced that the child is not acting impulsively, capriciously, or pursuant to pressure exerted by a parent. Thus, in one case, an award of custody to a father was warranted, despite the child's desire to be in her mother's custody. The court perceived that the child's preference was premised, in part, upon the laxity of discipline in her mother's house. *McCrocklin v. McCrocklin*, 77 A.D.2d 624, 430 N.Y.S.2d 320 (1st Dept. 1980). Even where manipulation of the child by the parent is not manifest, the stress of bitter litigation between the parents may impact upon the child's expression of a preference and, for that reason, the preference must not be given controlling significance. See *Walden v. Walden*, 112 A.D.2d 1035, 492 N.Y.S.2d 827 (2nd Dept. 1985).

In evaluating the weight to be given to a preference expressed by a child, the court should consider the strength and consistency with which the child voices the preference. See *Matter of Gravelding v. Loper*, 42 A.D.3d 740, 840 N.Y.S.2d 187 (3rd Dept. 2007) (Law Guardian reported that child, who was approximately 13 years old, was very confused; child stated variously that she did not want to indicate a preference, that she did not necessarily want to be removed from mother's home, and that she would like to try living with father for a while; in view of the confused and changing nature of child's preference, the appellate court held that little weight could be placed upon it).

The wishes of a child of tender years, even one of superior intellect, are to be considered but are not to be given material weight. A child of tender years is not to be regarded as capable of assessing all of the factors that must be considered in reaching a determination as to what custodial arrangement is in the child's best interests. See *Ira K. v. Frances K.*, 115 A.D.2d 699, 497 N.Y.S.2d 685 (2nd Dept. 1985). The court must be sensitive to the fact that the preferences of a child of tender years can easily be influenced by discipline, or lack of discipline, or by the denial or gratification of childish desires, even by a parent not intent upon influencing the child's choice. *Hahn v. Falce*, 56 Misc.2d 427, 289 N.Y.S.2d 100 (Family Court Ulster County 1968). However, where both parents are equally fit, the firm, unwavering and obstinate wishes of a child to reside with one parent may favor the award to that parent. See *Barry v. Glynn*, 59 Misc.2d 75, 297 N.Y.S.2d 786 (Family Court Bronx County 1969).

A child need not be called and sworn as a witness in order to state a preference or provide pertinent information. The child may be interviewed by an appropriate governmental agency or private social services expert and, thus, have his or her views made known to the court and the attorneys for the parties. *Hambleton v. Palmer*, 27 A.D.2d 978, 278 N.Y.S.2d 700 (4th Dept. 1967). The child may also be interviewed by the court in camera, outside the presence of the parties and their counsel. *Lincoln v. Lincoln*, 24 N.Y.2d 270, 299 N.Y.S.2d 842, 247 N.E.2d 659 (1969). However, in such event, a stenographic record of the interview should be made for purposes of appellate review.

Pursuant to *Family Court Act* § 664, the transcript of the interview is to be sent under seal to the appellate court, in the event of an appeal. Absent an order from the trial court, the transcript is not to be provided to the parties. The Appellate Division, Third Department, in a series of cases, condemned breaches of the confidentiality of the transcript, which surfaced when portions of in camera interviews were reproduced in the appellate record or appendix and cited in briefs of the parties. See *Matter of Buhrmeister v. McFarland*, 235 A.D.2d 846, 652 N.Y.S.2d 661 (3rd Dept. 1997); *Matter of Kathleen OO*, 232 A.D.2d 784, 649 N.Y.S.2d 193 (3rd Dept. 1996); *Sellen v. Wright*, 229 A.D.2d 680, 645 N.Y.S.2d 346 (3rd Dept. 1996). In *Buhrmeister*, the court indicated that it would have imposed sanctions upon the petitioner-appellant but for the fact that he was proceeding *pro se*, thus suggesting that a *pro se* litigant may not be expected to be as familiar with the confidentiality requirements as an attorney is expected to be.

There are indications in some opinions that the failure to ascertain the wishes and desires of the child, standing alone, constitutes reversible error. *Bullotta v. Bullotta*, 43 A.D.2d 847, 351 N.Y.S.2d 704 (2nd Dept. 1974); *Hambleton v. Palmer*, *supra*; *Salk v. Salk*, 89 Misc.2d 883, 393 N.Y.S.2d 841 (Sup.Ct. N.Y. County 1975), *affirmed on opinion below*, 53 A.D.2d 558, 385 N.Y.S.2d 1015 (1st Dept. 1976). However, an interview of the child is not always mandatory and may be dispensed with where no useful purposes would be served, such as where the child's preference is made known through the testimony of others or where the child is of insufficient age and discretion to have his or her wishes considered. See *Bazant v. Bazant*, 80 A.D.2d 310, 439 N.Y.S.2d 521 (4th Dept. 1981). Indeed, compelling an appearance by the child in court, where the child's views are already known, may result in needlessly duplicating information at the cost of potential additional emotional stress to the child. Of course, where the child stated a preference under suggestive circumstances or where the court believes it would gain valuable insight by meeting the child personally, an interview should be conducted.

It is imperative to ascertain the desires of a child, such as a 16 year old, who is close to the age of majority. See *Feldman v. Feldman*, 58 A.D.2d 882, 396 N.Y.S.2d 879 (2nd Dept. 1977). But even the preference of a 16 year old is not always determinative. In one case, the preference of a 16 year old boy for his mother was disregarded where the

father had custody for 11 years, was an honorable, well educated man possessing sound judgment, provided a suitable home, and where the child was well adjusted and the mother had left the son when he was two years old, attempted to procure a pre-arranged foreign divorce, and took the son out of the jurisdiction in violation of an agreement. *People ex rel. Glendening v. Glendening*, 259 A.D. 384, 19 N.Y.S.2d 693 (1st Dept. 1940), *affirmed*, 284 N.Y. 598, 29 N.E.2d 926 (1940). It should be noted that, where a mature child who is relatively close to majority is firm in his or her preference, it may be difficult to enforce the court's order. Even where the parent who the child prefers does not induce the child to avoid the order, there may be no practically effective way to prevent the child from gravitating to the preferred parent. The alternative of punishing the child for acting upon his or her preference, which is contrary to the judicial determination, is unattractive. The preferred parent may, of course, be cited for contempt if he or she violates, or induces the child to violate, the court's order.

#### **C240:16: Maintenance of Contact with Other Parent**

A significant factor in the making of an initial custody determination is which parent is best able, if awarded custody, to assure that the child will maintain meaningful contact with the other parent. Willful interference with a noncustodial parent's visitation rights is regarded as so inconsistent with the child's best interests as to raise a strong probability that offending party is an unfit custodian. *Matter of Nikolic v. Ingrassia*, 47 A.D.3d 819, 850 N.Y.S.2d 539 (2nd Dept. 2008). Thus, for example, in *Matter of Bliss v. Ach*, 56 N.Y.2d 995, 453 N.Y.S.2d 633, 439 N.E.2d 349 (1982), the trial court found that, although both parents were fit, the welfare of the child would be best served by placing primary custody in the mother. The court determined that if the father were to receive primary custody, he would attempt to completely integrate the child into his separate family, minimizing the role of the child's natural mother, jeopardizing both the child's sense of identity and his relationship with his natural mother. The court did not perceive such an attempt on the part of the natural mother. It was held that the trial court properly considered the effect of an award of custody to one parent might have on the child's relationship with the other parent.

The surreptitious removal of the child from the jurisdiction without justification and for the purpose of defeating the other parent's right of access to the child may render the removing parent unfit. *Gloria S. v. Richard B.*, 80 A.D.2d 72, 437 N.Y.S.2d 411 (2nd Dept. 1981). The refusal of one parent to respect the visitation rights of the other parent may be considered as a significant factor. *Gloria S. v. Richard B.*, *supra*. Likewise, in *Application of Kades*, 25 Misc.2d 246, 202 N.Y.S.2d 362 (Sup.Ct. N.Y. County 1960), which involved an application by the father to compel the mother to return the parties' infant daughter who the mother had surreptitiously taken to Australia, the court commented that, to award custody of the child to the mother, would in effect completely deny the child the right to the love, parental care, companionship and guidance of her father and would likewise deprive the father of his parental rights.

In recent years, some mental health professionals have advocated the existence of the "Parental Alienation Syndrome," which involves one parent's use of his or her influence with the child to undermine the relationship between the child and the other parent. Other, and perhaps most, mental health professionals reject the existence of such a syndrome and the existence of such a syndrome has not gained wide-spread acceptance. In *People v. Loomis*, 172 Misc.2d 265, 658 N.Y.S.2d 787 (Suffolk County Court 1997), a defendant charged with abuse of his children sought to compel the children and his wife to submit to a pre-trial evaluation by his expert to determine the possible existence of such a syndrome which would, in turn, show the charges to be fabrications. In denying the defendant's motion, the court indicated that it had found no New York cases dealing with the admissibility of evidence of "Parental Alienation Syndrome" and its opinion reviews the treatment that such evidence has received in other jurisdictions. *See also People v. Fortin*, 289 A.D.2d 590, 735 N.Y.S.2d 819 (2nd Dept. 2001) (defendant failed to demonstrate that "Parental Alienation Syndrome" was generally accepted in the relevant scientific communities), *leave to appeal denied*, 97 N.Y.2d 754, 769 N.E.2d 360, 742 N.Y.S.2d 614 (2002); *NK v. MK*, 17 Misc.3d 1123(A), 851 N.Y.S.2d 71 (Table), 2007 WL 3244980 (Sup.Ct. Kings County 2007) (court did not find that there is a generally accepted diagnostic determination or syndrome known as "parental alienation syndrome").

**C240:17: Joint Custody**

Joint custody, sometimes referred to as shared custody, reposes in both parents a shared responsibility for, and control of, a child's upbringing. It may or may not include an arrangement for alternating physical custody. *Braiman v. Braiman*, 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978). During marriage, and until a court or an agreement of the parties directs otherwise, parents are joint custodians of their children. DRL § 81.

Certainly, parents are free, subject to the supervising authority that may be asserted by the courts, to agree upon joint custody in the event of the termination of their marriage relationship. See DRL § 236, Part B, subd. 3; *Robinson v. Robinson*, 111 A.D.2d 316, 489 N.Y.S.2d 301 (2nd Dept. 1985), *appeal dismissed*, 66 N.Y.2d 613, 489 N.E.2d 258. In recent years, cooperating parents, mutually desirous of preserving the children's relationships with both parents and of avoiding the syndrome of a weekend visiting parent, have explored new ways of sharing custody. Much depends, however, upon the agreement of the parents. Joint custody can, if the terms of the sharing of custody involve no more than the recognition of the entitlement of the visiting parent to have some input in major decisions affecting the children and provide for primary custody in one parent and visitation rights for the other, can mean little more than figleaf covering of a traditional custody relationship. Indeed, it has been judicially commented that joint custody normally is cosmetic only and is employed to salve the feelings of the defeated parent. *Matter of Bliss v. Ach*, 86 A.D.2d 575, 446 N.Y.S.2d 305 (1st Dept. 1982), *affirmed* 56 N.Y.2d 995, 453 N.Y.S.2d 633, 439 N.E.2d 349 (1982). This, however, overstates the case. The parents can make joint custody truly meaningful. Joint custody can mean, effectively, equal custody. For example, agreements have been prepared which involve rotating the physical custody of the children between the separate homes of parents. In a few instances, parents have agreed to maintain the children in one home and for the parents to alternate periods of residence with the child. In these sorts of equal custody settings, the success of the arrangement depends virtually entirely upon the good will and faith of the parents and their belief that, despite differences between the parents, the arrangement is best preserved for the children. While the language of equal custody agreements can provide guidelines, judicial enforcement may be impracticable and the shared custody arrangement will collapse if either parent refuses to comply with either the letter or the spirit of the agreement. The joint custody arrangement is, of necessity, fragile and can be easily disrupted even where the parents act in the best of faith. For example, a relocation by one parent to a more distant location, prompted by a remarriage or by employment requirements, will inevitably require drastic changes in, if not cancellation of, the joint custody arrangement. However, in such a situation, the parties may be able to fashion a workable schedule for sharing time with the children and thereby prevent destruction of the joint custody arrangement. See *Matter of Jones v. Jones*, 105 A.D.2d 535, 481 N.Y.S.2d 479 (3rd Dept. 1984), *affirmed*, 65 N.Y.2d 649, 491 N.Y.S.2d 609, 481 N.E.2d 241 (1985).

Particularly where the proposed joint custody arrangement is novel, it may be appropriate to test the arrangement during an experimental or trial period to ascertain if the provisions are workable and, even if so, are suitable for both the parents and children. If arrangement proves to be unworkable due to hostility or lack of communication by the parents or if the arrangement turns out to be detrimental to the children, the joint custody provisions may be terminated by agreement or, if necessary by the court. See *Robinson v. Robinson*, 111 A.D.2d 316, 489 N.Y.S.2d 301 (2nd Dept. 1985). The parties could also agree that their joint custody arrangement is to continue for only a stated period of time or is to be reviewed after a stated period of time has elapsed.

While the parties may agree upon shared custody, some courts have been reluctant to impose any form of joint custody where either parent objects. Traditionally, the courts approached custody matters in a strict framework: one parent would be the primary custodial parent and the other parent would be generally afforded visitation rights. In the past decade, a number of factors have led to an effort to induce greater judicial acceptance of joint custody as a solution to litigated custody disputes. First, there has been a reassessment of the so-called traditional roles of father as breadwinner and mother as custodial homemaker. This reassessment led, for example, to the demise of the former tender years presumption which, as discussed in Practice Commentary C240:9, *supra*, favored the placement of young children in maternal custody. Secondly, given the employment of joint custody relationships by parents as part of a

voluntary agreement, some parents, particularly fathers, sought to have the courts impose joint custody where it was perceived that the other parent was arbitrarily refusing to consider a form of joint custody as a means of resolving the issue of custody.

As discussed below, the courts have generally refused to impose a joint custody arrangement upon litigants. As a result of this judicial attitude, efforts have been made to encourage joint custody awards by legislation. In 1981 and 1982, the Legislature passed bills which would have amended [DRL sections 70](#) and 240 so as to create a preference for joint custody. However, the legislation was vetoed by the Governor on the grounds that the proposals did not keep the child's best interests as the paramount consideration and unduly restricted the discretion of the courts in determining custody questions. (Message of Governor Hugh L. Carey, Disapproving Assembly Bill 10721, June 10, 1982, N.Y.S.Legislative Annual, p. 301). The matter has since been the subject of study by the Law Revision Commission but legislation has not been adopted.

The major Court of Appeals pronouncement on the subject of joint custody came in [Briman v. Briman](#), [44 N.Y.2d 584](#), [407 N.Y.S.2d 449](#), [378 N.E.2d 1019](#) (1978). There, the custody of two sons was in dispute. While the mother was initially granted custody by agreement incorporated in a divorce judgment, the father subsequently moved to obtain their custody. The trial court granted his application but the Appellate Division reversed and imposed a joint custody arrangement, with the mother having custody during weekdays and the father during the weekends. The Court of Appeals reversed and ordered a new hearing. The Court noted that the authorities are divided on the question of joint custody. In favor of joint custody are the fact that children are entitled to the love, companionship and concern of both parents and that joint custody affords the otherwise noncustodial parent psychological support which can be translated into a healthy environment for the children. [44 N.Y.2d at 589](#), [407 N.Y.S.2d at 451](#). On the other hand, the Court noted, children need a home base and, particularly where alternating physical custody is directed, joint custody may involve shifting of children that will further the insecurity and pain frequently experienced by the young victims of shattered families. [44 N.Y.2d at 589](#), [407 N.Y.S.2d at 451](#). Hence, the Court concluded, while joint custody is encouraged a voluntary alternative for relatively stable amicable parents behaving in a mature and civilized fashion, it can only enhance family chaos as “a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs....” [44 N.Y.2d at 589-590](#), [407 N.Y.S.2d at 451](#).

In the *Briman* case itself, the Court found that the parents, after more than four years of separation, were still unable to manage their common problems with their children, let alone trust each other. The parents continued to find fault with each other and accuse each other of various wrongs. They had failed to work out between themselves even a limited visitation arrangement. It was beyond rational hope, said the Court, to expect them to exercise the responsibility entailed in sharing physical custody of the children. Likewise, it would take more than reasonable self-restraint to shield the children, as they went from house to house, from the ill feelings, hatred, and disrespect each parent harbored for the other. [44 N.Y.2d at 590](#), [407 N.Y.S.2d at 451](#). A further complication found by the Court of Appeals was that the mother's whereabouts were undisclosed and she was admittedly desirous of leaving the jurisdiction. The joint custody arrangement imposed by the Appellate Division contemplated reasonable geographic proximity and, as a matter of logistics alone, was unrealistic. The Court of Appeals found that the conflicts and contradictions in the record were so severe and so material that it was impossible to resolve them without assessments of credibility. Further, two years had elapsed since the hearing, during which the boys had lived with their father and were prevented from seeing their mother, while the mother had found it necessary to conceal her whereabouts. Accordingly, the Court directed that new hearing be held. [44 N.Y.2d at 590-591](#), [407 N.Y.S.2d at 451-452](#).

Thus, the Court of Appeals in *Briman* ruled that, while joint custody may be encouraged as part of a voluntary agreement between consenting mature parents, it is only rarely to be imposed as a solution to custody litigation. The Court stated as follows:

There are no painless solutions. In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. Divorce dissolves the family as well as the marriage, a reality that may not be ignored. In this case the gross conflict between the parents is so embittered and so involved with emotion and litigation that between them joint custody is perhaps a Solomonic approach, that is one to be threatened but never carried out. At least, that is what the present record shows. A new record may offer a better, if still imperfect, solution. [44 N.Y.2d at 591](#), [407 N.Y.S.2d at 452](#).

The *Braiman* decision by the Court of Appeals was presaged by the decision in *Dodd v. Dodd*, [93 Misc.2d 641](#), [403 N.Y.S.2d 401](#) (Sup.Ct. N.Y. County 1978), which was approvingly cited in *Braiman*. In *Dodd*, the father resisted the mother's claim for sole custody by seeking joint custody. The court noted that joint custody was an appealing concept because it would permit the court to escape an agonizing choice, would keep from wounding the self-esteem of either parent, and would avoid the appearance of gender discrimination. Joint custody would allow both parents to have an equal voice in making decisions and recognizes the advantages of shared responsibility for raising young children. However, in view of the mother's opposition to joint custody, the court commented that while it should not yield to frivolous objections, it must consider whether joint custody is feasible where one party is opposed and judicial intervention would be needed to effectuate it.

In the *Dodd* case, the parties had tried a joint custody arrangement. For fourteen months, the parents lived apart without either a separation agreement or court order of custody. In that period, they shared all decisions and, during most of that time, divided physical custody equally. However, conflicts arose over both major and minor matters. There were disagreements over medical care, psychotherapy, clothing for the children, discipline, money, and the children's attendance at family functions. Overt, bitter hostility, criticism of each parent by the other, and angry words and obscenities were observed repeatedly by the children. Psychiatrists called by each of the parties testified that the joint custody arrangement was not working well and the father's expert, who was given the greater weight by the court, testified that the arrangement caused stress in the children and was unworkable. Accordingly, the court determined to award sole custody to the mother.

A dim view of joint custody, at least as a court-imposed solution was expressed by a majority of the Appellate Division, First Department, in *Stanat v. Stanat*, [93 A.D.2d 114](#), [461 N.Y.S.2d 32](#) (1983), *appeal denied*, [59 N.Y.2d 605](#), [464 N.Y.S.2d 1025](#), [451 N.E.2d 504](#) (1983). In that case, the mother was awarded custody after trial and, on appeal, it was urged that joint custody be granted. The majority opinion commented that joint custody was an idea that was attractive at a distance, but not quite so when viewed close up. The court noted that the legislation that would encourage joint custody by the courts had been universally disapproved by various bar groups and had been vetoed by the Governor. The court quoted approvingly from a statement by the New York County Lawyers' Association: the joint custody bill "would permit, even encourage the courts to award joint custody with shared responsibility for bringing up a child to separated or divorced parents who cannot agree on anything else in their lives." [461 N.Y.S.2d at 34](#). Accordingly, the court sustained the award of sole custody to the mother.

The First Department also reacted negatively to joint custody in *Trapp v. Trapp*, [136 A.D.2d 178](#), [526 N.Y.S.2d 95](#) (1st Dept. 1988). There, the Appellate Division set aside a joint custody arrangement imposed by the trial court. The trial court had imposed a joint custody arrangement upon parents who were unable to agree on such matters as choice of school and vacation arrangements. The Appellate Division set aside the joint custody order and restored sole custody to the mother, who had been designated as custodial parent by a prior settlement stipulation. The court commented that the parents could not make joint decisions and it would be a disservice to the children to allow a joint custody determination to stand in light of the stalemate between the parties. The court noted that attribution of fault for this lack of cooperation is beside the point; a joint custody arrangement cannot succeed if the parents cannot reconcile their differences for the interest of the children, no matter which parent is more to blame for the parental impasse.

In *Trapp*, the Appellate Division left intact the provisions requiring joint parental agreement as to the children's religious upbringing and citizenship. These matters, said the court, are a profound part of the children's heritage and do not require daily and immediate intervention by the custodial parent. Since there was no compelling reason to allow the mother to determine these matters unilaterally, the court concluded that neither parent should be left with the exclusive authority to determine the children's religion and citizenship.

There are some decisions in which the courts granted joint custody as consistent with the children's best interests. In the *Braiman* decision, the Court of Appeals stated that an award of joint custody would be authorized by the broad power conveyed to the courts by Domestic Relations Law § 240.

Some courts, in particular the Appellate Division, Third Department, have moved to imposing joint custody in situations where the parties have exhibited “the type of mature and civilized behavior that makes an award of joint custody appropriate”. *Guarnier v. Guarnier*, 155 A.D.2d 744, 547 N.Y.S.2d 455 (3rd Dept.1989); see also *Matter of Darrow v. Burlingame*, 298 A.D.2d 651, 748 N.Y.S.2d 798 (3rd Dept. 2002) (even though father was awarded sole physical custody, joint legal custody was appropriate, given parties' testimony and record evidence that they could cooperate in making joint decisions in matters of importance concerning their child); *Finn v. Finn*, 277 A.D.2d 834, 715 N.Y.S.2d 800 (3rd Dept. 2000) (joint custody was awarded even though father claimed mother had alienated him from children and he had eavesdropped on her calls, struck the car she was in with his car, and made derogatory remarks about her); *Lukaszewicz v. Lukaszewicz*, 256 A.D.2d 1031, 682 N.Y.S.2d 696 (3rd Dept. 1998) (joint custody was granted, even though mother alleged that father had been abusive toward her, and the children and mother had relocated; law guardian recommended it and parties could agree on visitation schedule); *Jones v. Jones*, 92 A.D.2d 632, 459 N.Y.S.2d 946 (3rd Dept. 1983) (an award of joint custody was affirmed where it was found that both parents were fit to provide for the care and supervision of their child and there was evidence of the parties' ability to work cooperatively with one another); *Martin v. Martin*, 113 A.D.2d 943, 493 N.Y.S.2d 840 (2nd Dept. 1985).

In *Burnham v. Basta*, 241 A.D.2d 628, 659 N.Y.S.2d 945 (3rd Dept. 1997), the court affirmed the award of joint custody, even as it also affirmed the denial of the mother's request to relocate the child to New Jersey. The court held that the record showed that the parties, despite the acrimony, were able to put aside their differences and work together to engage in joint decision-making with respect to the child's upbringing. Indeed, the court cited the parties' ability to reach agreements as to the logistics of long-distance visitation as supporting its conclusion. On the other hand, in *Marino v. Marino*, 240 A.D.2d 954, 659 N.Y.S.2d 335 (3rd Dept. 1997), the court held that joint custody was inappropriate due to the extremely acrimonious relationship of the parties, which had been inflamed by the revelation of their respective infidelities and exacerbated by the presence of new suitors in each of their households. See also *Juneau v. Juneau*, 240 A.D.2d 858, 659 N.Y.S.2d 113 (3rd Dept. 1997); *Ellis v. Ellis*, 233 A.D.2d 678, 649 N.Y.S.2d 951 (3rd Dept. 1996).

In *Lenczycki v. Lenczycki*, 152 A.D.2d 621, 543 N.Y.S.2d 724 (2nd Dept.1989), the Court sustained the trial court's refusal to impose joint custody, reasoning that joint custody was not appropriate given “the intense acrimony existing between the parties”.

In *Perotti v. Perotti*, 78 Misc.2d 131, 355 N.Y.S.2d 68 (Sup.Ct. Queens County 1974), the parents were given shared responsibility, with physical custody to the father and visitation to the mother. However, in a subsequent, unreported decision, the father ultimately was awarded sole custody. In *Woicik v. Woicik*, 66 Misc.2d 357, 321 N.Y.S.2d 5 (Sup.Ct. N.Y. County 1971), where the child was in boarding school in the winter and camp in the summer, joint custody was decreed with the parents equally dividing the child's vacation time. In *Ross v. Ross*, 4 Misc.2d 399, 149 N.Y.S.2d 585 (Sup.Ct. Erie County 1956), joint custody was imposed as a temporary measure, with the actual division of time to be agreed by the parties. However, if the parties were unable to agree, the father was to have sole custody, with weekend visitation rights to the mother. Similarly, in *R. v. R.*, 91 Misc.2d 792, 399 N.Y.S.2d 93 (Sup.Ct. N.Y.

*County 1977*), while all decisions affecting the children were to be made jointly, physical custody was divided along more traditional lines by allowing the children to live with their father and visit with their mother.

In *Matter of Broome County Department of Social Services on Behalf of Ostapchuck v. Dennis*, 97 A.D.2d 908, 470 N.Y.S.2d 741 (3rd Dept. 1983), the refusal of the trial court to order joint custody was affirmed, as a proper exercise of discretion, where the parents were severely antagonistic to each other. Indeed, the parties had different views as to the religion and rearing of the child. Such antagonism is inevitably fatal to the judicial imposition of joint custody. The requirement for constant consultation on matters necessarily entailed in the concept of joint custody will exacerbate the already sharp differences between the parents. See *Matter of Bliss v. Ach*, 86 A.D.2d 575, 446 N.Y.S.2d 305 (1st Dept. 1982), *affirmed*, 56 N.Y.2d 995, 453 N.Y.S.2d 633, 439 N.E.2d 349 (1982).

Where the parties are awarded joint custody, it is antithetical to that concept to give one parent decision-making authority in the event that the parents cannot agree. *Matter of Williams v. Boger*, 33 A.D.3d 1091, 822 N.Y.S.2d 647 (3rd Dept. 2006). Nor may the court arbitrarily grant one parent decision-making power in even years and the other decision-making powers in odd years. *Fiorelli v. Fiorelli*, 34 A.D.3d 1216, 824 N.Y.S.2d 695 (4th Dept. 2006).

There has been an increasing tendency to split decision-making between parents by giving each a “sphere” of decisions to make. For example, in *Wideman v. Wideman*, 38 A.D.3d 1318, 834 N.Y.S.2d 405 (4th Dept. 2007), the Appellate Division, Fourth Department, affirmed an order which granted the mother primary physical custody of the children and decision-making authority with respect to religion, finances, counseling/therapy and summer activities, while granting the father decision-making authority with respect to education, medical/dental care, and extracurricular activities. The difficulty with this type of bifurcation of authority is that children's lives and activities are often not practically capable of being carved up into clear-cut spheres. For example, a child's education or extracurricular interests (e.g., music, sports) may impact on the child's summer activities and a child's need or response to therapy may be dependent upon, or related to, medical issues. Where a decision may be said to involve several overlapping spheres and each parent has decision-making authority in one or more of the overlapping spheres, the parents must, in essence, act jointly. But, if they were truly capable of acting jointly, then joint legal custody could have been decreed. For example, in the *Wideman* case, cited above, the Appellate Division affirmed the denial of joint legal custody, pointing to evidence of past acrimony between the parents and predictions by experts and by the mother herself that the parties would be unable to agree on major decisions. If the parties are assigned overlapping spheres, in some cases where the parties cannot manage to agree, the arrangement may prove unworkable.

In *Davis v. Davis*, 240 A.D.2d 928, 658 N.Y.S.2d 548 (3rd Dept. 1997), the court affirmed, as against the father's objections, an order which, in granting custody to the mother, gave the father ultimate decision-making authority with respect to the child's religious upbringing and educational needs. The Appellate Division held that the trial court was not precluded, as a matter of law, from ordering this type of custody arrangement. Further, although the order of the court below gave the father decision-making power over these two issues, it also specifically limited his rights so as not to interfere with the day-to-day functioning between the mother and the child, a situation the court found to be workable. It is not without significance that the mother did not object to this arrangement.

Where joint custody has been agreed upon, or imposed by the court, the court may terminate the joint custody provisions and award primary custody to one parent where the hostility between the parents makes shared custody unworkable or where shared custody proves to be detrimental to the child. See *Robinson v. Robinson*, 111 A.D.2d 316, 489 N.Y.S.2d 301 (2nd Dept. 1985), *appeal dismissed* 66 N.Y.2d 613, 489 N.E.2d 254. However, termination of joint custody is not to be had merely upon request by one party.

In *Matter of Jones v. Jones*, 105 A.D.2d 535, 481 N.Y.S.2d 479 (3rd Dept. 1984), *affirmed*, 65 N.Y.2d 649, 491, 609, 481 N.E.2d 241 (1985), following the judicial imposition of joint custody, the mother relocated to another jurisdiction due to employment necessities. While the Family Court found that this relocation was sufficient cause to terminate

joint custody and award sole custody to the father, the Appellate Division, joined by the Court of Appeals, disagreed. The Appellate Division found that the father's access to the child, styled visitation, had not been unduly disrupted by the wife's relocation, a relocation that the court found to be justifiable. Further, the court noted that the parties had arrived at a workable visitation schedule, thus showing that they have cooperated, and continued to cooperate, for the benefit of the child. Their cooperation, despite the father's request for sole custody, reflected the type of mature, amicable relationship that supported continuance of joint custody. The Court of Appeals, in affirming, commented that the Appellate Division's finding that there was no compelling reason to change the original custodial relationship comported more nearly with the weight of the evidence than did the Family Court's decision to award sole custody.

In *Carpenter v. La May*, 241 A.D.2d 625, 659 N.Y.S.2d 943 (3rd Dept. 1997), the court reversed the trial court's termination of joint custody, which termination occurred just months after the parties agreed to joint custody. The Appellate Division held that the animosity was not between the parents, but between the mother and the father's girlfriend. The mother testified that the father was nice to her as long as his girlfriend was not around. The court ruled that any problems between the mother and the girlfriend should be resolved and should not interfere with the mother's right to have joint custody under the parties' agreement.

Likewise, in *Reed v. Reed*, 240 A.D.2d 824, 658 N.Y.S.2d 532 (3rd Dept. 1997), the Appellate Division expressed concern that, although joint custody had been in place for some time, joint custody had become inappropriate. What transpired was that after the mother's male companion spoke to the child in an inappropriate manner, the relationship between the parents became strained to the point that they were communicating mostly through the child. However, rather than terminate joint custody, the court directed a further hearing in order to ascertain the present level of animosity and communication.

In *Stec v. Levindofske*, 153 A.D.2d 310, 550 N.Y.S.2d 966 (4th Dept. 1990) the Court declined to modify a prior joint custody agreement, even though the parties' disagreement over a proposed relocation by the mother had prompted full-scale litigation.

In *Teuschler v. Teuschler*, 242 A.D.2d 289, 660 N.Y.S.2d 744 (2nd Dept. 1997), the parties had joint custody of their daughter for eight years. Even though the daughter, upon becoming a teenager, expressed the desire not to visit her father, the court held that it was proper to deny the mother's application to terminate the joint custodial arrangement. Although there were disagreements between the parents, particularly on the issue of discipline, their relationship was not so severely antagonistic as to make continuation of joint custody improper.

#### **C240:18: Psychiatric and Psychological Reports and Evaluations**

Trial courts, confronted with a contested custody issue, may call upon qualified and impartial health care professionals to render reports based upon examinations of the children and parents. *Kessler v. Kessler*, 10 N.Y.2d 445, 225 N.Y.S.2d 1, 180 N.E.2d 402 (1962). The court, in an exercise of judicial discretion, may call upon qualified and impartial psychiatrists, psychologists, or other professional medical personnel, preferably under the auspices of the probation officer or family counselling unit connected with the court, to conduct such investigations. *Kessler v. Kessler, supra*. It is the duty of the court, in exercising its grave responsibility, to become aware of and seek out every bit of relevant evidence and, to that end, the services of a court family counselling unit or other similar organization may be properly availed of, even without the consent of the parents. *Matter of Anonymous*, 34 A.D.2d 942, 312 N.Y.S.2d 348 (1st Dept. 1970).

In a matrimonial action, the court, at the preliminary conference, may appoint a law guardian to represent the interests of the children involved in a custody dispute. The court may also direct the parties to file a list of expert witnesses from which the court may select a neutral expert. 22 N.Y.C.R.R. § 202.16(f). The court may also appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody and visitation issues.

22 N.Y.C.R.R. § 202.18. The court may direct the parties to submit to forensic examinations to be conducted under the auspices of the county probation department. *Waldman v. Waldman*, 95 A.D.2d 827, 463 N.Y.S.2d 868 (2nd Dept. 1983).

Section 251 of the Family Court Act expressly empowers the court to require any person within its jurisdiction and any parent or other person legally responsible for the care of a child within its jurisdiction to submit to examination by a physician, psychiatrist or psychologist appointed by the court. Such examination, however, is limited to the purpose of assisting the court in resolving a custody dispute and the statute does not authorize the court to compel a parent to undergo therapy or analysis. *Paris v. Paris*, 95 A.D.2d 857, 464 N.Y.S.2d 221 (2nd Dept. 1983); *Grado v. Grado*, 44 A.D.2d 854, 356 N.Y.S.2d 85 (2nd Dept. 1974); but see *McMahon v. McMahon*, 68 A.D.2d 68, 416 N.Y.S.2d 411 (3rd Dept. 1979) (the court suggested in *dicta* that section 251 of the Family Court Act empowers the court to provide for examination and counselling). However, other provisions of the Family Court Act, including sections 446 (subd. f) and 656 (subd. f), permit the court, as part of an order of protection, to require a party to participate in an educational program. There are also some cases in which the courts have ordered treatment as a component of, and not as a condition for, visitation rights. See, e.g., *Landau v. Landau*, 214 A.D.2d 541, 625 N.Y.S.2d 239 (2nd Dept. 1995); *Synakowski v. Synakowski*, 191 A.D.2d 836, 594 N.Y.S.2d 852 (3rd Dept. 1993); *Ramshaw v. Ramshaw*, 186 A.D.2d 243, 588 N.Y.S.2d 310 (2nd Dept. 1992); *Larisa F. v. Michael S.*, 120 Misc.2d 907, 466 N.Y.S.2d 899 (Family Court Queens County 1983).

The critical question of custody should not be decided upon limited evidence offered by the parties when independent evidence could be obtained through reasonable efforts of the parties and the auxiliary services of the court system. *Giraldo v. Giraldo*, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dept. 1982). While, in the *Giraldo* case, it was held not to have been an abuse of discretion to deny an untimely motion at an early stage of the hearing for psychiatric and psychological testing of the parties and their children, as the hearing progressed in length and scope, the court should have recognized that independent evidence was needed and should have sought out such evidence.

Forensic experts and attorneys for the children are commonly appointed in custody disputes and courts are prone to appoint them, both so as to assure that all relevant information is developed and to avoid reversal and a new hearing should an appellate court decide that an appointment should have been made. However, the court need not make such an appointment where it is not asked to do so and the appointment was not necessary for an appropriate determination of the issue. *Dana-Sitzer v. Sitzer*, 48 A.D.3d 354, 851 N.Y.S.2d 530 (1st Dept. 2008). But the appointment of a forensic expert, and consideration of the expert's views, are required where the evidence is sharply conflicting regarding the conduct of the parties and evidence suggests that the children are having behavioral problems. *Ekstra v. Ekstra*, 49 A.D.3d 594, 854 N.Y.S.2d 439 (2nd Dept. 2008).

As a general matter, the reports of psychologists, psychiatrists, and social workers may not be received into evidence in the absence of a stipulation or consent by the parties. *Issacs v. Murcin*, 38 A.D.2d 673, 327 N.Y.S.2d 126 (4th Dept. 1971); *Falkides v. Falkides*, 40 A.D.2d 1074, 339 N.Y.S.2d 235 (4th Dept. 1972). This is because such reports generally contain inadmissible hearsay. As against a hearsay objection, only such portions of the reports for which there is a proper evidentiary basis may be received. See generally, *Matter of Leon R.R.*, 48 N.Y.2d 117, 421 N.Y.S.2d 863, 397 N.E.2d 374 (1979); see also *Grado v. Grado*, 44 A.D.2d 854, 356 N.Y.S.2d 85 (2nd Dept. 1974). The child's best interest requires that the accuracy of the contents of such reports be established and that there be an opportunity to explain or rebut the material contained therein. *Matter of Lincoln v. Lincoln*, 24 N.Y.2d 270, 299 N.Y.S.2d 842, 247 N.E.2d 659 (1969); *Krebs v. Krebs*, 83 A.D.2d 989, 443 N.Y.S.2d 530 (4th Dept. 1981). The proper procedure, in the absence of a stipulation, is to call the experts as witnesses, subject to cross-examination. *Kessler v. Kessler*, *supra*.

In order to streamline the trial or hearing, the trial court may allow a written report of an expert to be used as the equivalent of the expert's direct testimony. However, the report, to be admissible, must be submitted under the oath of the expert and the expert must be present and available for cross-examination. 22 N.Y.C.R.R. § 202.16(g). The use

of this procedure avoids the necessity of having to compel the expert to set forth at length the same information and analysis already set out in the written report. This procedure is appropriate where the report is already before the court and the parties and the issue is not what the expert is going to say, but whether cross-examination will expose any flaws in the expert's analysis or cause the expert to retract, modify, amend or supplement the report or any portion of it. By allowing the report to serve as direct evidence, the court can get to the heart of the issue rapidly without having to waste time by having the expert read, either literally or figuratively, the report into the record. Of course, there may well be cases in which the expert should be required to testify on direct examination, such as to supplement a foundation for the report or to explain changes or amendments to the report. Whether to allow the report to serve as direct examination of the witness or to require direct examination is a matter within the discretion of the trial court. Counsel should, in order to advocate the position of their clients and to preserve the record for appellate review, make known their position on the use of this procedure and the reasons for that position.

As noted above, in order for a written forensic report to be admissible, in lieu of direct testimony from the expert, the expert must be present and available for cross-examination. This sometimes leads to contentions as to payment for the expert's appearance. The proponent of the report will want the expert to appear but will be reluctant to pay for what will be the opponent's cross-examination (though, really, if the report is received in lieu of direct testimony, that is a short-circuit that may benefit the proponent by reducing the expert's time in court, since the proponent would have to pay the expert to appear to offer traditional direct testimony). The opponent might not want to pay the expert, with whose report the opponent disagrees, since not paying the expert might lead to the expert not appearing and, hence, precluding the use of the report. One of the few reported cases to touch on this issue is *Ekstra v. Ekstra*, 49 A.D.3d 594, 854 N.Y.S.2d 439 (2nd Dept. 2008), where the court held that where a party seeks to cross-examine the expert, and the expert declines to appear unless paid, the court must make a provision for payment, rather than exclude the report. Thus, if the parties cannot agree as to who should pay the expert, the court must decide the issue. The court could, though, apportion the costs or order one party to pay, subject to reallocation at the conclusion of the matter.

Note that reports of child abuse and maltreatment are not admissible in custody or visitation hearings, unless an investigation has determined that "there is some credible evidence" of the alleged abuse or maltreatment, that the subject of the report has been notified that the report is "indicated", and that the report has not been amended or expunged by the State Commissioner of Social Services. DRL § 240, subd. 1-a; [Family Court Act § 651-a](#). If the report has been expunged, it is not admissible; if the report has been amended to delete any finding, that deleted finding is not admissible. If the report is amended to add new findings, those amendments, together with any unamended portions of the original report, may be admissible if they qualify as a business record. Even if such reports are admissible, they do not form a sufficient basis for making a finding of abuse or maltreatment unless corroborated by other evidence tending to support the reliability of the report. *Id.*

A party may not object to the disclosure of statements or records on the ground of the physician/patient or other privilege. Such privileges are generally considered waived by the party's election to contest custody. *See, e.g., Baecher v. Baecher*, 58 A.D.2d 821, 396 N.Y.S.2d 447 (2nd Dept. 1977); *Hickox v. Hickox*, 64 A.D.2d 412, 410 N.Y.S.2d 81 (1st Dept. 1978); *Perry v. Fiumano*, 61 A.D.2d 512, 403 N.Y.S.2d 382 (4th Dept. 1978). However, it is generally beyond the power of the court to require parties to stipulate to the confidentiality of such reports. *Waldman v. Waldman*, 95 A.D.2d 827, 463 N.Y.S.2d 868 (2nd Dept. 1983). The consent of the parties to an investigation may not be taken as a consent to the confidential use by the trial court of the ensuing reports. *Krebs v. Krebs*, 83 A.D.2d 989, 443 N.Y.S.2d 530 (4th Dept. 1981); *DiStefano v. DiStefano*, 51 A.D.2d 885, 380 N.Y.S.2d 394 (4th Dept. 1976).

The availability of auxiliary services to courts adjudicating custody matters varies throughout the state. In some counties, services available to the court through the probation department or other local agencies are sufficiently accessible as to permit the courts to routinely require parties and children in contested custody matters to submit to examination. In other areas, services may be available through a family counselling unit. Additionally, the court may

be able to provide for an impartial psychiatrist or psychologist by designating a qualified expert from an approved panel listing. However, in the latter instance, the fees of the expert may have to be paid by one, or both, of the parties.

The courts, when directing examinations to be conducted by nongovernmental or private experts, have generally required that either the parties stipulate as to the examining physician or that the physician be one appointed by the court. *See, e.g., Giraldo v. Giraldo*, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dept. 1982); *Matter of Barth v. Barth*, 74 A.D.2d 1002, 427 N.Y.S.2d 98 (4th Dept. 1980); *Matter of Schloss v. Schloss*, 63 A.D.2d 898, 405 N.Y.S.2d 717 (1st Dept. 1978); *Proschold v. Proschold*, 114 Misc.2d 568, 451 N.Y.S.2d 956 (Sup.Ct. Suffolk County 1982). Indeed, it has been held error for the court to direct that one parent provide complete medical records to, and submit to an evaluation by, a mental health professional selected by the other parent. *Matter of Armstrong v. Heilker*, 47 A.D.3d 1104, 850 N.Y.S.2d 673 (3rd Dept. 2008). The accepted, and required practice, where no evaluation has been conducted, is to have an evaluation by a court-appointed professional. *Id.* It is also common for the attorneys for the parties and the attorney for the child to stipulate to the designation of a specific forensic expert who is then approved by the court.

In *Shapiro v. Shapiro*, 89 A.D.2d 538, 452 N.Y.S.2d 626 (1st Dept. 1982), the trial court directed the parties to a custody litigation to submit themselves to psychiatric examination, with the examining physician to be selected from a panel. The trial court ultimately entered an order which designated a panel psychiatrist recommended by the defendant's attorney. The plaintiff moved to resettle the order, contending that there was a strong antipathy between the plaintiff's lawyer and the psychiatrist. The lower court refused relief and the Appellate Division reversed. The Appellate Division ruled that, since the proposed psychiatric examination will play an important part in determining the custody of the child, the patent antagonism toward the examining psychiatrist should have been considered, whether or not there was a factual basis for its genesis.

The reports and recommendations of a health care professional may be offered for the purpose of assisting the court. However, the court may not abdicate its responsibility by transferring its jurisdiction to the family counselling unit or other expert. *See Salamone v. Salamone*, 83 A.D.2d 778, 443 N.Y.S.2d 464 (4th Dept. 1981). Nor is the court required to follow the recommendations of any particular expert. *See Matter of Martello*, 77 A.D.2d 722, 430 N.Y.S.2d 709 (3rd Dept. 1980). The court may reject the opinion and recommendations of a court appointed expert. *Zelnik v. Zelnik*, 196 A.D.2d 700, 601 N.Y.S.2d 701 (1st Dept. 1993). The recommendations of an expert may be disregarded where the recommendation was based upon inadequate information, or upon a biased and one-sided description of events given by one party, or where it ignores the significance of the conduct of the parties. *See, e.g., Matter of Alan G., v. Joan G.*, 104 A.D.2d 147, 482 N.Y.S.2d 272 (1st Dept. 1984); *Matter of Gloria S. v. Richard B.*, 80 A.D.2d 72, 437 N.Y.S.2d 411 (2nd Dept. 1981). In *Bayer v. Bayer*, 102 A.D.2d 879, 477 N.Y.S.2d 51 (2nd Dept. 1984), the court ruled that the trial court had the right to disregard the recommendation of a governmental psychiatrist. However, a further hearing was required given the appellate court's concern with the absence of any reliable expert opinion in a circumstance where the mother, to whom custody had been awarded, suffered from a personality disorder.

The court may, on an appropriate record, rely upon the opinion of the court-appointed expert and reject the opinion of an expert retained by one litigant. *See People ex. rel Brawer v. Pinkins*, 215 A.D.2d 170, 626 N.Y.S.2d 134 (1st Dept. 1995).

The decisions of the Appellate Division, First Department in *Rentschler v. Rentschler*, 204 A.D.2d 60, 611 N.Y.S.2d 523 (1st Dept. 1994) and *Matter of Rebecca B.*, 204 A.D.2d 57, 611 N.Y.S.2d 831 (1st Dept. 1994), held that the trial courts in those cases had erred in disregarding the opinions of the court appointed experts. In both cases, the appellate court held that the opinions of the experts should not be lightly disregarded. Indeed, the Second Department has held that the opinions of the court-appointed experts are entitled to at least some weight, unless contradicted by the record. *Young v. Young*, 212 A.D.2d 114, 628 N.Y.S.2d 957 (2nd Dept. 1995); *see Muller v. Muller*, 221 A.D.2d 635, 634 N.Y.S.2d 190 (2nd Dept. 1995) (testimony and recommendations of mother's expert were properly credited where

not contradicted by the record). Various courts and commentators suggested that the First Department had, in effect, made the viewpoints of the experts more important than the observations of the trial judges. See *Koons v. Koons*, 161 Misc.2d 842, 615 N.Y.S.2d 563 (Sup.Ct. N.Y.County 1994). However, in *Chait v. Chait*, 215 A.D.2d 238, 638 N.Y.S.2d 426 (1st Dept.1995), the First Department made it clear that its decisions in *Rentschler* and *Rebecca B.* did not alter the existing standard for determining custody by minimizing the value of the trial court's independent judgment on the issue of custody. To give weight to the view of impartial professionals, as was done in those cases, does not mean that their opinions are conclusions or that their opinions should take precedence over the judgment of the trial judge, where the findings and conclusions of the trial court are supported by the record.

#### C240:19: Disclosure in Custody Cases

Discovery of psychiatric, medical and hospital records may be available in appropriate child custody cases. *Hickox v. Hickox*, 64 A.D.2d 412, 410 N.Y.S.2d 81 (1st Dept. 1978); *Perry v. Fiumano*, 61 A.D.2d 512, 403 N.Y.S.2d 382 (4th Dept. 1978). However, examinations before trial with respect to the issue of custody are not favored by some courts. See *P. v. P.*, 93 Misc.2d 704, 403 N.Y.S.2d 680 (Sup.Ct. N.Y. County 1978). Where pre-trial deposition of a forensic evaluator are not permitted, if counsel can only review the records while a witness is on the stand, counsel may not be prepared and the court may need to adjourn the matter so that counsel has time to review the material. Therefore, it may be proper to direct that the court-appointed forensic evaluator produce the file for review shortly before the start of the hearing. See *Nimkoff v. Nimkoff*, 36 A.D.3d 498, 830 N.Y.S.2d 27 (1st Dept. 2007) (file of court-appointed forensic expert ordered produced for review three business days prior to start of hearing).

In *Rosenblitt v. Rosenblitt*, 107 A.D.2d 292, 486 N.Y.S.2d 741 (2nd Dept.1985), a sharply divided court rendered a significant decision on the question of the entitlement of a custody litigant to compel the adverse party to submit to a psychiatric examination by the movant's own privately retained expert. To appreciate the case, the prior decision in *Matter of Gloria S. v. Richard B.*, 80 A.D.2d 72, 437 N.Y.S.2d 411 (2nd Dept. 1981), must be first mentioned. In *Matter of Gloria S.*, the expert opinion of a party's privately retained psychiatrist was found to be "virtually worthless" since the expert never interviewed the adverse party. In the *Rosenblitt* case, the mother sought to compel the father to submit to an examination by her expert so as to overcome any potential contention that the expert's opinion should not be considered by reason of a failure to interview the adverse party.

In *Rosenblitt*, the father was awarded custody of three minor children after a hearing. Shortly after the determination, the mother brought the children to a child psychiatrist so that he might evaluate their condition and prescribe treatment. Based upon a meeting with the children, extensive conversations with the mother, and tape recordings provided by the mother, the physician informed the mother that an emergency situation existed which constituted an actual danger to the children and which necessitated immediate action. The mother thereafter moved, by order to show cause, for an order requiring the father to submit to a psychiatric examination by her expert, for an award of custody, for an immediate hearing, for a provision for psychiatric therapy for the children, to expand previously ordered forensic examinations to include the paternal grandparents, and for counsel fees. The lower court denied the motion, with the exception that it directed the father to submit to examination by the mother's expert and expanded the forensic examinations to include the paternal grandparents. On appeal, the Appellate Division modified the order below as to deny all relief.

As to the question of the examination of the father by the mother's privately retained expert, the court first concluded that a further evaluation of the father, by anyone, was unnecessary and inappropriate. The court reasoned that, since forensic evaluations of the parties and the children had already been completed by the Forensic Division of the County Department of Social Services, any further examinations were duplicative and harassing, in the absence of any showing that the examinations were inadequate or deficient. Furthermore, it was error, if any examination was to be held, to require the father to submit to evaluation by the mother's privately retained expert. The courts have expressed a preference for the conduct of examinations by neutral and impartial professionals. In the *Rosenblitt* case,

since the expert had already reached a conclusion in favor of the mother, it would be patently unjust to compel the father to join the mother's efforts to shop around for, and bolster, favorable expert testimony. The court also suggested that to require the father to submit to an examination by the adverse private expert would open the door to harassment, annoyance and intimidation.

Two justices dissented. The dissenters argued that litigants are afforded the right to obtain physical and mental examinations of the adverse party by CPLR 3121 and the additional information to be provided by the mother's expert could only add to the pool of potentially useful information to be made available to the court. Indeed, argued the dissenters, the adversary system contemplates that parties will seek the services of experts who will support their positions. The dissenters would have allowed the examination, subject to the father's right to have counsel present during the examination as an observer. *See also Matter of Alexander L.*, 60 N.Y.2d 329, 469 N.Y.S.2d 626, 457 N.E.2d 731 (1983); *Koons v. Koons*, 161 Misc.2d 842, 615 N.Y.S.2d 563 (Sup.Ct. N.Y. County 1994).

On the question of the expansion of the forensic examinations to include the paternal grandparents, the majority ruled that the order was erroneous since the grandparents, nonparties to the litigation, had not been served with copies of the order to show cause or otherwise given notice and an opportunity to be heard. Further, ruled the majority in *Rosenblitt*, the mother had failed to demonstrate that such an examination was necessary. The dissenters agreed that the order had to be reversed for failure to notify the grandparents of the application and afford them an opportunity to be heard. However, the dissent maintained that, in view of the lack of notice, it was not necessary to reach the issue of whether the examinations were otherwise appropriately ordered.

The *Rosenblitt* rule was applied in *Hirschfeld v. Hirschfeld*, 114 A.D.2d 1006, 495 N.Y.S.2d 445 (2nd Dept. 1985), affirmed, 69 N.Y.2d 842, 514 N.Y.S.2d 704, 507 N.E.2d 297. The Second Department allowed an appeal of its ruling to the Court of Appeals, presumably so that the Court of Appeals would give its guidance as to the *Rosenblitt* doctrine. The Court of Appeals affirmed, but held that its review of the question was limited to whether the denial of discovery was an abuse of discretion as a matter of law. The Court of Appeals held that, measured by that standard, the denial of the discovery was not such an abuse. 69 N.Y.2d 842, 514 N.Y.S.2d 704, 507 N.E.2d 297 (1987). As a result, the Court did not provide a clear-cut indication as to whether it accepts the *Rosenblitt* rationale.

In *B. v. B.*, 134 Misc.2d 487, 510 N.Y.S.2d 979 (Family Court N.Y. County 1987), *Rosenblitt* was given a narrow reading. The court held that *Rosenblitt* was primarily addressed to the use of partisan expert under the specific circumstances of that case; the expert in question having formed preconceived opinions, the parties having submitted to examination before a non-partisan expert, and the additional examination posing risks of delay, harassment and duplication. In *B.*, the court granted an order compelling one party to submit to an examination by the other party's expert, finding that, unlike *Rosenblitt*, no impartial examinations had been conducted, the partisan expert had not professed any opinions, and the potential for delay and harassment was minimal.

As the court in *B.* acknowledged, *Rosenblitt* can be read more broadly as establishing a principle that mental health examinations in contested custody cases should be conducted by neutral, rather than, partisan experts. The court in *B.*, believing that examinations can be done in the same case by both neutral and partisan experts, elected to construe *Rosenblitt* narrowly.

Another issue, which often arises in cases where there is an allegation of drug abuse by a parent, is the ability of one parent to compel the other parent to submit to drug testing. In *Burgel v. Burgel*, 141 A.D.2d 215, 533 N.Y.S.2d 735 (2nd Dept. 1988) both parents sought custody of their children. The father claimed that the mother had in the past used, and continued to use, cocaine. The mother conceded that she did use cocaine in the past but claimed that she stopped using it several months ago. The father, pursuant to CPLR 3121(a) (providing for a physical or mental examination when a party's physical and mental condition is in issue) sought to have a physician cut several strands of the mother's hair to perform a radioimmunoassay test to determine whether the mother was still using cocaine.

The request was granted. The court held that the information sought was clearly relevant to the issue of custody. Accordingly, the Second Department concluded that the trial court did not abuse its discretion in granting the father's request for a physician to conduct this "minimally intrusive" procedure because the material sought was relevant and reasonable grounds existed for the request.

The criteria articulated in *Burgel*, that the material be relevant and that reasonable grounds exist for ordering the test, were strictly construed in *Garvin v. Garvin*, 162 A.D.2d 497, 556 N.Y.S.2d 699 (2nd Dept. 1990). In *Garvin*, the father, on the eve of trial, made a motion to compel the mother and her "live-in paramour" to appear for radio immunoassay testing of hair samples for the purpose of detecting the use of drugs. The lower court granted the motion, but the Second Department reversed, holding that, unlike the situation in *Burgel*, no "reasonable ground" for such testing had been shown to exist. Unlike in *Burgel*, there was no admitted use of drugs but rather only the "suspicion" that the mother smoked marijuana which, according to a study submitted by the father, is not readily detectable by the test to which the father would have the mother and her paramour submit. Under the facts of the *Garvin* case, there was no discernable legitimate purpose for such testing and it should not have been directed. Thus, although it was recognized that "the broad scope of discovery permitted under the CPLR takes on particular significance in child custody disputes," it was found that the court's equally broad discretionary power to limit disclosure and grant protective orders should have been exercised where reasonable grounds for the request did not exist.

The results of radioimmunoassay analysis of hair were held admissible in evidence in *Matter of Adoption of Baby Boy L.*, 157 Misc.2d 353, 596 N.Y.S.2d 997 (Family Court Suffolk County 1993).

Records of treatment for substance abuse may be ordered produced for in camera examination by the court. *DeBlasio v. DeBlasio*, 187 A.D.2d 551, 590 N.Y.S.2d 227 (2nd Dept. 1992). However, under federal law, disclosure must be authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. 42 U.S.C. § 290dd-2; see 42 C.F.R. § 2.64(d). The application must be made on notice to the custodian of the records. *Susan W. v. Ronald A.*, 147 Misc.2d 669, 558 N.Y.S.2d 813 (Sup.Ct. Queens County 1990). In assessing good cause, the court is required to weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. The court should not permit discovery of material which is cumulative or sought only for purposes of impeachment. See *Napoleoni v. Union Hospital of the Bronx*, 207 A.D.2d 660, 616 N.Y.S.2d 38 (1st Dept. 1994). Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, is required to impose appropriate safeguards against unauthorized disclosure. 42 U.S.C. § 290dd-2; see 42 C.F.R. § 2.64(d). While the federal statute permits disclosure upon consent of the patient, the consent must be voluntary and not one compelled by a court in a litigation. *Susan W. v. Ronald A.*, 147 Misc.2d 669, 558 N.Y.S.2d 813 (Sup.Ct. Queens County 1990).

### C240:20: Parental Visitation Rights

As a general proposition, the non-custodial parent has a right to visitation with his or her children which may not be stripped away absent a showing of exceptional circumstances. Exceptional circumstances involve situations where the exercise of the right is inimical to the welfare of the children or where the parent has in some fashion forfeited his or her right to visitation. E.g., *Strahl v. Strahl*, 66 A.D.2d 571, 414 N.Y.S.2d 184 (2nd Dept. 1979), *affirmed* 49 N.Y.2d 1036, 429 N.Y.S.2d 635, 407 N.E.2d 479; *Morgenstern v. Morgenstern*, 65 A.D.2d 888, 410 N.Y.S.2d 421 (3rd Dept. 1978). Indeed, the Court of Appeals has stated that visitation is a joint right of the noncustodial parent and of the child. *Weiss v. Weiss*, 52 N.Y.2d 170, 436 N.Y.S.2d 862, 418 N.E.2d 377 (1981). Even where one parent is awarded sole custody, the role of the other parent is not terminated and visitation rights are afforded as a matter of course. *Weiss v. Weiss*, *supra*. Thus, the children themselves have the right to continuing and meaningful contact with both parents. E.g., *Matter of Larisa F. v. Michael S.*, 120 Misc.2d 907, 466 N.Y.S.2d 899 (Family Court Queens

County 1983); *Matter of Doe v. Doe*, 86 Misc.2d 194, 378 N.Y.S.2d 269 (Family Court N.Y. County 1975); *Matter of Denberg v. Denberg*, 34 Misc.2d 980, 229 N.Y.S.2d 831 (Sup.Ct. Queens County 1962).

Where the parents reside in relatively close geographic proximity, reasonable access usually takes the form of weekly visitation. Such visitation may include alternate weekends, a mid-week visit, sharing of major holidays and family events (e.g., child's birthday), and sharing of school recess periods, such as winter, spring and summer recesses. *See, e.g., Costanza v. Costanza*, 199 A.D.2d 988, 608 N.Y.S.2d 14 (4th Dept. 1993); *Carr v. Carr*, 171 A.D.2d 776, 567 N.Y.S.2d 495 (2nd Dept. 1991); *Cesario v. Cesario*, 168 A.D.2d 911, 565 N.Y.S.2d 653 (4th Dept. 1990).

The paramount consideration always remains the best interest of the children. *Ex parte Endresen*, 277 A.D. 894, 98 N.Y.S.2d 275 (2nd Dept. 1950). The court's first concern must be with the interests and welfare of the children, not with any supposed rights of parents. Thus, where the exposure of the child to one of its parents presents a risk of physical harm or produces serious emotional strain or disturbance, visitation must be restricted, supervised, or even denied. *See, e.g., Hotze v. Hotze*, 57 A.D.2d 85, 394 N.Y.S.2d 753 (4th Dept. 1977); *Petraglia v. Petraglia*, 56 A.D.2d 923, 392 N.Y.S.2d 697 (2nd Dept. 1977); *Miriam R. v. Arthur D.R.*, 85 A.D.2d 624, 445 N.Y.S.2d 19 (2nd Dept. 1981); *People ex rel. Kourland v. Kourland*, 54 A.D.2d 638, 387 N.Y.S.2d 620 (1st Dept. 1976). Denial of visitation is, however, a drastic action and requires substantial evidence that visitation would be detrimental to the child. *Janousek v. Janousek*, 108 A.D.2d 782, 485 N.Y.S.2d 305 (2nd Dept. 1985). In *Patrick Lynn N. v. Vincent Michael N.*, 152 A.D.2d 549, 543 N.Y.S.2d 693 (2nd Dept. 1989), the court upheld the denial of visitation to the mother. The court held that visitation was properly denied in light of allegations of sexual abuse made by the mother's son from a prior marriage--allegations credited by the examining psychiatrist. Moreover, the court noted reports of ill effects that supervised visits had had on the children. However, the Appellate Division did note that the record before the court was three years old and, therefore, the mother could proceed with a new application for visitation if she believed that a change in circumstances had occurred.

Where there is animosity between the parents, claims by the custodial parent that visitation is disturbing to the child should be carefully scrutinized. *Marciano v. Marciano*, 56 A.D.2d 735, 392 N.Y.S.2d 747 (4th Dept. 1977). Denial of visitation is a drastic measure which must be supported by compelling evidence. *Goldring v. Goldring*, 73 A.D.2d 955, 424 N.Y.S.2d 270 (2nd Dept. 1980); *Herb v. Herb*, 8 A.D.2d 419, 188 N.Y.S.2d 41 (4th Dept. 1959).

The child's apparent indifference to the visiting parent is not a sufficient basis for terminating visitation. *De Biase v. Scheinberg*, 47 A.D.2d 657, 364 N.Y.S.2d 34 (2nd Dept. 1975). Likewise, visitation may not be made conditioned upon the child's consent thereto. *Eylman v. Eylman*, 23 A.D.2d 495, 256 N.Y.S.2d 264 (2nd Dept. 1965). Only where the child is so antagonistic towards the visiting parent that no useful purpose would be served by the visitation may the child's resistance to visitation form the basis for terminating visitation. *Liebllich v. Liebllich*, 18 Misc.2d 798, 164 N.Y.S.2d 179 (Sup.Ct. Queens County 1957). However, even in the situation involving extreme antagonism between child and visiting parent, visitation may be continued and may be coupled with a requirement that the child receive therapy. *Matter of Jane Doe*, 86 Misc.2d 194, 378 N.Y.S.2d 269 (Family Court N.Y. County 1975).

The fact that a parent is incarcerated will not, by itself, render visitation inappropriate; rather, visitation will be permitted unless there is a showing that such visitation would be harmful to the child. In *Rose v. Eveland*, 241 A.D.2d 638, 659 N.Y.S.2d 576 (3rd Dept. 1997), the court held that visitation with the father, who was in the county jail, should be permitted, since there was no evidence that visitation would be harmful. The court noted that, while the mother had refused to speak with or communicate with the father, the paternal grandmother was available to relay messages and to facilitate visitation, if required. In *Matter of Davis v. Davis*, 232 A.D.2d 773, 648 N.Y.S.2d 742 (3rd Dept. 1976), the court directed semiannual visits by the child to the state correctional facility where the father was incarcerated, rather than the monthly visits requested by the father. The Appellate Division found that the denial of monthly visits was appropriate since the visits will of necessity take place in the setting of a correctional facility, the child must make a round trip of at least seven hours in order to get there, he will most likely have to be driven to his

visits with the father by the paternal grandparents, with whom the child is not well acquainted, and the child had a medical history of respiratory problems which made frequent extended absences from home inadvisable.

Manifestly, visitation may be subjected to reasonable conditions and restrictions. Visitation may be supervised by third parties (such as social workers) or by other family members where necessary for the child's protection. See *Matter of Laura A.K. v. Timothy M.*, 204 A.D.2d 325, 611 N.Y.S.2d 284 (2nd Dept. 1994). In *Matter of Hover v. Shear*, 232 A.D.2d 749, 648 N.Y.S.2d 718 (3rd Dept. 1996), the court affirmed an order permitting the father's current wife to supervise some of his visitation and directing the parties to share equally the costs of supervision by a neutral party.

Conduct during visitation may be regulated, as for example, by directing the visiting parent not to drive the children in a vehicle if he or she has been drinking alcohol. *Bohnsack v. Bohnsack*, 185 A.D.2d 533, 586 N.Y.S.2d 369 (3rd Dept. 1992).

Overnight visitation may be refused where appropriate, given the age of the child, the needs of the child, and the circumstances of the case. See *Coffey v. Coffey*, 31 A.D.2d 811, 297 N.Y.S.2d 891 (2nd Dept. 1969). Reasonable provisions regarding advance notice as to the exercise of visitation rights may be imposed. *Oser v. Oser*, 66 A.D.2d 816, 411 N.Y.S.2d 204 (2nd Dept. 1978). In *Sheehan v. Sheehan*, 152 A.D.2d 942, 543 N.Y.S.2d 827 (4th Dept. 1989), the court sustained an order which prevented the father from taking the parties' three year old child on flights in his private plane during visitation. The court held that such a young child, no matter the father's skills as a pilot, was incapable of protecting herself in the event of an incident and, therefore, flying in a private plane with her father was not, at this stage of her development, in her best interests.

Visitation in the presence of the visiting parent's paramour may be precluded. *Hess v. Pedersen*, 211 A.D.2d 1000, 621 N.Y.S.2d 747 (3rd Dept. 1995); *Sheil v. Sheil*, 29 A.D.2d 950, 289 N.Y.S.2d 86 (2nd Dept. 1968). However, in *Cloud v. Cloud*, N.Y.L.J., July 24, 1990 (Sup.Ct. Nassau County), the court ruled that neither the fact that the husband resided out of state nor the fact that he was living with another woman would preclude the husband from visitation during the pendency of a matrimonial action. The wife contended that the husband should be barred from having visitation with the children in the presence of his paramour since that would expose the children to an illegal, adulterous relationship. The court held, however, that the husband had a right to exercise visitation in the company of anyone he chooses, provided that such other people do not adversely affect the welfare of the children. To preserve the welfare of the children, the husband was directed not to have any unrelated family sleep in the same room with him when the children were visiting with him.

In *Landau v. Landau*, 214 A.D.2d 541, 625 N.Y.S.2d 239 (2nd Dept. 1995), the court affirmed an order requiring the mother to undergo psychotherapy as a condition to any expanded or overnight visitation. She was awarded unconditional daytime visitation and the evidence before the court demonstrated that, absent therapeutic intervention, further visitation would not be in the child's best interests. The court also upheld an order temporarily suspending all visitation until the mother removed herself from a neighbor's home across the street from the marital residence.

In one case, a visitation provision which limited the father's right to visit his child to the town in which the mother resided, was held to be unduly harsh. The court said, however, that conditions should be imposed to ensure that the father returns the child after the child visits with him at his New York home. *Baker v. Baker*, 59 A.D.2d 519, 397 N.Y.S.2d 11 (2nd Dept. 1977). But see *Wright v. Wright*, 88 A.D.2d 1008, 451 N.Y.S.2d 936 (3rd Dept. 1982), where the Appellate Division held there was no abuse of discretion in restricting a father's visitation rights by providing that visitation of the child should be exercised each Sunday from 10:00 a.m. to 6:00 p.m. in the locality where the child resided with his mother.

For a court to impose restrictions upon visitation, there must be a reasonable basis for that action. In *Graham v. Graham*, 175 A.D.2d 540, 572 N.Y.S.2d 800 (3rd Dept. 1991), the court found that the record did not support the

denial of the father's request for mid-week visitation. While the mother claimed that such visits interfered with the oldest child's homework, it appeared that the issue could be resolved by having the father return the children home at an earlier time; moreover, the issue existed only with regard to one child and only while school is in session. Indeed, the Appellate Division, noting the absence of provision for visitation during holidays, directed that the trial court develop a more effective visitation schedule.

In *Graham*, the trial court did grant the father visitation during the summer, but on condition that he exercise summer visitation only within New York State. The father apparently desired to spend at least part of the summer in Jamaica, West Indies. The Appellate Division concluded that, while the father had not presently shown that such a trip should be authorized, the father should be given permission to make an application for permission should appropriate circumstances arise. Moreover, the court found that there was no reason to preclude vacation trips within the United States. There was no showing that travel would be harmful to the children or that there was a need for the children to remain relatively close to their residence.

In granting visitation rights to a father, who had been awarded custody by a foreign state and who had tried to forcibly remove the children from this state, the Court of Appeals suggested that, upon remand, the trial court should consider conditioning visitation rights upon the posting of a bond and a stipulation by the father agreeing to a vacatur of the foreign state order, as well as other measures the court may deem necessary. The Court refused to adopt the mother's suggestion to limit the father's visits with the children to this state. It noted that such provision should be adopted only if no other provisions can be made to insure the return of the children to New York after visiting their father in a foreign state. *Berlin v. Berlin*, 21 N.Y.2d 371, 288 N.Y.S.2d 44, 235 N.E.2d 109 (1967).

Permission was granted to a father to take the children of the marriage to Italy for one month upon posting of a \$10,000 bond. *Grassi v. Grassi*, 40 A.D.2d 546, 334 N.Y.S.2d 127 (2nd Dept. 1972). In another case, to overcome the fear of a mother that if visitation were granted to her husband he would flee with their child to Czechoslovakia, the parties stipulated that the husband would leave his passport with his wife upon taking the child. *Kresnicka v. Kresnicka*, 42 A.D.2d 607, 345 N.Y.S.2d 118 (2nd Dept. 1973).

In a different action, in light of several prior actions by the husband-father, in continuing flagrant and deliberate disregard of court orders as to the visitation rights of the wife-mother, the matrimonial court was held to have properly directed the posting of a bond by the husband, to insure compliance with an order directing a nine-day period of visitation by the daughter, with the wife. However, the forfeiture aspect of the bond, which directed that if the husband failed to appear with his daughter at the mother's residence as directed, the bond be forfeited and his attorney directed to turn it over to the mother or her attorney, was an improvident exercise of discretion. *Schoonheim v. Schoonheim*, 92 A.D.2d 474, 459 N.Y.S.2d 56 (1st Dept. 1983).

Pursuant to DRL § 240, subdivision 3, the court may make an order of protection in assisting, or as a condition of, an order with respect to custody or visitation. Such an order may set forth reasonable conditions of behavior to be observed by a party for a specified period of time. Such an order may require a party to: (1) stay away from the home, school, business or place of employment of the child, the other parent, or any other party, and to stay away from any other location designated by the court; (2) permit a parent to visit the child at stated periods; (3) abstain from committing a family offense (see [Criminal Procedure Law § 530.11](#)) or any criminal offense against the child, the other parent, or any person having custody, or from harassing, intimidating or threatening such persons; (4) permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in a proceeding or action under the Domestic Relations Law; (5) refrain from acts of commission or omission that tend to make the home not a proper place for the child; (6) pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order incurred by the person who is protected thereby should the order be issued or enforced; (7) to refrain from intentionally killing or injuring, without justification, a companion animal the respondent knows is owned or kept by the persons protected by the order or by the minor child residing in a protective person's

household; or (8) to observe such other conditions as are necessary to further purposes of protection. For additional statutory provisions authorizing the issuance of orders of protection in matters involving custody and visitation, see [Domestic Relations Law § 252](#) and [Family Court Act § 656](#); *see also* Practice Commentary C240:30, *infra*.

The deprivation of visitation rights does not, per se, relieve a visiting parent of support obligations. However, such a deprivation, if it arises to the level of deliberate frustration or active interference with visitation and is not warranted by pressing concern for the welfare of the custodial parent or child, may result in the suspension of the obligation to pay maintenance. *See* [DRL § 241](#); *Hecht v. Hecht*, 222 A.D.2d 589, 635 N.Y.S.2d 280 (2nd Dept. 1995); *Fuerst v. Fuerst*, 131 A.D.2d 426, 515 N.Y.S.2d 862 (2nd Dept. 1987). On the other hand, the failure of the noncustodial parent to make payment of support, standing alone, is an insufficient basis for denying visitation. *Engrassia v. Di Lullo*, 89 A.D.2d 957, 454 N.Y.S.2d 103 (2nd Dept. 1982).

Note that subdivision 1-c of DRL § 240 precludes the awarding of custody or visitation rights to persons who are convicted of having murdered a parent, legal custodian, legal guardian, or sibling (including a half or step sibling) of the child at issue. This aspect of the statute is discussed in Practice Commentary C240:10B, *supra*.

#### **C240:21: Necessity for Hearing**

As a general proposition, the issue of custody can be resolved only after a full and comprehensive hearing. E.g., *Anstett v. Wolcott*, 94 A.D.2d 692, 461 N.Y.S.2d 1022 (2nd Dept. 1983); *Hall v. Hall*, 89 A.D.2d 1037, 454 N.Y.S.2d 350 (3rd Dept. 1982); *Evans v. Evans*, 81 A.D.2d 753, 438 N.Y.S.2d 152 (4th Dept. 1981); *Corso v. Corso*, 48 A.D.2d 652, 367 N.Y.S.2d 557 (2nd Dept. 1975). Likewise, the issue of visitation, where the parties cannot agree, must be determined after a hearing. E.g., *Piro v. Piro*, 82 A.D.2d 783, 440 N.Y.S.2d 665 (1st Dept. 1981); *Kresnicka v. Kresnicka*, 48 A.D.2d 929, 369 N.Y.S.2d 522 (2nd Dept. 1975); *Turner v. King*, 79 A.D.2d 654, 433 N.Y.S.2d 834 (2nd Dept. 1980). Thus, as a general rule, custody and visitation determinations may not be made on the basis of conflicting affidavits. *See, e.g.,* *Bowman v. Bowman*, 19 A.D.2d 857, 244 N.Y.S.2d 38 (4th Dept. 1963). However, the right to a hearing may be waived. *Kuleszo v. Kuleszo*, 59 A.D.2d 1059, 399 N.Y.S.2d 801 (4th Dept. 1977). Further, temporary custody may be fixed without a hearing where adequate facts are shown by an uncontroverted affidavit. *Meltzer v. Meltzer*, 38 A.D.2d 522, 326 N.Y.S.2d 831 (1st Dept. 1971).

In *Rodriguez v. Rodriguez*, 79 A.D.2d 550, 434 N.Y.S.2d 22 (1st Dept. 1980), the Appellate Division was confronted with cases in which the trial court, in uncontested matrimonial actions, unaccountably deleted from the proposed judgments provisions granting custody to the plaintiffs. The court held that, under then prevailing language of DRL § 240, the court was required to give direction as to custody and the striking out of proposed custody provisions, without any basis being set forth for that action, was a refusal to exercise the discretion mandated by statute. The result in *Rodriguez* should be the same under the current statutory language, which requires the court to verify the custody and support status of children and make orders for custody and support. However, it would appear permissible for the court, in an uncontested action, to require the plaintiff to testify at an inquest with respect to the custody question or to submit written affidavits as to that issue. *See* [DRL § 211](#) and Practice Commentaries thereto.

#### **C240:22: Agreements Between Parents**

The power of the state and the function of the courts as to the determination of custody transcends agreements between individuals. *People ex rel. Converse v. Derrick*, 146 Misc. 73, 261 N.Y.S. 447 (Sup.Ct. Orleans County 1933). Parents can never finally contract with respect to custody of their children and the courts have jurisdiction over the children regardless of any such contract. *Hill v. Hill*, 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup.Ct. N.Y. County 1951). A separation agreement is not a bar to a change in custody when the welfare of a child requires a change. *Barry v. Glynn*, 59 Misc.2d 75, 297 N.Y.S.2d 786 (Family Court Bronx County 1969). Agreements as to custody are always

subject to the supervening power of the court. *Agur v. Agur*, 32 A.D.2d 16, 298 N.Y.S.2d 772 (2nd Dept. 1969). An agreement which precludes or limits the right of a custodial parent to relocate would not be enforceable to the extent that it is inconsistent with the best interests of the child. See *Tropea v. Tropea*, 87 N.Y.2d 727, 642 N.Y.S.2d 575, 665 N.E.2d 145 (1996). Likewise, an agreement with regard to a child's religious upbringing is enforceable only to the extent that it is in the best interests of the child. See *Perlstein v. Perlstein*, 76 A.D.2d 49, 429 N.Y.S.2d 896 (1st Dept. 1980); see discussion in Practice Commentary C240:13, *supra*.

The Equitable Distribution Law permits parties to a separation agreement to make provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section 240 of the Domestic Relations Law. DRL § 236, Part B, subd. 3. Section 240 of the Domestic Relations Law grants the court the authority in matrimonial actions, in proceedings by writ of habeas corpus, and in proceedings commenced by petition and order to show cause, to make orders for custody and support of any child of the parties, as in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child, subject to certain statutory requirements. In short, the parties' ability to contract in a separation agreement with respect to matters affecting children is subject to the supervisory role of the court and to the terms of express statute.

These principles are confirmatory of existing law. In terms of custody, even before the enactment of the Equitable Distribution Law, it was well accepted that parents could never dispositively contract with respect to custody matters since, where the best interests of the child requires a custodial arrangement different from that provided for by agreement, the court may disregard the agreement. *Agur v. Agur*, 32 A.D.2d 16, 298 N.Y.S.2d 772 (2nd Dept. 1969). No agreement as to custody may bind the court as to render inoperable its supervisory power. *People ex rel. Wasserberger v. Wasserberger*, 42 A.D.2d 93, 345 N.Y.S.2d 46 (1st Dept. 1973), *affirmed*, 34 N.Y.2d 660, 355 N.Y.S.2d 580, 311 N.E.2d 651 (1974).

While no agreement can bind the court to a custody disposition other than one which is based upon an assessment of the child's best interests, weight may be given to the priority created by virtue of that agreement. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982). The priority created by virtue of an initial custody determination, such as a custody determination made by voluntary agreement between parents, arises from the conception that stability in a child's life is in the child's best interests and that a prior determination, including one made by agreement, reflects a considered and experienced judgment concerning all of the factors involved. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982). However, when the court is requested to modify a prior custodial arrangement, the priority to be given to stability is but one of several factors to be considered and, in fact, an agreement which was so contradictory of considered judgment as to merely determine custody on the basis of the child's wishes, is not even a weighty factor. *Friederwitzer v. Friederwitzer*, *supra*.

In entering into a separation agreement, the parties may agree, subject to the supervisory powers of the court, with respect to custody and visitation. The parties may agree to confer custody upon one parent and fix the visitation rights of the other parent. Alternatively, the parties may agree to a joint custody arrangement and may define the meaning and scope of that arrangement. See *Braiman v. Braiman*, 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978); see discussion in Practice Commentary C240:17, *supra*. However, the court may convert a joint custody arrangement into a single custody arrangement where the circumstances and the best interests of the child so require. See, e.g., *Munford v. Shaw*, 84 A.D.2d 810, 444 N.Y.S.2d 137 (2nd Dept. 1981); cf. *Goho v. Goho*, 59 A.D.2d 1045, 399 N.Y.S.2d 800 (4th Dept. 1977).

A stipulation or agreement as to custody should not be enforced without a plenary hearing which should concern itself primarily with the best interests of the child. A child's welfare cannot be bartered or compromised. The child's rights are superior to those who are parties to the stipulation and may not be foreclosed by stipulation. It is the duty of the court to determine custody solely on the basis of the welfare of the child. *Application of Araujo*, 38 A.D.2d 537, 327 N.Y.S.2d 217 (1st Dept. 1971); see also *Scoville v. Scoville*, 47 A.D.2d 971, 366 N.Y.S.2d 676 (3rd Dept. 1975).

A significant decision with respect to the judicial authority over custody agreements was made in *Charatan-Berger v. Berger*, 158 A.D.2d 426, 551 N.Y.S.2d 525 (1st Dept. 1990). There, the parties, during the course of a custody hearing, entered into a stipulation pursuant to which the husband would be awarded custody of the parties' child. However, within days of that agreement, the wife "disavowed" it and the custody hearing resumed. The wife sought to stay enforcement of the stipulation, a request which the trial court granted. The Appellate Division, however, set the stay aside by a vote of 4-1. The Appellate Division majority held that the stipulation was enforceable since it satisfied the requirements of CPLR 2104 (writing signed by the parties and counsel) and the "judicial policy in this State is to favor the enforcement of stipulations". That the stipulation was valid and enforceable, however, did not prevent the court from continuing the custody hearing to determine the child's best interest. It appears that, while the court did not view the agreement as foreclosing judicial scrutiny of the best interest issue, it did not see a proper basis for staying the agreement, pending the conclusion of the custody hearing. A dissenting justice maintained that the majority had given "undue deference" to the parties' stipulation which had as yet been approved by the trial court.

Also worthy of note is *Senior v. Senior*, 152 A.D.2d 784, 543 N.Y.S.2d 564 (3rd Dept. 1989) wherein the Court gave legal effect to an undisputed term of an oral agreement between the parties pursuant to which the child was to live with the father for at least a certain length of time (other terms were disputed).

However, the parties may by agreement fix custody and, once custody is fixed, it generally may not be disturbed absent a showing that the custodial parent is unfit. Thus, where one day after the parties signed a separation agreement providing for the wife to have custody of the child, the husband secured an ex parte order changing custody to himself, the Appellate Division reversed the order transferring custody. It held that when the parties have agreed that custody should be in one parent, that custody should not be upset without a finding that the custodian is unfit or at least less fit than the other parent. *Papernik v. Papernik*, 55 A.D.2d 846, 390 N.Y.S.2d 337 (4th Dept. 1976). See also *Becker v. Ball*, 61 A.D.2d 884, 403 N.Y.S.2d 373 (4th Dept. 1978).

With respect to the issue of the arbitration of child custody and visitation disputes, some courts have held that arbitration is permissible at least for purposes of initial determination, with the court possessing the power of complete review, including the power to completely disregard the arbitration determination if the determination was contrary to the child's best interests. *Sheets v. Sheets*, 22 A.D.2d 176, 254 N.Y.S.2d 320 (1st Dept. 1964). However, other courts, particularly the Appellate Division, Second Department, hold that the power of the courts to act as *parens patriae* for children under their jurisdiction is so important and fundamental as to preclude arbitration altogether. *Glauber v. Glauber*, 192 A.D.2d 94, 600 N.Y.S.2d 740 (2nd Dept. 1993); *Agur v. Agur*, 32 A.D.2d 16, 298 N.Y.S.2d 772 (2nd Dept. 1969). Since the court would have the authority to hear custody matters *de novo*, allowing arbitration to proceed, even as a preliminary matter, is regarded as a waste of time, expense and effort. See *Glauber v. Glauber*, *supra*; *Nestel v. Nestel*, 38 A.D.2d 942, 331 N.Y.S.2d 241 (2nd Dept. 1972). In the *Glauber* and *Nestel* cases, the Second Department held that arbitration would actually delay an expeditious resolution of the matter and that the judicial process is better suited towards the protection of the best interests of a child.

Just as the parties may not conclusively bind the court's determination of custodial questions by agreeing to arbitration, they may not bind the court by agreeing to other means of custody dispute resolution. Thus, an agreement that the issue of custody would be resolved in accordance with a professional opinion to be obtained from a designated psychiatrist is not conclusive on the court. See *Matter of Hennelly v. Viger*, 194 A.D.2d 791, 599 N.Y.S.2d 623 (2nd Dept. 1993); *Bender v. Bender*, 33 A.D.2d 546, 304 N.Y.S.2d 482 (1st Dept. 1969). However, as was held in a later decision in *Hennelly v. Viger*, *supra*, while the court may not delegate to anyone its power to decide the issue of custody, the court may follow the report of an expert where the court reserved the final decision to itself and, in making that decision, relied upon the record as a whole. 198 A.D.2d 224, 603 N.Y.S.2d 168 (2nd Dept. 1993).

**C240:23: Jurisdiction of Supreme Court to Modify or Annul Custody Directions of New York Courts**

The New York Supreme Court may annul or modify any direction as to custody of children made in actions or proceedings brought to annul a marriage, to declare the nullity of a void marriage, for a separation, for a divorce, or to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage. In the event no direction as to custody has been made in the final judgment in such actions or proceedings, the court may amend the judgment by inserting a direction as to custody. DRL § 240 (subd. 1[h]).

Modification may be sought in a variety of procedural contexts: petition under the Domestic Relations Law, modification petition under the Family Court Act, or, where the arrangement sought to be altered was made by stipulation in a still pending action or proceeding, by notice of motion in the action or proceeding. Even where the request is made in the wrong form, such as by notice of motion in a matrimonial action which has gone to judgment, the court may overlook the procedural irregularity in the absence of prejudice to the party opposing modification. *Posporelis v. Posporelis*, 41 A.D.3d 986, 838 N.Y.S.2d 681 (3rd Dept. 2007).

The jurisdiction of a court over the parties and over the incidental subject matter continues after the entry of judgment. *Matter of Nehra v. Uhlar*, 43 N.Y.2d 242, 401 N.Y.S.2d 168, 372 N.E.2d 4 (1977); *Fox v. Fox*, 263 N.Y. 68, 188 N.E. 160 (1933). This traditional principal is subject to the provisions of the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act (*see Scheinkman, New York Law of Domestic Relations, Chapter 20 [West 2nd Ed]*).

The application to Supreme Court may be made by the husband, the wife, or any person or party having the care, custody, and control of the child. The application is to be made upon such notice to the other party or parties having the care, custody, and control of the child and given in such manner as the court shall direct. DRL § 240 (subd. 1[h]). An application to modify an award of custody can be made only by order to show cause, not by notice of motion. Failure to proceed by order to show cause is a fatal defect. *Hechemy v. Hechemy*, 79 Misc.2d 988, 361 N.Y.S.2d 818 (Sup.Ct. Albany County 1974).

When an application for an order to show cause is presented to the court, the court, in reviewing the submitted papers, has discretion in deciding whether to issue the requested order to show cause. The court may decline to issue the order in order to prevent litigants from harassing their adversaries with frivolous applications. Where the Supreme Court refuses to issue a requested order to show cause, the applicant may seek to have that determination reviewed by the Appellate Division pursuant to CPLR 5704(a); however, the Appellate Division will not entertain an Article 78 proceeding in the nature of mandamus to compel the issuance of the show cause order. *Matter of Greenhaus v. Milano*, 242 A.D.2d 383, 661 N.Y.S.2d 664 (2nd Dept. 1997).

Section 467, subdivision (a), of the Family Court Act provides that the Supreme Court may refer to the Family Court the determination of applications to modify judgments or orders of custody. Upon such a referral, the Family Court may modify the judgment or order upon a showing that there has been a subsequent change of circumstances and that modification is required. Accord, Family Court Act § 652 (subd. a).

Pursuant to section 467, subdivision (b), of the Family Court Act, the Family Court, even in the absence of a referral from Supreme Court, may determine any application to enforce or modify an order or judgment awarding custody or visitation. However, the Family Court is precluded from exercising jurisdiction where the Supreme Court provided in the order or judgment to be enforced or modified that enforcement or modification may be obtained only in Supreme Court. Again, the Family Court's entitlement to make modifications is dependent upon its finding that there has been a subsequent change of circumstances and that modification is required.

**C240:24: Standards for Custody Modification Generally**

A prior custody determination by a New York court is never *res judicata* as to foreclose reconsideration of custody by another New York court. See *Barry v. Glynn*, 59 Misc.2d 75, 297 N.Y.S.2d 786 (Family Court Bronx County 1969); *McCuen v. McCuen*, 71 Misc.2d 539, 336 N.Y.S.2d 884 (Sup.Ct. Queens County 1972). However, the priority of custody created by the initial award is a weighty factor to be considered upon a modification application.

Custody should be established on a long term basis whenever possible, and changes in established custody should be made only on the demonstration of a sufficient change in circumstances to show a real need to effect a change to insure the welfare of the child. *Dintruff v. McGreevy*, 34 N.Y.2d 887, 359 N.Y.S.2d 281, 316 N.E.2d 76 (1974).

In the absence of extraordinary circumstances, priority in custody should be given to the first custody awarded in the litigation or by voluntary agreement. In *Nehra v. Uhlar*, 43 N.Y.2d 242, 401 N.Y.S.2d 168, 372 N.E.2d 4 (1977), it was determined that the father was entitled to custody of the children. The Michigan court which had divorced the parties has awarded the father custody of the children. He was a fit parent, and the mother had obtained possession of the children by lawless self-help. In *Corradino v. Corradino*, 48 N.Y.2d 894, 424 N.Y.S.2d 886, 400 N.E.2d 1338 (1979), the Court of Appeals referred to the Appellate Division's opinion which held that although both the divorced father and mother were fit parents in the instant case, the goal of the child's development into a completely rounded person could best be assured by continuing custody in the mother, pursuant to a separation agreement, with the father exercising liberal but reasonable visitation rights. See also *Cella v. Cella*, 82 A.D.2d 795, 439 N.Y.S.2d 219 (2nd Dept. 1981). However, in *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982) the Court of Appeals found that although the mother was not an unfit parent, she was the less fit parent, and therefore the trial court was not bound by the stipulation of the parties, but was required to review the totality of the circumstances to see what was in the child's best interests.

The ultimate issue in the modification context is whether there has been a substantial change in circumstances which makes modification necessary. See *Family Court Act § 467*.

In *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982), the Court of Appeals held that the standard ultimately to be applied in a proceeding to consider change in parental custody remains the best interests of the child when all applicable factors are considered. The Court considered the statement from *Nehra*, *supra*, that "Priority, not as an absolute but as a weighty factor, should in the absence of extraordinary circumstances, be awarded to the first custody awarded in litigation or by voluntary agreement." The Court explained that the phrase "absence of extraordinary circumstances" is to be read as "absence of countervailing circumstances on consideration of the totality of circumstances," not that some particular or unusual event has occurred since the prior award. See also *Krom v. Comerford*, 57 N.Y.2d 704, 454, N.Y.S.2d 701, 440 N.E.2d 786 (1982); *Robert T.F. v. Rosemary F.*, 148 A.D.2d 449, 538 N.Y.S.2d 605 (2nd Dept. 1989); *Bonnaci v. Bonnaci*, 89 A.D.2d 634, 453 N.Y.S.2d 90 (3rd Dept. 1982); *Speranzi v. Clark*, 90 A.D.2d 877, 456 N.Y.S.2d 471 (3rd Dept. 1982); *Fitch v. Guinn*, 92 A.D.2d 682, 460 N.Y.S.2d 197 (3rd Dept. 1983); *Dylong v. Dylong*, 92 A.D.2d 698, 460 N.Y.S.2d 400 (3rd Dept. 1983); *Fontaine v. Smielak*, 92 A.D.2d 880, 459 N.Y.S.2d 865 (2nd Dept. 1983); *Stanat v. Stanat*, 93 A.D.2d 114, 461 N.Y.S.2d 32 (1st Dept. 1983).

In *Matter of Louise E.S. v. W. Stephen S.*, 64 N.Y.2d 946, 488 N.Y.S.2d 637, 477 N.E.2d 1091 (1985), the Court of Appeals again stressed that stability of custodial relationships is not a conclusive factor. While the disruption that change brings about is an important consideration, is not preclusive. Primary is the assessment of the parents' ability to provide for the child's emotional and intellectual development, the quality of the home environment, and the parental guidance. In the case before it, the Court found that a change in custody was warranted as the mother had not paid adequate attention to the child's development and the child had few peers, was excessively absent from school, spent little time away from home and school, and developed a behavioral problem.

The benchmark for determining whether an existing custody order should be modified is whether there has been a change in circumstances. *Carpenter v. La May*, 241 A.D.2d 625, 659 N.Y.S.2d 943 (3rd Dept. 1997). The Appellate Division, Fourth Department, has developed a five-factor test for measuring applications for custody modification: (1) the quality of the home environment and the parental guidance the custodial parent provides for the child; (2) the ability of each parent to provide for the child's emotional and intellectual development; (3) the financial status and ability of each parent to provide for the child; (4) the relative fitness of the respective parents; and (5) the length of time the present custody arrangement has been in effect. *Matter of Kristi T. v. Andrew R.V.*, 48 A.D.3d 1202, 850 N.Y.S.2d 765 (4th Dept. 2008); *Matter of Maher v. Maher*, 1 A.D.3d 987, 767 N.Y.S.2d 179 (4th Dept. 2003). These factors are not new; the summarization is helpful, but the listing of five specific factors should not prevent the court from considering any other facts or factors that are involved in the case, even if not specifically included in the five-factor list. In other words, the five-factor formulation should not be regarded as exclusive.

In *Studenroth v. Phillips*, 230 A.D.2d 247, 657 N.Y.S.2d 257 (3rd Dept. 1997), the court rejected an argument that a stipulation between the parties as to a different standard for modification was against public policy. In *Studenroth*, the parties entered into a stipulation which was approved by the Law Guardian and by Family Court and which provided for, *inter alia*, joint legal custody of both children, physical custody to be awarded to the mother and extensive visitation awarded to the father. The stipulation also provided that either party had the right to repetition Family Court for custody modification within six months of the court's order effectuating the terms of the stipulation and that neither party would have to allege or prove a change of circumstances in order to invoke their agreed right to repetition. When the father re-petitioned and was awarded custody, the mother objected, arguing that it was "an affront to public policy" for the court to dispense with the "required standard" and "substantive requirement" that a sufficient change in circumstances must be shown to warrant a change in physical custody. The court rejected the argument, holding that the custody agreement subject to the stipulation was far from "established" when the father invoked the option of a full and comprehensive best interests hearing, an option available to either parent. Furthermore, the totality of circumstances must be considered in determining whether any custody arrangement should be changed, with the preeminent concern always being the children's best interests. Here, the court noted, the stipulation afforded the trial court the opportunity, which it took, to determine the children's best interests based upon proof of events and conditions throughout their lives and not based on some particular, sudden or unusual event which occurred since the making of the agreement. There was ample basis to enforce the stipulation and, in addition, the Appellate Division agreed that the evidence presented at the hearing supported the decision to change custody to the father.

In *Carpenter v. La May*, 241 A.D.2d 625, 659 N.Y.S.2d 943 (3rd Dept. 1997), the court found that there had not been a showing of changed circumstances. While the mother claimed that she had stopped associating with people who were not good for her, no longer used drugs or alcohol, and had a better relationship with her children, her testimony was not supported by objective evidence. Moreover, the mother admitted that she had not followed through on recommended treatment. Additionally, while the mother claimed that the father had hindered her visitation, the court concluded some of the difficulties were of the mother's own making (she did not have ready access to a car) and that the father had not willfully interfered in the relationship such as to jeopardize the child's best interests.

In *Perez v. Perez*, 239 A.D.2d 868, 659 N.Y.S.2d 642 (4th Dept. 1997), the court affirmed an order changing custody of a 10-year-old daughter because the mother, who had been the custodial parent, had interfered with the child's relationship with the father to such an extent that she had acted contrary to the best interests of the child. The mother's conduct was such as to raise a strong probability that she was unfit. The record established that the mother's conduct had greatly upset the child and that the mother's attitude substantially interfered with her ability to place the needs of the child before her own in fostering a continued relationship with the noncustodial parent. Among other things, the child preferred to live with the father because of the mother's constant interrogation concerning visitation with plaintiff. While the result was to separate the child from her 18-year-old sister, the court concluded that the separation of siblings was appropriate since the older child did not have a relationship with the father.

The courts should be reluctant to transfer custody of young children who have been with a parent since birth or to permit separate custody of siblings. *Aberbach v. Aberbach*, 33 N.Y.2d 592, 347 N.Y.S.2d 456, 301 N.E.2d 438 (1973). Generally, the courts require the non-custodial parent to show that the custodial parent is less fit as a parent before changing custody which has been retained for a long period. *Nierenberg v. Nierenberg*, 43 A.D.2d 717, 350 N.Y.S.2d 437 (2nd Dept. 1973). See also *Million v. Haselkorn*, 84 A.D.2d 809, 444 N.Y.S.2d 139 (2nd Dept. 1981); *State ex rel. Schussler v. Schussler*, 86 A.D.2d 787, 447 N.Y.S.2d 7 (1st Dept. 1982).

Custody may be modified where a parent demonstrates unfitness by denying visitation to the other parent. See *Janecka v. Franklin*, 150 A.D.2d 755, 542 N.Y.S.2d 206 (2nd Dept. 1989). However, the denial of visitation, even where malicious, does not necessarily warrant a change in custody. For example, in *Gagliardo v. Gagliardo*, 151 A.D.2d 718, 543 N.Y.S.2d 684 (2nd Dept. 1989), the Appellate Division concluded that a change in custody from mother to father was the wrong remedy under the circumstances for the mother's refusal to provide visitation. The Court concluded that the mother was "indisputably a loving and attentive mother"; that the psychiatric and psychological evidence supported continuation of custody in her; and that the mother was available as a full-time parent, while the father was employed full-time. Indeed, the Appellate Division remarked that placement of custody in the father would be tantamount to placing the child in the custody of the paternal grandparents. However, the Appellate Division did leave open the possibility that custody be changed in the future should the mother continue her course of conduct.

Change of custody has been granted where it has been shown that the custodial parent had permitted the child to engage in dangerous activities. *Moore v. MacRae*, 177 A.D.2d 1012, 578 N.Y.S.2d 314 (4th Dept. 1991). Custody may be changed where there is a showing of physical abuse of the child, *Van Hoesen v. Van Hoesen*, 186 A.D.2d 903, 590 N.Y.S.2d 139 (3rd Dept. 1992); *Lenny M.J. v. Luis V.*, 100 A.D.2d 514, 472 N.Y.S.2d 721 (2nd Dept. 1984), or sexual abuse of the child. *Finn v. Finn*, 176 A.D.2d 1132, 575 N.Y.S.2d 591 (3d Dept. 1991). Grounds for a change in custody exist where there is evidence that the child has been exposed to acts of violence against the custodial parent by a paramour, *Feltman v. Feltman*, 99 A.D.2d 540, 471 N.Y.S.2d 619 (2nd Dept. 1984), or that the custodial parent was an alcohol abuser who was occasionally violent. *Johns v. Johns*, 156 A.D.2d 777, 549 N.Y.S.2d 200 (3rd Dept. 1989).

The wishes of the child have been noted as a factor for consideration in a number of modification cases. Indeed, the failure of the trial court to ascertain the custody preference of mature children has been deemed improper. *Koppenhoefer v. Koppenhoefer*, 159 A.D.2d 113, 558 N.Y.S.2d 596 (2nd Dept. 1990). For example, in *Hennelly v. Viger*, 198 A.D.2d 224, 603 N.Y.S.2d 168 (2nd Dept. 1993), the father's household was found to be more stable and less quarrelsome than the mother's, and the father and step-mother were deemed more nurturing and less impulsive than the mother and step-father. The child's desire to be with the father was considered an additional factor justifying change of custody. See also *Mead v. Mead*, 143 A.D.2d 454, 532 N.Y.S.2d 449 (3rd Dept. 1988). However, where countervailing factors have been found to outweigh the child's desires, particularly with regard to children of tender years, the change of custody will not be granted. Thus, in *Feltman v. Feltman*, 99 A.D.2d 540, 471 N.Y.S.2d 619 (2nd Dept. 1984), an eleven-year-old child's preference to live with her mother was not determinative, where she was repeatedly exposed to violent acts committed against the mother. The court stated that an eleven-year-old did not have the maturity to intelligently weigh the factors necessary to make a wise choice regarding custody. In *Moore v. MacRae*, 177 A.D.2d 1012, 578 N.Y.S.2d 314 (4th Dept. 1991), the child's unexplained preference to live with his father was outweighed by the parents' agreement as to custody, absence of countervailing circumstances, and un rebutted testimony that the father refused to give the child his asthma medicine, allowed him to engage in dangerous activities and exposed him to pornography. In *Fox v. Fox*, 177 A.D.2d 209, 582 N.Y.S.2d 863 (4th Dept. 1992), a change of custody from father to mother was reversed on appeal, despite the strong preference of a ten-year-old daughter to live with her mother, where the decision was made without benefit of an investigative report, without taking testimony of teachers, counselors, psychologists or other experts, and where the child and her younger brother were progressing well academically under the father's custody.

Modification of visitation to require that it be supervised has been ordered where there is fear of parental kidnaping, physical or sexual abuse, or other potential danger to the child. Thus, where the mother had previously absconded with the child, and there appeared to be a likelihood that she would do so again if her access was unfettered, supervised visitation was ordered. *Silver v. Silver*, 100 A.D.2d 543, 473 N.Y.S.2d 240 (2nd Dept. 1984). Supervised visitation was also ordered where the parties displayed obvious acrimony, and the child had developed severe emotional problems, *James U. v. Susan U.*, 125 A.D.2d 921, 510 N.Y.S.2d 286 (3d Dept. 1986), and where there were acts of violence against the mother and allegations of sexual abuse of the child. *A.F. v. N.F.*, 156 A.D.2d 750, 549 N.Y.S.2d 511 (2nd Dept. 1989).

The failure or refusal of the custodial parent to properly attend to a child's physical or mental health needs may constitute grounds for a change in custody. Thus, evidence of a parent's attitude toward her daughter's health and the parent's failure to obtain medical attention for a severe fungus infection on her daughter's scalp was sufficient to support the finding of changed circumstances warranting transfer of custody from the wife to the husband. *Ferguson v. Coddington*, 80 A.D.2d 966, 438 N.Y.S.2d 624 (3rd Dept. 1981).

In *Payette v. Payette*, 91 A.D.2d 733, 457 N.Y.S.2d 1000 (3rd Dept. 1982), the trial court had based its decision to transfer custody of the parties' child on one solitary observation of better rapport of the child with her father. That court had made no other findings as to what facts favored the father over the mother. The appellate court found that the record, on the other hand, indicated crucial factors favoring a contrary decision. The mother had formerly been granted custody by court order and then by voluntary agreement of the father, good care had been given the child by the mother, and the present arrangement was a stable one.

Where an award of joint custody had been made pursuant to a divorce decree, it will not be changed unless there has been a showing of substantial change in circumstances which adversely affects the children and makes a change of custody necessary in their best interest, or unless it is shown that a custodial parent is unfit. The burden of establishing a substantial change of circumstances rests upon the party seeking modification. Where no other facts were alleged by the father other than that the mother had moved to Colorado, the father failed to establish a sufficient change in circumstances to warrant modification of the award of joint custody. *Rusin v. Rusin*, 103 Misc.2d 534, 426 N.Y.S.2d 701 (Sup.Ct. Albany County 1980).

In *Labow v. Labow*, 86 A.D.2d 336, 449 N.Y.S.2d 977 (1st Dept. 1982), *affirmed*, 59 N.Y.2d 956, 466 N.Y.S.2d 304, 453 N.E.2d 533 (1983), a father sought modification of custody of his 11-year-old son. The only change of circumstances, said the Appellate Division, was the failure of the father to comply with his court ordered obligations, bringing about the efforts of the mother to enforce them, with the consequent "hassle" as described by the child. Evidence did not support the trial court's finding that the mother, who was allegedly "obsessed" with money matters, was an unfit parent. Under the circumstances, said the appellate court, there was no warrant for a change in custody, or else noncompliance with court decrees would be rewarded because such noncompliance has brought about its desired effect.

The fact that a custodial parent has remarried and has other children should not, by itself, warrant a change in custody. Likewise, the fact that the noncustodial parent has remarried and has other children should not, by itself, suffice to justify a change in custody. Thus, in one case, that the father, who had custody of the children, had remarried and that his new wife had an infant daughter, did not warrant a change in custody from the father without direct proof that such a new family relationship had a harmful effect on the best interests of the custodial children. *Hechemy v. Hechemy*, 82 Misc.2d 79, 368 N.Y.S.2d 709 (Sup.Ct. Albany County 1975). Likewise, remarriage of a mother was not such an extraordinary change of circumstances as to justify transfer of custody. Although the psychiatrist's report recommended the instant transfer, it was largely based on a description of family life provided by the children, without any indication that the mother was ever interviewed, and which was presented in the face of an admission by the

father that he made disparaging remarks about the mother in the presence of the children. *De Francesco v. MacNary*, 74 A.D.2d 966, 425 N.Y.S.2d 885 (3rd Dept. 1980).

In *Greenblatt v. VanDeusen*, 87 A.D.2d 713, 448 N.Y.S.2d 888 (3rd Dept. 1982), the Family Court was held to have erred by denying, without a hearing, a mother's application to modify a prior order of custody. The generalized allegations of the petition, alleging a change in circumstances consisting of the father's failure to provide proper discipline and to attend to the child's behavioral development, as well as his interference in relations between mother and child, set forth sufficient facts which, if established at an evidentiary hearing, could afford a basis for granting the relief sought. This was particularly so, said the appellate court, in light of the holding in *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982), in which the Court of Appeals relaxed the requirement of pleading and proof of extraordinary circumstances in change of custody cases.

Repercussions of a claim and the change of circumstances alleged in a petition, i.e., the change in the composition of the custodial household and the resulting friction allegedly brought on by respondent's remarriage to a woman with young children or her own, necessitated a hearing in which the court could determine the best interests of the children of petitioner and respondent, ages 10 and 15. *Matter of Maloney*, 90 A.D.2d 551, 455 N.Y.S.2d 129 (2nd Dept. 1982).

#### **C240:25: Relocation by Custodial Parent**

In the landmark case of *Tropea v. Tropea*, 87 N.Y.2d 727, 642 N.Y.S.2d 575, 665 N.E.2d 145 (1996), the New York Court of Appeals held that relocation cases should not be measured by any particular formula or prejudged by the use of any particular set of presumptions. In particular, the Court of Appeals held that the “exceptional circumstances” or “pressing concerns” test, set forth in earlier decisions flowing from *Weiss v. Weiss*, 52 N.Y.2d 170, 436 N.Y.S.2d 862, 418 N.E.2d 377 (1981), are not valid. Instead, each relocation case must be considered on its own facts, with due consideration of all the relevant facts and circumstances, and with the paramount issue being what outcome is most likely to serve the best interests of the child.

*Tropea* removes the bias against relocation that had been long built into New York law. Relocation cases are now to be fought out on a level playing field, with no tilt for or against relocation. But in holding that each case must be evaluated on its own facts and circumstances, *Tropea* brings the articulated legal standard into line with the actual, case-specific determinations made by the trial and intermediate appellate courts.

Because determining the issue of best interests is sensitive and complex, relocation applications must generally be determined only after a evidentiary hearing. See *Heisler v. Heisler*, 30 A.D.3d 321, 818 N.Y.S.2d 60 (1st Dept. 2006) (mother's desire to return to her roots in Baltimore where there was a family environment offering greater emotional and financial support for the child sufficient to generate an issue for hearing; while Baltimore is approximately 3 hours away, the mother's request was not automatically precluded by the potential impact on the father's mid-week visitation).

In deciding a relocation case, the distance involved in the proposed relocation, and the impact on the non-custodial parent's visitation, are significant factors. A relocation to a town 40 miles away, though involving a relocation to another state, was held not involve a “great distance” and was permitted in light of the custodial mother's employment opportunity. *Matter of Mooney v. Ferone*, 34 A.D.3d 679, 825 N.Y.S.2d 495 (2nd Dept. 2006). On the other hand, a relocation to Israel was disapproved for lack of a sufficiently compelling reason where the proposed relocation would significantly curtail the non-custodial parent's active role in the children's day-to-day life. *Ritz v. Ritz*, 36 A.D.3d 437, 829 N.Y.S.2d 27 (1st Dept. 2007).

The only certainty that has emerged in relocation cases is that there is almost no certainty in the outcome of any request for permission to relocate. *Tropea*, while assuring that the focus must be on the best interest of the child,

will not likely bring any greater certainty. Each case must be evaluated upon its own facts and circumstances, with the emphasis being on the best interests of the children involved in the particular case. All that exists is a broad parameter--“the best interests of the child”--within which the courts will make their determinations.

In *Tropea*, the Court of Appeals held that, rather than relying upon an exceptional circumstances test, “each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child.” 87 N.Y.2d at 738-739, 642 N.Y.S.2d at 580, 665 N.E.2d at 150. In particular, while the rights of each parent are to be considered, “it is the rights of the children that must be accorded the greatest weight, since they are innocent victims of their parents’ decision to divorce and are the least equipped to handle the stresses of the changing family situation.” *Id.*

*Tropea* involved two separate cases. In both cases, the Court sanctioned relocation. However, both cases involved moves of relatively modest distances and in both instances there were factual findings that the relocation was in the best interests of the children involved.

In the lead case, *Tropea v. Tropea*, the mother had custody of two children, the father had visitation at least three days per week and holidays, and both parties were barred from relocating outside of Onondaga County without prior court approval. The mother sought to relocate to Schenectady in conjunction with her plans to marry an architect who had an established firm there. The mother was expecting a child by her fiancé and they had purchased a home in the Schenectady area. The mother was willing to afford the father frequent and extended contact and was willing to drive the children on the two and a half hour trip from Schenectady to Syracuse. However, the travel time would render mid-week visits impossible.

In the second case decided under the *Tropea* title, *Browner v. Kenward*, the mother had custody of the parties’ child and the father had midweek overnight visits and alternate weekend visitation. The mother was to live with her parents in Purchase, New York and the father was to live in White Plains, which is nearby. The mother was required to obtain court permission if she intended to move more than 35 miles from the father’s residence. The mother sought to relocate to Pittsfield, Massachusetts because her parents were moving there. The mother claimed that she could not find a job, despite duly diligent efforts, in New York, but was able to find one in Pittsfield. She also asserted that her prospects for locating affordable housing in the Purchase area were bleak and that her job in Pittsfield would give her enough income to enable her to rent a home of her own.

On review of the precedents, the Court of Appeals observed that a three-step analysis had been commonly used to decide relocation cases:

- a) at the threshold, the inquiry focused on whether the proposed relocation would deprive the noncustodial parent of regular and meaningful access to the child. If the relocation did not involve such a deprivation, the relocation would be permitted, without an assessment of the merits of the custodial parent’s decision to relocate;
- b) if the proposed relocation threatened loss of regular access by the noncustodial parent, the move was presumed not to be in the child’s best interests, and the custodial parent had to show exceptional or compelling circumstances to justify the move or else relocation would be denied;
- c) if exceptional circumstances were shown, it was still necessary to establish that the relocation would be in the child’s best interests.

The Court of Appeals rejected the use of this three-tiered approach. It held that this approach erected “artificial barriers to the courts’ consideration of all of the relevant factors”. As the Court stated:

Most moves outside of the noncustodial parent's locale have some disruptive effect on that parent's relationship with the child. Yet, if the disruption does not rise to the level of a deprivation of "meaningful access," the three-tiered analysis would permit it without any further inquiry into such salient considerations as the custodial parent's motives, the reasons for the proposed move and the positive or negative impact of the change on the child. Similarly, where the noncustodial parent has managed to overcome the threshold "meaningful access" hurdle, the three-tiered approach requires courts to refuse consent if there are no "exceptional circumstances" to justify the change, again without necessarily considering whether the move would serve the child's best interests or whether the benefits to the children would outweigh the diminution in access by the noncustodial parent. The distorting effect of such a mechanical approach may be amplified where the courts require a showing of economic necessity or health-related compulsion to establish the requisite "exceptional circumstances" ... or where the demands of a new marriage are summarily rejected as a sufficient basis for satisfying this test ... [87 N.Y.2d at 737-738](#), [642 N.Y.S.2d at 580](#), [665 N.E.2d at 149](#).

The *Tropea* Court held that relocation cases are simply too complex to be satisfactorily handled by any mechanical, tiered analysis which prevents a simultaneous consideration of all relevant facts and circumstances. While stressing that no single factor should be treated as dispositive or given such disproportionate weight as to make it determinative, the Court offered a number of important insights and observations that may serve to provide guidance in trying to determine what resolution would further the best interests of the child involved in particular cases.

The Court made it clear that, notwithstanding the eradication of the exceptional circumstances standard, the impact of the relocation on the relationship between the child and the noncustodial parent remains a "central concern". [87 N.Y.2d at 739](#), [64 N.Y.S.2d at 580](#), [665 N.E.2d at 150](#). The Court noted that there are undoubtedly cases where the loss of mid-week or every weekend visits with the noncustodial parent, resulting from relocation, would be devastating to the relationship between the child and the noncustodial parent. On the other hand, there may be other cases in which less frequent, but more extended, visits, would be equally conducive, or even more conducive, to the relationship. The loss of more frequent, shorter visits may be offset, or more than offset, by extended visits, which may give the noncustodial parent and child an opportunity to interact in an established domestic setting.

Moreover, under earlier cases, a relocation would be permitted where it did not interfere with regular, meaningful access. The Court of Appeals in *Tropea* held that, even in such cases, there is still a need to weigh the effect of quantitative and qualitative losses that naturally will result from the relocation against the other factors, such as the reasons for the relocation.

The reasons for relocation must be examined and weighed against the pertinent factors. Under prior law, economic necessity and specific, health-related concerns were valid motives for relocation that could be cited as constituting exceptional circumstances. In *Tropea*, the Court of Appeals confirmed that economic necessity and health reasons remain "particularly persuasive" grounds for permitting relocation. [87 N.Y.2d at 739](#), [642 N.Y.S.2d at 580-581](#), [665 N.E.2d at 150-151](#). However, the Court also held that remarriage and economic betterment, which were not generally regarded as "exceptional circumstances", also be valid motives, and should not be summarily rejected as justifications for relocation, at least where the overall impact on the child would be beneficial. *Id.* This analysis suggests that, where remarriage or economic betterment are proffered as the reasons for relocation, the noncustodial parent may try to defeat the relocation by showing that the overall impact on the child would be detrimental or, at best, neutral.

*Tropea* rejected an effort by the noncustodial parent to have the courts consider the "unclean hands" of the custodial parent in seeking to relocate in order to marry an individual with whom a relationship had been developed prior to the dissolution of the marriage. The Court held that relocation decisions should not turn on the "guilt" or "innocence" of the parties' marital conduct. [87 N.Y.2d at 742](#), [642 N.Y.S.2d at 582](#), [665 N.E.2d at 152](#). This suggests that, where the noncustodial parent is fearful that the custodial parent may wish to relocate with a new partner, the noncustodial parent's more effective strategy may be to resist the divorce or condition it on a forbearance from relocation.

In *Weiss v. Weiss*, 52 N.Y.2d 170, 436 N.Y.S.2d 862, 418 N.E.2d 377 (1981), which was the Court of Appeals' first foray into the relocation thicket, the Court of Appeals held that the mother's desire to make a new life for herself in Las Vegas was an insufficient basis for permitting a relocation. However, in *Tropea*, the Court left open the possibility that the noncustodial parent's desire for a "fresh start" may be a sufficient basis for relocation, since such a fresh start may help the children in "strengthening and stabilizing the new, post-divorce family". 87 N.Y.2d at 739-740, 642 N.Y.S.2d at 581, 665 N.E.2d at 151.

*Tropea* makes explicit a further factor which was at least implicitly considered in past decisions. Where the custodial parent is set on moving, and either cannot or will not remain in the prior residential setting, the suitability of the noncustodial parent to be the custodial parent is an important factor. Where the noncustodial parent is unsuitable for custody or not available to effectively exercise custody, bowing to the relocation may be inevitable. On the other hand, where the noncustodial parent is both suitable and available to assume custody, the transfer of custody may be a realistic alternative to forcing, or trying to force, the custodial parent to remain involuntarily. A transfer of custody may be required where the child's tie to the noncustodial parent and to the community are so strong as to make a relocation undesirable.

Equally important is the effect that a transfer of custody would have on the children. The transfer of custody from one parent to the other may be as traumatic, or more traumatic, than the issues presented by the relocation.

In *Tropea*, the Court of Appeals also suggested that, where there are sufficient reasons to permit a relocation, the court may consider "the possibility and feasibility of a parallel move by an involved and committed noncustodial parent as an alternative to restricting a custodial parent's mobility." 87 N.Y.2d at 739-740, 642 N.Y.S.2d at 581, 665 N.E.2d at 151. There have been a small number of instances where the noncustodial parent made a parallel move in order to preserve the relationship with children that existed prior to the custodial parent's relocation. However, there are many reasons why such parallel moves are typically impractical, such as employment considerations, second marriages, and ownership of property, and lack of opportunity in the new locale. Indeed, the dislocation involved in a parallel move may require adjustments in maintenance and child support payments to such a degree as to adversely impact the children and the relocating parent. Further, a parallel move may threaten or disturb the relocating parent's effort to make a fresh start in an new environment away from the scene of past family difficulties.

While a parallel move may be a useful way of avoiding or minimizing conflict in relocation cases, it is unlikely to be a solution for any but a few of such matters. Nor should the court require the noncustodial parent to engage in such a parallel move as a condition for continued access to the children.

The *Tropea* Court identified a number of other important considerations that must be factored into relocation decisions:

Other considerations that may have a bearing in particular cases are the good faith of the parents in requesting or opposing the move, the child's respective attachments to the custodial and noncustodial parent, the possibility of devising a visitation schedule that will enable the noncustodial parent to maintain a meaningful parent-child relationship, the quality of the lifestyle that the child would have if the proposed move were permitted or denied, the negative impact, if any, from continued or exacerbated hostility between the custodial and noncustodial parents, and the effect that the move may have on any extended-family relationships. Of course, any other facts or circumstances that have a bearing on the parties' situation should be weighed with a view toward minimizing the parents' discomfort and maximizing the child's prospects of a stable, comfortable and happy life.

Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may be unrealistic in some cases to try to preserve the noncustodial parent's accustomed close involvement in the children's everyday life at the

expense of the custodial parent's efforts to start a new life or to form a new family unit. In some cases, the child's interests might be better served by fashioning visitation plans that maximize the noncustodial parent's opportunity to maintain a positive nurturing relationship while enabling the custodial parent, who has the primary child-rearing responsibility, to go forward with his or her life. In any event, it serves neither the interests of the children nor the ends of justice to view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another.

Rather, we hold that, in all cases, the courts should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination. These factors include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests. 87 N.Y.2d at 740-741, 642 N.Y.S.2d at 581-582, 665 N.E.2d at 151-152.

In the particular cases before the Court, the Court permitted the relocations.

In *Tropea*, the Court sustained the Appellate Division's finding that the relocation of the children into a new home where they would be raised within a new family unit was in the children's best interests. It also sustained the finding that the father would be permitted frequent and extended visitation.

In the companion case of *Browner v. Kenward*, the Court noted that the trial court had found the relocation to be in the child's best interests, a finding based on psychological evidence presented in the case. While the mother did not convince the trial court that her justifications for relocation were convincing, the father's loss of mid-week visits and reduction in the quality of the weekend visits was not regarded by the Court of Appeals as constituting a loss of a meaningful opportunity to maintain a close relationship with the child.

It is apparent that *Tropea* substantially undercuts major portions of the Court of Appeals' earlier decision in the *Weiss* case. It is of significance that *Weiss* involved a cross-country relocation, while the two cases presented in *Tropea* involved much more modest relocations.

While the distance involved in the relocation was not explicitly stated to be a relocation consideration by the *Tropea* Court, it mostly certainly should be. For example, in *Browner v. Kenward*, the father was not confronted with the loss of alternating weekend visitation, though such visitation may be lost, or at least prohibitively expensive, in a cross-country relocation. Nor does it appear that in *Tropea* weekend visitation was threatened by the relocation. Indeed, the Court indicated that the relocating mother was willing to undertake the transportation involved.

That the distance involved in the relocation is greater does not necessarily mean that the court should, in general, be more reluctant to permit it. It does mean though that the relocation will have a greater impact on the maintenance of regular and consistent contact with the noncustodial parent and, as such, may weigh against the relocation as one of the factors to be considered.

### **C240:26: Grandparent Visitation**

DRL § 240 (subd. 1[a]) authorizes the court to provide reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties. This statutory provision is in addition to [DRL § 72](#) which permits the grandparents to maintain an independent proceeding to obtain visitation with their grandchildren where the grandparents' own child has died or where other exceptional circumstances exist.

Pursuant to DRL § 240, the court may, but is not required to, provide for visitation rights of grandparents during the course of custody proceedings involving the parents. The statute essentially is procedural, allowing all custody and visitation issues to be decided in one proceeding, rather than splitting them between proceedings involving the parents and proceedings, pursuant to [DRL § 72](#), commenced by grandparents. Indeed, the courts have expressed a clear preference, where grandparents have sought visitation while the parents are involved in matrimonial litigation, to have the matrimonial court decide all custody and visitation issues. See *Grossbardt v. Grossbardt*, 95 A.D.2d 705, 464 N.Y.S.2d 4 (1st Dept. 1983).

Whether visitation rights should be decreed for the grandparents lies within the discretion of the court, exercised in the light of the best interests of the child. *LoPresti v. LoPresti*, 40 N.Y.2d 522, 387 N.Y.S.2d 412, 355 N.E.2d 372 (1976); *Matter of Johansen v. Lanphear*, 95 A.D.2d 973, 464 N.Y.S.2d 301 (3rd Dept. 1983). The court should look to whether a parent is prepared to allow his or her parents to reasonable visits with the child during the time that the child is with the parent. If the parent is so prepared, a formal visitation order for the benefit of grandparents should be refused. To enter such an order, when the grandparents are visiting with the child pursuant to access gained through a parent, might needlessly complicate the child's own schedules and prevent an older child from participating fully in extra-curricular activities. Likewise, visitation by grandparents should be denied where it is shown that such visits would be, or have been harmful to the child. See *LoPresti v. LoPresti*, *supra*.

If the court grants visitation rights to grandparents, it need not be evenhanded. It may award such rights to the maternal grandparents, to the paternal grandparents, to both, or to neither.

Note that, in connection with applications by grandparents for visitation with children remanded or placed in the care of a person, official, agency or institution pursuant to Article 10 of the Family Court Act (child protective proceedings), the applicant must, in such manner as the court will determine, serve a copy of the application upon the social services official who has custody and care of the child and must serve a copy of the application upon the law guardian for the child. These persons are to be afforded the opportunity to be heard on the application. [Family Court Act, § 651\(d\)](#).

For further discussion of grandparent visitation, see both the Practice Commentaries to [DRL § 72](#) and Scheinkman, *New York Law of Domestic Relations* (West 2nd Ed.) §§ 21.7 through 21.78.

This discussion, and the provisions of DRL § 240, pertain to grandparents who seek visitation rights. Where grandparents seek custody rights, it may be necessary for them to seek leave to intervene in the matrimonial action involving their children and grandchildren. A case on point is *Guma v. Guma*, 132 A.D.2d 645, 518 N.Y.S.2d 19 (2nd Dept. 1987). There, the paternal grandparents sought to intervene in custody battle between the parents. Because there was evidence of extraordinary circumstances that might justify an award of custody to the grandparents, the Appellate Division held that the grandparents had a sufficiently real and substantial interest in the case to allow intervention. The trial court had denied intervention on the ground that there was hostility between the mother and the paternal grandparents and the presence of the grandparents in the case would encumber the proceeding and obfuscate the issues. These rationales were found wanting by the Appellate Division. The Appellate Division held that acrimony is not unusual in custody disputes and the intervention of the grandparents would illuminate the custody questions and be in the interests of judicial economy.

When a custody dispute arises in a matrimonial action, the dispute is generally between the parents/spouses. Where a third party has a claim to custody of a child whose custody is being debated within a matrimonial action, the third party may seek permission to intervene. [CPLR 1013](#). Allowing intervention, when timely requested, is in the interest of judicial economy since, with all competing custody litigants before the court, the court may make a custody determination within the context of a single proceeding. If intervention is not requested, or is denied, the prospect is

that, while the court's determination would be binding as between the parties, a second proceeding would be required to resolve the custody claim by the third party. This second proceeding may require the court to cover the same ground; moreover, the custodial status of the child would be left in legal limbo for a longer time.

### **C240:27: Child Support**

DRL § 240, subdivision 1(a), requires that the court verify the status of any child with respect to custody and support. The court is required to enter such orders for support and custody as it determines in its discretion that justice requires. The revised statute, the court must verify what the custodial status of the child is by inquiring into whether there is a custody order, with whom the child resides, and whether custody should be fixed or modified by the court. Likewise, with respect to child support, the court must verify whether there is a support order, whether support is being paid and by whom, and whether the amount paid is appropriate. However, once the court has verified the status of the child, it may defer entering an order if the circumstances warrant such a deferral. The statute requires that, whenever the court makes a direction as to custody, the court must make a provision for child support. The statute also mandates that child support be determined in accordance with the provisions of the Child Support Standards Act.

### **C240:27A: Basic Child Support**

In 1989, the Legislature introduced sweeping new procedures for the determination of awards of child support through the enactment of the Child Support Standards Act. [L.1989, Ch. 567](#). The purpose of the legislation, as set forth in the preamble, is to remedy deficiencies in enforcing child support obligations, by adopting guidelines that permit judicial discretion but which also establish minimum and meaningful standards of obligations “on the premise that both parents share the responsibilities for child support.” While the legislation affected by Child Support Standards Act of 1989 has itself been amended several times since 1989, the statutory provisions pertaining to child support, both those contained in the Domestic Relations Law and those set forth in the Family Court Act, are commonly referred to as the Child Support Standards Act and that label will be used herein.

The Child Support Standards Act (CSSA) amended Section 240 of the Domestic Relations Law to require that the court verify the custodial and support status of each child and that an award of child support be made in accordance with the Act. The legislation also amended [subdivision 7 of Part B of Section 236](#) by eliminating all of the former discretionary criteria for determining child support.

Child support generally means the amount of money to be paid for the care, maintenance and education of an unemancipated child. DRL § 240 (subd. 1-b[b][2]). The statute defines “basic” child support as the sum derived by application of the child support guidelines formula, as increased by obligations for health, child care, and educational expenses. DRL § 240 (subd. 1-b[b][1]).

Basic child support has become understood to mean the regular periodic payment of support made by the noncustodial parent to the custodial parent. The obligations for health care, child care, and educational expenses are commonly referred to as “add-on” expenses. The issues with respect to “add-on” expenses are considered in Practice Commentary C240:27B, *infra*. In addition, the statute requires the court to determine the parties' respective obligations to provide health insurance benefits for the child, which may include “cash medical support”, *i.e.*, a payment to a health care plan for health insurance.

Thus, child support consists of three distinct elements: (a) a regular periodic payment, or basic support; (b) contribution towards “add-on” expenses, which are additional items not encompassed in the regular, basic child support payment; and (c) a contribution towards the expense of the child's health plan coverage.

The procedure required by the statutory guidelines is for the court to determine the combined parental income, i.e., the income of both parents, and multiply that income, up to a threshold amount, by a child support percentage, which varies depending upon the number of children involved. The resulting figure is then apportioned between the parents “in the same proportion as each parent’s income is to the combined parental income.” DRL § 240 (subd. 1-b[c]). The two final figures then represent the “basic” child support obligation of the parents.

The Child Support Standards Act was adopted in 1989--over twenty years ago. In the original Act, the Legislature made the use of the child support percentages mandatory up to a threshold amount of \$80,000 of annual combined parental income and discretionary as to annual combined parental income over the \$80,000 annual income threshold. In recognition that inflation and other factors have led to increases over the past twenty years in both income levels and in expenses, the Legislature, in 2009, increased the \$80,000 figure to \$130,000, effective as of January 31, 2010. (L.2009, ch. 343, “The Child Support Modernization Act”).

This change should not result in any changes in the decisional law, as the only change is to the number, not to the substance of the law. It does mean that, as a practical matter, as to income between \$80,000 to \$130,000, it will be more difficult to obtain a downward adjustment pursuant to the provision that allows the court to deviate downward based upon the statutory child support factors. As will be discussed below, the courts only rarely deviate downward in cases subject to the mandatory application of the statutory formula. It may also mean that the courts will be more open to application of the formula to higher combined annual incomes. Prior to the 2009 amendment, it seemed apparent from the reported cases that the statutory formula was regularly applied to combined parental income as high as \$150,000 per annum. Since \$150,000 is only \$20,000 over the increased base level of \$130,000, the amount of combined parental income that may be subject to regular application of the formula may well trend higher. Additionally, a view had developed, prior to the 2009 amendment, that, once combined parental income reached \$300,000 or so, application of the formula was only rarely appropriate; indeed, some have espoused the view that income over \$300,000 should not even be considered, except in cases involving unusual wealth. With the increase from \$80,000 to \$130,000 in the base line, the outer boundary may also increase.

Further, the 2009 legislation mandates that the executive branch adjust the \$130,000 base amount on account of increases in the consumer price index every two years, beginning January 31, 2012. Consequently, it should be anticipated that the \$130,000 base line will be higher as of January 31, 2002 and, therefore, the trend of upward adjustment to the amount of combined parental income subject to application of the formula should continue. The Assembly Memorandum in support of the 2009 legislation states: “It is imperative that the ‘combined parental income amount’ keep pace with current economic realities so that proper orders are granted on a consistent and predictable basis throughout the State, leaving only exceptional income cases to potentially be determined outside of the presumptively correct CSSA percentages”.

Since, as of the time of this writing, there are no reported decisions applying the increased base line, in reviewing the existing case law, consideration should be given to the fact that the \$80,000 base line is now \$130,000 and that may be increased further.

In determining the incomes of the parents, a starting point is the amount reported by each parent as his or her gross income on the most recent federal income tax return. If the parties file joint income tax returns, each party must prepare a form, sworn to under penalty of perjury, disclosing his or her gross individual income. In recognition of the prospect that a parent may not have fully reported his or her income on the tax return, the statute authorizes the court to look to the amount that “should have been or should be reported.” Thus, the court is not bound by the amount that was, in fact, reported. DRL § 240 (subd. 1-b[b][5]); see *Relf v. Relf*, 197 A.D.2d 611, 602 N.Y.S.2d 690 (2nd Dept. 1993) (court relied upon income twice than that reported on return); *Marsh v. Fieramusca*, 150 Misc.2d 776, 569 N.Y.S.2d 1012 (Family Court Erie County 1991). However, imputation of income must be based on evidence in

the record and not merely speculation. *LaBombardi v. LaBombardi*, 220 A.D.2d 642, 632 N.Y.S.2d 829 (2nd Dept. 1995); *Bohnsack v. Bohnsack*, 185 A.D.2d 533, 586 N.Y.S.2d 369 (3rd Dept. 1992).

Because tax returns reflect income for the past year, use of past tax returns may cause the court to calculate child support based on income figures which are out of date. A parent may have had income increases or decreases since the last tax return was filed. The matrimonial litigants are required to disclose their most recent pay stubs, a disclosure accomplished by the requirement that such pay stubs be annexed to the parties' net worth statements. See DRL § 236, Part B, subd. 4. Presumably, this information is sought so that support may be calculated on the basis of current data entire year. But the use of the most recent pay stub for child support calculation seems to be at variance with the literal language of the statute. While some courts have found the use of current information helpful in cases where there have been significant fluctuations of income, see *Martusewicz v. Martusewicz*, 217 A.D.2d 926, 630 N.Y.S.2d 156 (4th Dept. 1995), other courts have insisted upon use of the most recent tax return, rather than "approximation" of the parties' income. *Linda R.H. v. Richard E.H.*, 205 A.D.2d 498, 612 N.Y.S.2d 656 (2nd Dept. 1994).

Where a parent's base salary is enhanced by a bonus or other incentive, the additional income represented by the bonus should be included in the parent's income for child support standards act purposes. However, most bonuses are paid only once or twice a year, or, perhaps, quarterly. It may represent something of a hardship, from a cash-flow point of view, to include the bonus in calculating the regular periodic payment. Yet, to omit the bonus would be to seriously understate income. The cash-flow concerns may be addressed by directing the noncustodial parent to remit a percentage of the bonus, as and when received. *Quilty v. Quilty*, 169 A.D.2d 979, 564 N.Y.S.2d 877 (3rd Dept. 1991).

To the gross income figure as gleaned from the tax return, the court is required to add amounts not there included which represent net investment income (investment income as reduced by sums expended in connection with such investment); workers' compensation benefits; disability benefits; unemployment insurance benefits; social security benefits; veterans' benefits; pension and retirement benefits; fellowships and stipends; and annuity payments. DRL § 240 (subd. 1-b[b][5]).

There is a special intricacy with respect to social security benefits. "Social security benefits" are to be included in the gross income of the parents for purposes of calculating support. DRL § 240 (subd. 1-b[b][5][iii][D]). There is no limitation based on the type of social security benefits paid. However, while the statute specifically includes social security benefits received by the parent as part of his or her income, it does not similarly include social security benefits paid to the dependent children in that definition. As a result, while the benefits paid to the children are not income to the parent, the noncustodial parent may not take credit for the children's benefits for purposes of reducing child support. *Graby v. Graby*, 87 N.Y.2d 605, 641 N.Y.S.2d 577, 664 N.E.2d 488 (1996).

The court has discretion to add to the income figure values attributable to non-income producing assets; to employment expense payments for meals, lodging, memberships, automobiles or other perquisites to the extent that such payments cover personal expenses or confer personal benefits; to other employment fringe benefits; to "money, goods, or services provided by relatives or friends." DRL § 240 (subd. 1-b[b][5][iv]). In order for the court to take these matters into consideration, the court should be given evidence as to the existence of these perquisites and their economic value. Significantly, the court is also apparently required to apportion these benefits into business and personal components. To the extent that these benefits represent "pure" business expenses, they would not be includable. See *Smith v. Smith*, 197 A.D.2d 830, 602 N.Y.S.2d 963 (3rd Dept. 1993). The statute also opens the door to consideration for money, goods and services supplied by relatives or friends.

Under the statute, the court is also required to make certain reductions from income, i.e.: the amounts for (a) unreimbursed employee business expenses (except to the extent that such expenses reduce personal expenses); (b) alimony or maintenance actually paid to a prior spouse; (c) alimony or maintenance actually paid to the other party to the action, provided that there will be an adjustment in child support when the alimony or maintenance terminates; (d)

child support actually paid on behalf of children other than those involved in the pending action; (e) public assistance; (f) supplemental security income; (g) New York City or Yonkers income or earning taxes actually paid; and federal insurance contributions act (FICA) taxes actually paid. DRL § 240 (subd. 1-b[b][vii]).

The statute permits a reduction for the amount of alimony or maintenance paid to the other party to the action, only if there is an adjustment in child support, presumably upward, when spousal support terminates. See *Lenigan v. Lenigan*, 159 A.D.2d 108, 558 N.Y.S.2d 727 (3rd Dept. 1990) (specific future adjustment required for amount to be excluded for child support purposes). This indirectly suggests that, when the court is considering child support, it must provide for an automatic modification upon the cessation of maintenance.

When each parent's income has been calculated, the two income figures are added to come up with the combined parental income. Once combined parental income has been ascertained, a percentage is applied to calculate the amount of basic child support. That percentage is: 17 percent for one child; 25 percent for two children; 29 percent for three children; 31 percent for four children; and at least 35 percent for five or more children. DRL § 240 (subd. 1-b[b][3]). The applicable percentage does not change because one of the children is away at college. *Matter of P.St. J. v. P.J.T.*, 175 Misc.2d 417, 669 N.Y.S.2d 150 (Family Court Westchester County 1997).

Some parents have non-recurring payments from extraordinary sources which were not taken into account in calculating income. Such special, non-recurring items may include life insurance proceeds, discharge of debts, recovery of bad debts, gifts and inheritances, and lottery winnings. The court may allocate a proportion of such payments to child support. DRL § 240 (subd. 1-b[e]); see *Bryant v. Bryant*, 235 A.D.2d 116, 663 N.Y.S.2d 401 (3rd Dept. 1997) (lump sum payments out of proceeds of inheritance treated as nonrecurring payments); compare *Matter of Wiltsie v. Wiltsie*, 245 A.D.2d 887, 666 N.Y.S.2d 823 (3rd Dept. 1997) (lump sum pension and profit-sharing distributions treated as income); see also *Matter of Knapp v. Levy*, 245 A.D.2d 1027, 667 N.Y.S.2d 563 (4th Dept. 1997) (proper not to include as income one-time payment from employer for vehicle father won in a contest).

The statutory text purports to prohibit the court from ordering child support of less than \$25 per month. Where the non-custodial parent's income is less than or equal to the poverty income level, unpaid child support arrears in excess of \$500 shall not accrue. DRL § 240 (subd. 1-b[d]). However, the requirement of a \$25 per month minimum was held to be preempted by federal legislation in *Rose v. Moody*, 83 N.Y.2d 65, 607 N.Y.S.2d 906, 629 N.E.2d 378 (1993), cert. denied 511 U.S. 1084, 114 S.Ct. 1837, 128 L.Ed.2d 464 (1994).

The court is specifically precluded from finding that the non-custodial parent's pro rata share of basic child support is unjust or inappropriate on the ground that such share exceeds the portion of a public assistance grant which is attributable to a child or the children. DRL § 240 (subd. 1-b[g]).

If the court concludes that the non-custodial parent's share of the basic child support obligation is "unjust or inappropriate," the court may vary the amount to be paid, either upward or downward. However, before finding that the amount is "unjust or inappropriate," the court must consider nine statutory factors, as well as any other factor it finds appropriate to consider. The court's consideration of the statutory factors is mandatory (where guidelines are not to be followed) and must be set forth in a written order, together with the reasons for the level of support fixed by the court. This requirement may not be waived. Moreover, where the court finds that the non-custodial parent's pro rata share of basic child support is unjust or inappropriate, the court must set forth in a written order the factors it considered, the amount of each party's pro rata share of the basic child support obligation, and the reasons why the court did not order support in that amount. DRL § 240 (subd. 1-b[f], [g]).

The nine specifically enumerated statutory deviance factors are: (1) the financial resources of the custodial and non-custodial parent and of the child; (2) the physical and emotional health of the child and his or her special needs and aptitudes; (3) the standard of living the child would have enjoyed but for the dissolution of the household; (4) the

tax consequences; (5) the non-monetary contributions that the parents will make toward the child; (6) the educational needs of either parent; (7) a determination that the gross income of one parent is substantially less than the other parent's gross income; (8) the needs of other children that the non-custodial parent is supporting, if not already taken into account, and the financial resources of any person also obligated to support such other children, provided that the resources available to support such other children are less than those available to the children for whom support is now being considered; and (9) provided that the child is not on public assistance, extraordinary visitation expenses of the non-custodial parent or expenses incurred by the non-custodial parent during extended visitation that reduce the expenses of the custodial parent. The court may also consider any other fact that it determines to be relevant. DRL § 240 (subd. 1-b[f]).

*In Matter of Commissioner of Social Services on behalf of Wandel v. Segarra*, 78 N.Y.2d 220, 573 N.Y.S.2d 56, 577 N.E.2d 47 (1991), the Court held that in a proceeding by a social services official to obtain support for a child on public assistance against the non-custodial parent of the child, the official is not limited to a monthly award representing only the amount paid out monthly in public assistance for such child. The Court held that a non-custodial parent's obligation for child support is not limited to the amount of a public assistance grant; to the contrary, a non-custodial parent's obligation is based on the child's reasonable needs and the parents' financial means, fixed in accordance with the Child Support Standards Act. In the event that the non-custodial parent's support obligations are fixed at an amount in excess of the public assistance grant, then that excess is distributed between the social services official and the public assistance recipient in accordance with federal and state regulations.

In resolving the issue of child support, the trial court must apply the provisions of the Child Support Standards Act, must set forth the basis for its calculations, and provide a justification for any deviation from the child support guidelines. *Dean v. Dean*, 214 A.D.2d 786, 624 N.Y.S.2d 666, (3rd Dept. 1995); *Baker v. Baker*, 206 A.D.2d 931, 615 N.Y.S.2d 549 (4th Dept. 1994); *Pilato v. Pilato*, 206 A.D.2d 928, 615 N.Y.S.2d 182 (4th Dept. 1994).

Notwithstanding the authority to not follow the guidelines result where unjust or inappropriate, in situations involving combined parental income of under the statutory base line (at the time \$80,000 of combined parental income), the cases reflect that only rarely will the courts deviate from the strict application of the statutory formula. The judicial attitude of virtually mandatory use of the statutory formula in these cases is revealed in *Rochler v. Rochler*, 215 A.D.2d 831, 626 N.Y.S.2d 312 (3rd Dept. 1995). There, the court found that the children's actual needs were less than the amount of support dictated by application of the statutory formula. The non-custodial parent argued that, because the children's needs were less than what he would have to pay under the formula, that fact alone made use of the formula unjust or inappropriate. The Appellate Division rejected this contention, holding that such a disparity is a factor to be considered, but does not by itself warrant a deviation.

There is a strong policy supporting *Rochler* which was not explicitly stated by the court. The statutory formula represents a legislative statement as to how much of the parental income should be spent by parents on the support of their children. That the children's actual needs have been less than the amount of indicated support indicates that the parents have been spending less on their children than should be the case. This disparity may result, and often does, from the custodial parent's adjustment of the children's needs to the amount of money available to fund them. As a result, the existence of such disparity between needs and support should not be surprising and, indeed, one of the stated purposes of the Child Support Standards Act was to increase the level of support, for the benefit of children, in circumstances such as these.

In those rare circumstances in which the courts will permit a deviation from the statutory formula with respect to income levels below the statutory baseline (then \$80,000 per annum), it is more likely than not that the deviation will result in an upward adjustment of support. That was the case in *Santy v. Santy*, 207 A.D.2d 535, 616 N.Y.S.2d 92 (2nd Dept. 1994). There, the non-custodial parent could not retain his position due to his employer's financial problems and opted for early retirement. As a result, he would not be receiving any regular income for some two years until his

pension benefits would kick in. Notwithstanding the suggestion that the early retirement was occasioned by events outside the husband's control, the Appellate Division viewed the husband's reduction in earnings as self-created and declined to base support on the statutory formula. Another way of looking at this case is to suggest that the husband's earning ability was not accurately measured by his presently non-existent income and that it was appropriate to impute to him the amount of income that he could earn by honest efforts.

Use of the guidelines is mandatory only up to the base line (now \$130,000, subject to further adjustment) in combined parental income. As to any portion of combined parental income in excess of the base line, the court may apply the guidelines "and/or" may apply the discretionary factors listed in subdivision (f) to complete the assessment of child support obligations. DRL § 240 (subd. 1-b)(c)(3).

In *Cassano v. Cassano*, 85 N.Y.2d 649, 628 N.Y.S.2d 10, 651 N.E.2d 878 (1995), the Court of Appeals addressed the question as to the application of the statutory formula to combined parental income in excess of the then existing base line of \$80,000 per year. In that case, the lower courts applied the statutory formula to combined parental income of \$99,944, nearly \$20,000 over the \$80,000 figure. The non-custodial parent maintained that the courts should not apply the statutory formula to the advanced level of income without providing reasons which relate to the child's needs.

In *Cassano*, the Court of Appeals concluded that the "and/or" language in the statute gives the courts discretion as to apply the statutory formula to income over the base line or to determine support in accordance with the support factors listed in paragraph (f). Of critical significance, *Cassano* holds that, in making the choice as to which approach to take--formula or factors--the court is not required to make findings as to the children's actual needs. All that is required is that there be "some record articulation of the reasons for the court's choice to apply the percentage." In essence, all it takes to apply the formula to income over the base line is a decision which reflects, in sum and substance, "both that the court has carefully considered the parties' circumstances and that it has found no reason why there should be a departure from the prescribed percentage." 85 N.Y.2d at 655, 628 N.Y.S.2d at 14.

*Cassano* does not, however, require that the statutory formula be used in every instance where the combined parental income exceeds the base line. Nor does *Cassano* create an express presumption that the formula approach be applied rather than an approach based on analysis of the child support factors. *Cassano* has a more limited focus; it concerns what the court needs to state in its decision in order to support its conclusion that the formula approach should be followed based on the facts of the case.

Review of the reported decisions and discussions with trial judges and trial counsel have led to the view that the statutory formula has, in fact, been widely and routinely applied to combined parental income as high as \$150,000 per annum. See *Mitnick v. Rosenthal*, 260 A.D.2d 238, 688 N.Y.S.2d 150 (1st Dept. 1999) (application of percentages to income over \$150,000 would have been unjust or inappropriate under circumstances).

In *Matter of Jones v. Reese*, 227 A.D.2d 783, 642 N.Y.S.2d 378 (3rd Dept. 1996), the Third Department sustained the application of the statutory guidelines to combined parental income in excess of \$315,000. This decision was quite surprising, particularly in light of the trial court's terse and conclusory justification for its adoption of the statutory percentages. The dissenting opinion in the Appellate Division articulated the general perception that, when dealing with substantial income, while "the emphasis in calculating child support is on the standard of living that should be shared with a child, the assessment of what should be the child's standard of living should be based on reason and fairness [and] [c]hild support should not be perceived as a disguised source of income for the custodial parent." Instead, "the court should identify specific enhancements to the child's standard of living that will directly benefit the child." 227 A.D.2d at 786, 642 N.Y.S.2d at 380 (Cardona, P.J., dissenting). This comment is attributable to the fact that, in this case, the parents were not married and, therefore, no support for the custodial parent could be imposed. It appears that *Jones v. Reese* is simply a fact driven decision, influenced by the particular circumstances presented. It should also be noted that, in *Jones v. Reese*, the court did reduce the amount of basic child support somewhat in

view of the noncustodial parent's extraordinary visitation expenses. He lived in Florida, while the custodial parent lived in Albany with the child.

That *Jones v. Reese* is a fact driven decision is confirmed by the Third Department's subsequent decision in *Gluckman v. Qua*, 253 A.D.2d 267, 687 N.Y.S.2d 460 (3rd Dept. 1999). Therein, without citing to *Jones v. Reese*, the court declined to apply the statutory percentage to combined parental income of \$244,827.36. The court concluded that the use of a percentage of 15% (rather than 25%, as the court requires for two children) bore a more reasoned corollary between the statutory factors and the parties' circumstances. 687 N.Y.S.2d at 463.

Other cases, particularly from the Second and Fourth Departments, indicate a pronounced reluctance to apply the formula to income substantially in excess of \$80,000 without evaluation of the needs of the child or children involved. There seems to be a consensus that, in relation to income in excess of the base line, the trial court must provide a record articulation for deviating or not deviating from the statutory formula and must relate that record articulation to the statutory factors, with the needs of the child being one of the factors. *Gluckman v. Qua*, 253 A.D.2d 267, 687 N.Y.S.2d 460 (3rd Dept. 1999); *Gruttadauria v. Catapano*, 250 A.D.2d 681, 672 N.Y.S.2d 893 (2nd Dept. 1998); *Granade-Bastuck v. Bastuck*, 249 A.D.2d 444, 671 N.Y.S.2d 512 (2nd Dept. 1998); *Matter of Gomolinski v. Ekel*, 245 A.D.2d 448, 666 N.Y.S.2d 653 (2nd Dept. 1997); *Frei v. Pearson*, 244 A.D.2d 454, 664 N.Y.S.2d 349 (2nd Dept. 1997); *Lester v. Lester*, 237 A.D.2d 872, 654 N.Y.S.2d 528 (4th Dept. 1997); *Matter of Niagara County Dept. of Social Services v. C.B.*, 234 A.D.2d 897, 651 N.Y.S.2d 785 (4th Dept. 1996); *Ballard v. Davis*, 229 A.D.2d 705, 645 N.Y.S.2d 148 (3rd Dept. 1996); *Junkins v. Junkins*, 238 A.D.2d 480, 656 N.Y.S.2d 650 (2nd Dept. 1997); *Zaremba v. Zaremba*, 237 A.D.2d 351, 654 N.Y.S.2d 176 (2nd Dept. 1997); *Schmitt v. Berwitz*, 228 A.D.2d 604, 644 N.Y.S.2d 760 (2nd Dept. 1996).

Where the parents' combine income exceeds the base line, the court should follow a three-step process for determining child support. First, the court should determine the amount of the combined parental income by adding the incomes of the two parents. Second, the court should determine the amount of basic child support, predicated upon the amount of income up to the base line by (a) applying the statutory percentage to the amount up to the base line to determine the total basic obligation; and (b) prorating responsibility for the total basic obligation between the parents based upon the proportion that each parent's income (including income above the base line) bears to the total combined parental income. Third, the court should decide whether to make an award based upon the additional income above the base line income and, if so, whether to use the statutory formula. If the court decides to use the statutory formula, it must follow the same process that it did in determining the amount of basic child support based upon the up-to-base line of combined parental income. Upon completion of the three-step process, the court should also consider whether the result thus obtained is unjust or inappropriate, based upon the statutory factors. *Gianniny v. Gianniny*, 256 A.D.2d 1079, 683 N.Y.S.2d 769 (4th Dept. 1998) (holding it error for the lower court to have applied the statutory formula to the combined parental income in excess of \$80,000 per annum but then not utilizing that result without articulating the statutory factors); see also *Ballard v. Davis*, 259 A.D.2d 881, 686 N.Y.S.2d 225 (3rd Dept. 1999).

In determining whether the support applicant is the custodial parent for CSSA purposes, the court's focus is on whether the children at issue live primarily with the person seeking support. If the support applicant is the person with whom the children reside most of the time, that person qualifies as custodial parent under the CSSA, even if a formal custody order has not yet been made or if the custody order grants both parents joint custody. *Nicholas v. Cirelli*, 209 A.D.2d 840, 619 N.Y.S.2d 171 (3rd Dept. 1994).

In *Commissioner of Social Services v. Raymond S.*, 180 A.D.2d 510, 581 N.Y.S.2d 1 (1st Dept. 1992), the court held that, where a parent has a number of children living in different households, it is error to simply take the applicable statutory percentage and divide it by the number of children involved. The statutory percentages are based upon the proportion of income required to support a child, or children, in a single household. Thus, it is error to take the

applicable percentage and spread it among children living in different households. *Accord, Cox v. Cox*, 181 A.D.2d 201, 585 N.Y.S.2d 841 (3rd Dept. 1992).

Exactly how the court should approach a situation involving children residing in multiple households is unclear. If the cases are taken one at a time, each child support award reduces the income available to the next child to be considered. This is because a permitted deduction from income is child support actually being paid pursuant to a court order for a child not the subject of the pending action. Thus, the first child to be heard could, assuming the respondent's income was the sole source of support, obtain a greater award simply by having the advantage of being first. Of course, such result may be perfectly permissible in situations in which the cases do not arise at the same time but develop over a period of years.

Where the cases are each brought for initial determination at the same time, it may be appropriate to consolidate the cases, apply the CSSA standards as best as possible, and then evaluate the appropriateness of the awards in light of the totality of respondent's obligations. *See Commissioner of Social Services v. Ayala*, 177 A.D.2d 403, 576 N.Y.S.2d 248 (1st Dept. 1991).

For additional authorities and discussion on the issue of child support, see Chapter 16, Scheinkman, New York Law of Domestic Relations (West 2nd Ed. 2009).

#### **C240:27B: Basic Child Support in Split and Joint Custody Cases**

Split and joint custody present conceptual problems in attempting to apply the Child Support Standards Act to determine child support. The Child Support Standards Act assumes that all of the children of a given set of parents reside primarily with one of the parents. Split custody occurs where at least one child resides with each parent. Joint custody, in this context, involves the situation where the child or children reside with each parent roughly the same amount of time. Split and joint custody have received different treatment from the courts.

The CSSA applies to split custody cases. *Smith v. Smith*, 197 A.D.2d 830, 602 N.Y.S.2d 963 (3rd Dept. 1993). However, the question is how to apply the statute in circumstances where at least one child resides with each parent, making each parent both a custodial and noncustodial parent.

Where split custody is involved, it is clear that the court may not simply treat the two households as one for purposes of determining the statutory percentage (i.e., 25 percent for two children, 29 percent for three children, etc.) and then simply allocate that amount based on the number of children in each household. This approach runs afoul of the principle that the statutory percentages reflect the economy of scale realized by raising multiple children within a single household. *Kerr v. Bell*, 178 A.D.2d 1, 581 N.Y.S.2d 879 (3rd Dept. 1992); *accord, Buck v. Buck*, 195 A.D.2d 818, 600 N.Y.S.2d 520 (3rd Dept. 1993).

There is a method by which the statutory guidelines may be applied to a split custody situation. Each parent may be regarded as the custodial parent for the child or children residing in his or her household, with the other parent being the noncustodial parent for such child or children. The support calculations can then be performed and the result of the statutory percentages ascertained. Then, the focus shifts to the other household, with the custodial/noncustodial roles of the parents being reversed with respect to the remaining children. The support calculations are performed on that basis and compared against the results of the first set of calculations. Rather than have the parents each submitting child support payments to the other, the net support obligation should have been derived by subtracting the smaller obligation from the greater one. This approach was approved by the Appellate Division, Third Department in *Riseley v. Riseley*, 208 A.D.2d 132, 622 N.Y.S.2d 387 (3rd Dept. 1995).

In the event that the application of the statutory formula, as applied in the split custody circumstance, would result in an inadequate amount of support for either household, the court may use its authority, based upon the statutory factors, to declare the result unjust or inappropriate and fix a more appropriate award.

It should be noted that in *Roy v. Roy*, 188 A.D.2d 274, 590 N.Y.S.2d 468 (1st Dept. 1992), the Appellate Division, First Department, declared that, in split custody cases, the application of the statutory factors would be unjust and inappropriate. It appears that what the *Roy* court intended to declare was that the use of the statutory formula is *per se* inappropriate in a split custody case.

The issue of joint custody presents different issues and it is important to clarify what joint custody means in this context. The Child Support Standards Act clearly applies to cases where the children reside primarily with one of the parents. The mere invocation of the term “joint custody” does not take the matter out of the statute. The use of the statutory formula is required in those cases where the parties have agreed to joint legal custody, but with physical residence of the children being primarily with one of the parents. *Eaton v. Eaton*, 214 A.D.2d 933, 626 N.Y.S.2d 286 (3rd Dept. 1995); see *Costanza v. Costanza*, 199 A.D.2d 988, 608 N.Y.S.2d 14 (4th Dept. 1993). While legal decision-making may be shared, the children are being raised primarily in one household and that household is entitled to the same amount of support as would be granted if legal decision-making was vested largely in one of the parties. In other words, the sharing of legal decision-making should not result in the lessening of the support obligation of the parent who does not have primary residence of the children. The sharing of legal decision-making should have no impact on the need for, or amount of, support. Indeed, as the courts have recognized, the term “custodial parent,” as used in the statute, refers to the parent with whom the children live most of the time. *Nicholas v. Cirelli*, 209 A.D.2d 840, 619 N.Y.S.2d 171 (3rd Dept. 1994); *De Arakie v. De Arakie*, 169 A.D.2d 660, 565 N.Y.S.2d 40 (1st Dept. 1991).

In *Bast v. Rossoff*, 91 N.Y.2d 723, 675 N.Y.S.2d 19, 697 N.E.2d 1009 (1998), the Court of Appeals addressed the application of the child support formula to instances of shared physical custody. The Court held that the child support formula must be applied to joint custody situations. The Court ruled that cases are not removed from the reach of the Child Support Standards Act by terminology employed to describe the custodial arrangement. *Bast* holds that the child support formula may be applied by identifying the parent who has physical possession of the child for a majority of the time. The parent who has physical custody of the child most of the time is the primary custodial parent and is the “custodial parent” for CSSA purposes.

As *Bast* recognizes, in most instances there will be little difficulty in determining which parent has physical possession of the child for a majority of time. However, as *Bast* also recognizes there can be disputes over the calculation. For example, where a day is divided between the parents, each parent may attempt to claim the entire day. These sorts of disputes will not be material where it is clear that one parent has possession of the child more often than the other. On the other hand, there may be situations in which possession of the child is equally or close to equally divided. *Bast* appears to direct the application of the guidelines approach whenever one parent has more time with the child than the other parent does, even if the percentage allocation is as close as 51/49. *Bast* does not provide guidance as to the approach to be taken in the event that the parents have an exactly equal division of time with the child.

*Bast* further holds, because the statute does not expressly provide for the use of the proportional offset method, that method is not to be used. Under the proportional offset method, each parent's pro rata share of the basic child support obligation is multiplied by the percentage of time that the child spends with the other parent, with the resulting amounts offset against each other and the “net” is paid to the parent with the lower amount. The Court of Appeals held that policy choices inherent in this formula are best left to the Legislature and should not be made by the courts.

However, the fact that the child support formula must be applied in joint custody cases does not end the issue. As *Bast* further holds, once the formula is applied, the court may consider whether the formula result is unjust or inappropriate and, if it is, the court may utilize the discretionary factors to fashion an appropriate award. In cases in which custody

is truly shared, the real issue should not be the ritualistic invocation of a formula, but whether the generally used formula yields a just result on the facts presented.

*Bast* may, however, make it more difficult to settle custody cases. In *Bast*, while the parents could not agree upon the economic issue of child support, they did agree on the issue of custody. The parties thus made a custody stipulation which left the issue of child support to be determined by the court. In light of the uncertainty as to how the court may determine child support in the future, it may well be that the parents will be unwilling to settle custody without knowing what impact the custody settlement will have on child support. At the very least, it would be appropriate for counsel to point out to the parents the uncertainty as to the possible application of the statutory formula.

As noted above, *Bast* does not provide any guidance as to the determination of child support in situations where the parties have an exactly equal division of time with the children. Such a situation arose in *Baraby v. Baraby*, 250 A.D.2d 201, 681 N.Y.S.2d 826 (3rd Dept. 1998). Recognizing that *Bast* did not address the issue, the Third Department construed *Bast* as requiring that the CSSA be applied in such a way as to assure that children will realize the maximum benefit of their parents' resources and continue, as near as possible, their preseparation standard of living in each household. In order to effectuate this goal where the parents' custodial arrangement splits the children's physical custody so that neither can be said to have physical custody of the children for a majority of the time, the court directed that the parent having the greater pro rata share of the child support obligation, determined after application of the three-step statutory formula of the CSSA, should be identified as the "noncustodial" parent for the purpose of support regardless of the labels employed by the parties. In other words, the parent with the higher income should have to pay child support to the parent with the lower income.

#### **C240:27C: "Add-on" Support for Educational, Health Care and Child Care Expenses**

The basic child support obligation, as computed in accordance with the procedure discussed in Practice Commentaries C240:27A and C240:27B, *supra*, may be supplemented in a number of ways in accordance with the Child Support Standards Act (CSSA).

Where the custodial parent is working, or is receiving training or education that will lead to employment, and incurs child care expenses as a result, the court is required to ascertain the reasonable amount of such expenses and apportion responsibility for such expenses between the parties "in the same proportion as each parent's income is to the combined parental income." This amount is to be separately stated and added to the basic support obligation. DRL § 240 (subd. 1-b)[c][4]). A similar adjustment may be made where the custodial parent is seeking work and incurs child care expenses as a result. *Id.*

In *Matter of Gina P. v. Stephen S.*, 33 A.D.3d 412, 824 N.Y.S.2d 619 (1st Dept. 2006), the court held that child care expenses may be awarded only for the time that the custodial parent is at work, as distinguished from the amount of time that she is away from the home. While a custodial parent should be allowed a reasonable amount of time to get to and from work, the non-custodial parent is not obligated to contribute to child care while a parent is simply out. Of moment, in the cited case, the custodial parent worked out of her apartment. As is evident from the ruling, the fact that the custodial parent works at home does preclude an award of child care expenses as, if the child is young or needy, the need to attend to and care for the child may well preclude the custodial parent from focusing on work.

There is no *per se* bar to the custodial parent's use of a relative as a paid caregiver in order to obtain an award for child care expenses. The question is whether the rate charged by the relative is within the range is customarily charged in the community for similar services. See *Matter of Anonymous v. Anonymous*, 31 A.D.3d 955, 819 N.Y.S.2d 588 (3rd Dept. 2006). However, there is little reason to require the non-custodial parent to pay for the child to travel with the custodial parent on business trips taken by the custodial parent. *Id.*

In *Burke v. Burke*, 245 A.D.2d 1007, 667 N.Y.S.2d 102 (3rd Dept. 1997), the court set aside a directive from a hearing examiner that prohibited either party from seeking reimbursement for child care expenses to which the other side objected or which were incurred though the other party or a suitable relative was available to provide care. The Appellate Division ruled that the courts should not delegate to each party the right to rule on the reasonableness of the other party's child care. Likewise, the Appellate Division held that there was no authority for the courts to make child care expense reimbursement dependent upon the absence of a free caregiver. The court ruled that, doing so, would lend instability to child care arrangements. Instead, if a party objects to the reasonableness of the other party's child care expenses, the remedy is to make an application for modification. While not discussed in *Burke*, another approach may be taken where the child care expense is known. Where the custodial parent is presently incurring child care expenses, the court may rule as to whether the expense is reasonable. If it is, the court may direct the noncustodial parent to pay a particular amount of the known expense. See *Nolan v. Nolan*, 215 A.D.2d 795, 626 N.Y.S.2d 568 (3rd Dept. 1995). If the amount is known but excessive, the court may direct the noncustodial parent to pay his or her share of an amount that the court considers reasonable. If child care expense is unknown, the court should direct the noncustodial parent to pay a defined percentage of reasonable child care, with the burden being on the noncustodial parent to come back to court and object if the amount of expense incurred by the custodial parent is claimed to be unreasonable. Of course, if a known child care expense changes, an application to modify the award may be made.

The court must prorate each parent's share of future reasonable health care expenses of the child, not covered by insurance, in accordance with the proportion that each parent's income bears to the combined parental income. Domestic Relations Law § 240 (subd. 1-b)(c)(5). The non-custodial parent's share is to be paid in a fashion to be determined by the court, a fashion that may include direct payments to the health care provider (i.e., the doctor). *Id.* Making provision for the child to have health insurance, and the parental responsibility for the costs of insurance, is considered in Practice Commentary C240:28, *infra*.

*Cassano v. Cassano*, 85 N.Y.2d 649, 628 N.Y.S.2d 10, 651 N.E.2d 878 (1995) holds that the requirement that the noncustodial parent pay a pro rata share of unreimbursed medical expenses does not constitute an impermissible open-ended obligation. While the Appellate Division, Second Department once had a strong policy against creating open-ended obligations, the CSSA itself obligates the courts to require noncustodial parents to pay their pro rata share of medical expenses. The statute now overrules the earlier cases barring open-ended obligations, at least so far as child support is concerned.

Where a child is involved, the court should order the noncustodial parent to pay his or her pro rata share of the child's medical, dental, pharmaceutical, psychiatric and/or psychological, child care, and school tuition expenses. *Landau v. Landau*, 214 A.D.2d 541, 625 N.Y.S.2d 239 (2nd Dept. 1995). Note that the rule may be different as to medical expenses of a spouse or former spouse, since, as to adults, some courts continue to proscribe the creation of open-ended obligations. The First Department rejects the Second Department's rule against "open ended obligations." See *Lolli-Ghetti v. Lolli-Ghetti*, 165 A.D.2d 426, 568 N.Y.S.2d 29 (1st Dept. 1991) (no bar to open-ended obligations for spouse); *Zabin v. Zabin*, 176 A.D.2d 262, 574 N.Y.S.2d 75 (2nd Dept. 1991) (open-ended obligations for spouse not permitted); *Ware v. Ware*, 193 A.D.2d 684, 598 N.Y.S.2d 532 (2nd Dept. 1993) (parties may agree to open-ended obligations); *Richards v. Richards*, 207 A.D.2d 628, 615 N.Y.S.2d 784 (3rd Dept. 1994) (court disapproved open-ended obligations for "repairs and improvements"); *Baker v. Baker*, 206 A.D.2d 931, 615 N.Y.S.2d 549 (4th Dept. 1994) (court disapproved open-ended obligations for "all basic utilities to maintain the marital residence").

Medical expenses may be difficult to predict and, therefore, the best the court can do may be to require the payment of a pro rata share of future, reasonable medical expenses. See *Ames v. Ames*, 212 A.D.2d 653, 622 N.Y.S.2d 774 (2nd Dept. 1995). Prior to CSSA, if a parent wanted to compel the other parent to contribute to "extraordinary" medical expenses, an application to force such payment would have to be made. Now the burden has shifted. Instead of the custodial parent having to come into court to establish a right to reimbursement for the costs of "extraordinary" medical expenses, the noncustodial parent should be ordered, in advance, to pay his or her share of reasonable medical

expenses. If the matter is to be contested, it is the noncustodial parent who must bring the application and who, to avoid liability, would have to show that the medical expense in question was not reasonable. But note that the Third Department has suggested that, with respect to orthodontic expenses, a prior court order authorizing such expenses must be obtained before liability will be imposed. *Urbach v. Krouner*, 213 A.D.2d 833, 623 N.Y.S.2d 380 (3rd Dept. 1995).

The courts may not impose a pre-set spending limit which may not be exceeded without the non-custodial parent's consent. Thus, in *Bruder v. Aggen*, 244 A.D.2d 797, 665 N.Y.S.2d 722 (3rd Dept. 1997), the court held that, notwithstanding the non-custodial father's complaint that the children's dentist was charging double or triple what other dentists in the area charge, the court could not impose a requirement that the mother obtain the father's permission for any health care expenses above \$50. Instead, the father was entitled to question the reasonableness of any items as to which the mother wanted him to contribute a pro rata share. Where a particular expense is challenged as not being reasonable and factual issues are presented, the court will be required to hold a hearing in order to resolve the issues. *Matter of Bruder v. Aggen*, *supra*.

It should be noted that it is not unusual for parties to a separation agreement to agree to a spending limit, not to be exceeded without the consent of the non-custodial parent. So long as the child's needs are being adequately met, and so long as the agreement complies with the statutory requirements, such clauses appear to be valid and enforceable.

Where the court determines that the child requires educational expenses, such as for college or private school or for special or enriched education, the court may award educational expenses. The non-custodial parent may be required to pay those expenses as the court directs, including by direct payment to the education provider. DRL § 240 (subd. 1-b[c][7]).

With respect to educational expenses, it should be noted that the Second Department in an earlier decision in the *Cassano* case acknowledged that the CSSA had changed the criteria for evaluating whether a parent should be ordered to pay for a private school education. Under prior law, private school could not be directed in the absence of any agreement unless there was a showing of "special circumstances." The Second Department in *Cassano* held that the statute had the effect of repealing the old "special circumstances" requirement. But the court also held that test requires a balancing of the relevant factors in a fashion that is not much different than the old test. One of the crucial factors to be considered is whether, and to what extent, there exists a real difference in quality between the education furnished by the public schools, on the one hand, and that which is available at the private school which the child in question attends or plans to attend, on the other. 203 A.D.2d 563, 612 N.Y.S.2d 160 (2nd Dept. 1994). This aspect of *Cassano* was not reviewed by the Court of Appeals.

Where the non-custodial parent is paying, or contributing to, educational expenses for a child who is attending college or a boarding school, that parent may be given a reduction in basic child support to the extent that the educational expenses reduce the basic expenses for the child incurred by the custodial parent. But while there may be a credit against child support for room and board or other living expenses while the child is away at school, no credit should be given for tuition payments since those payments do not reduce the expenses incurred by the custodial parent on account of the child's living expenses, such as shelter, food, clothing or other essential expenses. See *Keating v. Keating*, 33 A.D.3d 867, 823 N.Y.S.2d 210 (2nd Dept. 2006).

### **C240:27D: Child Support Agreements**

Provisions in marital agreements with respect to child support are subject to the supervision of the courts. By the enactment of the Child Support Standards Act in 1989, the Legislature ushered in an era where a fixed statutory formula may, and in many instances must, be used by the matrimonial courts and by parties to marital agreements to determine child support.

The CSSA statute does not take away the right of parties to voluntarily agree as to child support in valid agreements or stipulations, whether the standards are used or not. DRL § 240 (subd. 1-b[h]); [Family Court Act § 413 \(subd. 1\[h\]\)](#). However, under the legislation, the court retains discretion as to child support, meaning that the court continues to have the authority to assure that a child is being adequately supported, either by policing the original agreement or by ordering modification of previously agreed to amounts.

Pursuant to [Section 413 of the Family Court Act](#), both parents of a child under age 21 are chargeable with the support of such child. Even before the statutory amendments which eliminated the former principles imposing primary liability for child support upon fathers and only secondary liability upon mothers, the courts held that both parents are chargeable with the support of their children on an equal basis. *See, e.g., Carter v. Carter*, 58 A.D.2d 438, 397 N.Y.S.2d 88 (2nd Dept. 1977); *Tessler v. Siegel*, 59 A.D.2d 846, 399 N.Y.S.2d 218 (1st Dept. 1977). Such holdings were a reinterpretation of former [Sections 413 and 414 of the Family Court Act](#), needed to save those statutes from being declared an unconstitutional gender based discrimination. *See Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

A separation agreement may not effectively release either parent from the statutory imposed obligation to support children under the age of 21. *See, e.g., Matter of Hoppl v. Hoppl*, 50 A.D.2d 59, 376 N.Y.S.2d 524 (1st Dept. 1975); *Matter of Davidow v. Davidow*, 97 Misc.2d 220, 410 N.Y.S.2d 989 (Family Court Richmond County 1978); *Belaustegui v. Belaustegui*, 85 Misc.2d 1015, 380 N.Y.S.2d 950 (Sup.Ct. Queens County 1976). Agreements that purport to reduce or eliminate either parent's statutory support duty or which are silent as to child support are unenforceable. *See, e.g., Matter of Jentoft-Nilsen v. Jentoft-Nilsen*, 109 Misc.2d 12, 439 N.Y.S.2d 610 (Family Court Delaware County 1981). While parents may allocate their child support obligations as between them, a court simply is not bound by a separation agreement that fails to provide for adequate support for the parties' children. *Collins v. Collins*, 241 A.D.2d 725, 659 N.Y.S.2d 955 (3rd Dept. 1997), *appeal dismissed, leave to appeal denied*, 91 N.Y.2d 829, 666 N.Y.S.2d 560, 689 N.E.2d 530 (1997); *Harriman v. Harriman*, 227 A.D.2d 839, 642 N.Y.S.2d 405 (3rd Dept. 1996). A separation agreement which fails to incorporate adequate support for minor children is voidable and cannot bind an appropriate court from remedying the inadequacy thereof. *Maki v. Straub*, 167 A.D.2d 589, 563 N.Y.S.2d 218 (3rd Dept. 1990). Where one parent agrees not to seek child support from the other, the courts will not enforce such an agreement by imposing damages upon a parent who seeks child support in violation of the agreement. *Pecora v. Cerillo*, 207 A.D.2d 215, 621 N.Y.S.2d 363 (2nd Dept. 1995).

DRL § 240 (subd. 1-b[h]) provides that an agreement or stipulation between the parties must include a provision stating that the parties were advised of the provisions of the CSSA and that the basic amount of child support provided for in the CSSA would “presumptively result in the correct amount of child support to be awarded.” Further, if the agreement or stipulation provides for different child support than the CSSA would provide for, the agreement or stipulation must set forth the amount that the basic child support obligation would have been and the reasons why the parties did not provide for the CSSA amount in their agreement or stipulation.

While the statute does not prevent parties from agreeing to child support amounts which differ from the amounts that the CSSA would provide, the court is not required, or indeed permitted, to simply rubber stamp the parties' agreement. To the contrary, the new statutory provision requires that any court order or judgment which incorporates an agreement or stipulation which deviates from the basic child support obligation must set forth the court's reasons for permitting the deviation.

Where an agreement or stipulation does not comply with the statutory mandate, the agreement or stipulation cannot be enforced as to child support. *Fessenden v. Fessenden*, 307 A.D.2d 444, 761 N.Y.S.2d 725 (3rd Dept. 2003) (agreement as to child support invalid as it failed to state the amount of basic support under CSSA and failed to indicate reasons for deviation; court made higher award in conformity with CSSA); *Toussaint v. Toussaint*, 270 A.D.2d 338, 704

N.Y.S.2d 144 (2nd Dept. 2000); *Farca v. Farca*, 271 A.D.2d 482, 705 N.Y.S.2d 402 (2nd Dept. 2000); *Bill v. Bill*, 214 A.D.2d 84, 631 N.Y.S.2d 699 (2nd Dept. 1995); *Sievers v. Estelle*, 211 A.D.2d 173, 626 N.Y.S.2d 592 (3rd Dept. 1995). *But see* *Lounsbury v. Lounsbury*, 300 A.D.2d 812, 752 N.Y.S.2d 103 (3rd Dept. 2002) (general explanation of deviation set forth in agreement was held sufficient, where agreement specified what the presumptive amount was and identified fact of deviation, and where court could make independent findings supporting reasons for deviation).

Not every defect in the child support provisions of a separation agreement will void those provisions. Rather than allow a party to escape his or her obligations through a technical omission, the court should consider whether the agreement substantially complied with the statutory requirements and whether the party who is complaining about the defect was misled into signing the document by the failure of the agreement to accurately set forth the statutory requirements. Thus, where the agreement of the parties provided for a greater amount of child support than would have been set under the CSSA, and the agreement set forth both the approximate amount that would have been payable under the CSSA and the reasons for the deviation, the failure of the agreement to expressly acknowledge that the guidelines result is presumptively correct was not a defect so substantial as to warrant the invalidation of the agreement. *Blaikie v. Mortner*, 274 A.D.2d 95, 713 N.Y.S.2d 148 (1st Dept. 2000).

Indeed, the Appellate Division, First Department, has held that an agreement may be validated where statutory language missing from the agreement is set forth in the judgment. *Blaikie v. Mortner*, 274 A.D.2d 95, 713 N.Y.S.2d 148 (1st Dept. 2000). However, the fact that the original divorce judgment and stipulation complied with CSSA does not save from invalidation a subsequently made modification stipulation which sets child support in an amount which deviates from the CSSA result and which lacks the requisite language supporting the deviation. *Calian v. Calian*, 28 A.D.3d 506, 814 N.Y.S.2d 649 (2nd Dept. 2006).

The Appellate Division, Third Department has held that the failure of a modification agreement to set forth the CSSA calculation was cured by the modification agreement's incorporation by reference of the all of the terms and provisions of the parties' separation agreement, which did contain the missing calculations. *McCull v. McCull*, 6 A.D.3d 794, 774 N.Y.S.2d 586 (3rd Dept. 2004).

It has been held that a child support agreement is not rendered defective because the actual calculations used to reach the results are not set out in the agreement. *Bright v. Freeman*, 24 A.D.3d 586, 808 N.Y.S.2d 359 (2nd Dept. 2005) (note, however, that the agreement in question was invalidated as unconscionably minimizing the father's liability and placing a disproportionately greater burden on the mother). It is sufficient that the parties set forth the parties' combined net income, their respective net incomes after the CSSA deductions were made, and the applicable support percentage, as well as the amount that would have been required under the CSSA and the reasons for departing from the statutory formula.

The statute requires that the correct amount of child support be stated only where the parties' have "opted out" and elected to deviate from the guidelines. Where the child support amount agreed to was not significantly different from the correct calculations, it was held that the parties did not intend to opt out and, therefore, the error was of no consequence and did not invalidate the agreement as to basic child support. *Fasano v. Fasano*, 43 A.D.3d 988, 842 N.Y.S.2d 517 (2nd Dept. 2007). On the other hand, in the same case, it was held that the annual increases provided for by a provision in the agreement for a cost of living adjustment were potentially deviations from increases called for by the guidelines and, since the agreement did not explain the reasons for the deviation, the agreement's COLA provisions were invalid. *Fasano v. Fasano*, 43 A.D.3d 988, 842 N.Y.S.2d 517 (2nd Dept. 2007)

An agreement defective as to child support is ineffective as to basic child support, educational expenses, health care expenses, and any other provisions relating to child support. But the defect as to child support does not necessarily invalidate the entire agreement, i.e., the provisions of the agreement unrelated to child support, such as provisions with respect to equitable distribution or maintenance or custody. *Toussaint v. Toussaint*, 270 A.D.2d 338, 704 N.Y.S.2d

144 (2nd Dept. 2000). Provisions unrelated to child support would be invalidated only when it is apparent that the child support provisions and the other provisions (e.g., maintenance, equitable distribution) were mutually dependent. *Farca v. Farca*, 271 A.D.2d 482, 705 N.Y.S.2d 402 (2nd Dept. 2000).

Where an agreement is defective for failing to contain the information and language required by the CSSA, then the court should be free to consider the issue of child support de novo, without regard for the provisions of the defective agreement. The existence of a judgment (assuming that the judgment complies with the CSSA, though the agreement did not) would either satisfy the CSSA, according to the First Department, or shift the inquiry to a “change of circumstances” inquiry. If the judgment is valid (but the agreement is not), then whether child support as set in the judgment would depend upon whether there has been a change in circumstances sufficient to warrant modification. In one case, where the agreement was valid but the judgment was not, the Appellate Division, Third Department, held that modification would depend upon meeting the *Boden/Bresica* standard of an unreasonable and unanticipated change in circumstances such that the child was not receiving adequate support. *McColl v. McColl*, 6 A.D.3d 794, 774 N.Y.S.2d 586 (3rd Dept. 2004).

It would be preferable for the parties to provide for whether the child support provisions are severable from the other provisions in the event of invalidity, rather than to leave this issue to judicial interpretation. For example, when the child support provisions are central to the entire agreement and the parties would not have made the agreement but for its child support provisions, it may be advisable to provide for the invalidation of the entire agreement if the child support provisions fail. This would protect a party who accepted a more unfavorable amount of maintenance than would have been the case but for the amount of the child support payments. Boilerplate language providing for the severance of clauses found to be invalid is commonly included in separation or other marital agreements. Counsel should reflect on whether severability is truly desired.

The statutory provisions requiring that specific language be included in order to “opt-out” of the use of the child support standards formula do not apply where the parties intend to apply the formula. Thus, where the parties specify that the amount of child support provided for is the amount determined pursuant to the statutory formula, it is not necessary for the agreement to set forth what the CSSA calculation would have been and the reasons for not utilizing it. *Pellot v. Pellot*, 305 A.D.2d 478, 759 N.Y.S.2d 494 (2nd Dept. 2003). Further, where the agreement provides that the parties intended to, or did, apply the formula, and the parties err in the calculation, the court may adjust the calculation in order to interpret and enforce the contract so that their reasonable expectations will be realized. *Pellot v. Pellot*, 305 A.D.2d 478, 759 N.Y.S.2d 494 (2nd Dept. 2003).

The statute makes no provision for what action to take where the parties, though in agreement as to what child support should be paid, cannot agree as to what the CSSA result would have been. This issue is most likely to arise in two different types of cases: (a) cases in which the incomes of the parties exceed the \$80,000 statutory cap, making consideration of the “excess” income discretionary; and (b) cases in which the income of one or both parties is not, for one reason or another, fully set forth on tax returns and one or both parties seek to have additional income imputed to the other.

Clearly, it is preferable for the parties to try to work out their differences and agree upon what the CSSA result would have been. But if the parties cannot agree as to what the CSSA calculations would yield, one approach would be to adopt the court's view of those calculations, as set forth in a temporary support order or as indicated at a conference. Another approach would be to set forth each party's statement of what CSSA would have yielded. Indeed, disagreement between the parties as to what CSSA would yield would seem, by itself, ample justification for a compromise on child support which would deviate from both parties' calculations.

The desire of the parties to avoid litigation, conserve resources that litigation would consume, and avoid counsel fees would also support a compromise on child support which represents a deviation from the guidelines.

In one case, the court held that the stipulation as to child support was valid, even though the stipulation did not set forth the required information, where the parties were aware of the CSSA, it was difficult to ascertain the father's actual income, and the parties settled the matter before the court was able to determine what the CSSA amount would have been. *Elizabeth B. v. Emanuel K.*, 175 Misc.2d 127, 667 N.Y.S.2d 1004 (Fam.Ct. Ulster County 1997).

A question may arise as to what happens if a party, after entering into an agreement or stipulation, learns that the calculation of CSSA results set forth in the agreement is erroneous, whether due to mathematical error, failure to include income (intentional or otherwise), failure to make appropriate deductions, or otherwise. It would seem that a material error in the calculation would be sufficient cause for setting the agreement aside. This is because a party may legitimately complain that he or she agreed to a deviation which was relatively minor when compared to the stated CSSA results but which, in fact, was a significantly greater deviation due to material error. If, because of material error, the deviation is large enough to raise a legitimate concern that one or both parties may not have agreed to the deviation had the true extent of the deviation been known, the court may be required to set the agreement aside as to child support.

The court is instructed by the statute not to incorporate CSSA-deviating child support agreements without a statement of the reasons for that deviation. The court retains jurisdiction not to incorporate the agreement or stipulation either: (a) because it disagrees with the amount of support being provided; or (b) because it finds the reasons given for a CSSA deviation to be inadequate. Where the matrimonial court did not articulate the reasons for allowing the parties to deviate from the guidelines but the parties generally explained the reasons for their agreement to deviate in their agreement the appellate court may review the record and make independent findings to remedy the defect. *Lounsbury v. Lounsbury*, 300 A.D.2d 812, 752 N.Y.S.2d 103 (3rd Dept. 2002).

The statute does not give the courts any guidance as to the circumstances in which CSSA deviations should and should not be allowed. Perhaps the critical factor in the decision will be the reasonableness of the justifications offered by the parties for their deviation from the CSSA results. Where the justifications are reasonable, have been considered by parties who have been assisted by counsel, and the child has been adequately provided for, the court should permit the deviation. On the other hand, where the proffered justification is flimsy and there is reason to doubt that the child will be adequately supported, the court should inquire further before permitting a deviation from CSSA standards.

An agreement barring a parent from seeking child support, or additional child support, is contrary to public policy and may not be enforced. *Pecora v. Cerillo*, 207 A.D.2d 215, 621 N.Y.S.2d 363 (2nd Dept. 1995). Likewise, an agreement which purports to terminate the noncustodial parent's child support obligations in the event that the custodial parent allows another adult to move into the home is void as against public policy. *Marceca v. Marceca*, 174 A.D.2d 505, 571 N.Y.S.2d 282 (1st Dept. 1991). Further, it is contrary to public policy for the noncustodial parent to seek damages for the difference between the amount of support stipulated in an agreement and a higher amount fixed by subsequent court order. *Maki v. Straub*, 167 A.D.2d 589, 563 N.Y.S.2d 218 (3rd Dept. 1990). A child support agreement may also be set aside upon the ground of unconscionability. *Bright v. Freeman*, 24 A.D.3d 586, 808 N.Y.S.2d 359 (2nd Dept. 2005).

This is not to say, however, that where the parties have agreed upon an allocation between maintenance and child support, the parties are precluded from providing that modification as to child support will also trigger a modification as to maintenance. Since there is a distinct relationship between maintenance and child support, and an increase or decrease in child support may impact upon a party's ability to pay maintenance, it seems permissible for the parties to agree that a change in child support may permit modification as to maintenance. Such a clause may be particularly relevant where the parties agreed to higher maintenance, and lower child support, in order to take advantage of the deductibility of maintenance by the payor spouse. That deductibility might enable the payor to make higher payments than would otherwise be the case, at little or no tax to the recipient, where the dependent spouse has no other

meaningful taxable income or substantial tax deductions. In that circumstance, a change in child support, without also a change in maintenance, might result in a combined payment that is unaffordable by the payor.

The statute requires that, in cases not involving persons in receipt of public assistance, a court order for child support or combined child and spousal support must provide for an income deduction order unless the court finds and sets forth in writing: (i) the reasons that there is good cause not to require immediate income withholding; or (ii) that an agreement providing for an alternative arrangement has been reached between the parties. DRL § 240 (subd. 2[b] [2]). But where the parties agree, in a proper stipulation or valid agreement, that payments are to be made directly to the custodial parent, such agreement is enforceable as a contract and the court may not disregard it. *Hosza-Dzielak v. Hosza*, 26 A.D.3d 378, 812 N.Y.S.2d 564 (2nd Dept. 2006).

Agreements between same sex couples who are the legal parents of a child as to child support may be legally enforceable, as, for example, an agreement reached in mediation between the child's biological parent and her same sex partner who adopted the child. See *Frazier v. Penraat*, 32 A.D.3d 772, 822 N.Y.S.2d 21 (1st Dept. 2006) (rejecting, on the facts, a claim by the petitioner, the adoptive mother, for more support than provided for in the mediation agreement).

It is commonplace for separation agreements to provide for events under which child support payments may be terminated. However, such provisions may not be enforced where termination is not authorized by law. Hence, a provision in a separation agreement which purports to permit a parent to terminate child support payments at age 18, rather than at age 21, is unenforceable, unless the child is found to be legally emancipated. *Davidow v. Davidow*, 97 Misc.2d 220, 410 N.Y.S.2d 989 (Fam.Ct. Richmond County 1978).

Support liability terminates, as a matter of law, in certain contexts. First, the death of a parent terminates that parent's obligation to a child born in wedlock. See, e.g., *Matter of Wosnitzer*, 47 A.D.2d 402, 366 N.Y.S.2d 653 (1st Dept. 1975). It should be noted that Section 513 of the Family Court Act holds that an order of support or judicially approved support agreement made with respect to an out of wedlock child survives the death of the payor spouse and may become a charge on the parent's estate. Second, the adoption of the child by a person of the same gender as a natural parent lifts the natural parent's liability, as does the termination of the natural parent's parental rights. See DRL § 110. Third, where the custodial parent has wrongfully interfered with visitation, the court may suspend the non-custodial parent's child support liabilities. See DRL § 241; *Hudson v. Hudson*, 97 Misc.2d 558, 412 N.Y.S.2d 242 (Sup.Ct. N.Y. County 1978). Fourth, the emancipation of a child terminates child support liability as well. Emancipation can result from the acceptance of gainful employment by the child (*Eason v. Eason*, 86 A.D.2d 666, 446 N.Y.S.2d 392 [2nd Dept. 1982]), the child's enlistment into military service (*Veneri v. Veneri*, 40 A.D.2d 735, 336 N.Y.S.2d 474 [3rd Dept. 1972]), or by the child's marriage. *Peters v. Peters*, 14 A.D.2d 778, 219 N.Y.S.2d 906 (2nd Dept. 1961). Additionally, if the child fails to abide by reasonable parental regulations and avoids such parental control by moving away, without cause, from the parent's home, child support liabilities of the parent terminate. *Matter of Roe v. Doe*, 29 N.Y.2d 188, 324 N.Y.S.2d 71, 272 N.E.2d 567 (1971).

Emancipation may be reversible and where a court finds that a once emancipated child is no longer emancipated, liability for child support is revived. *Matter of Hamdy v. Hamdy*, 203 A.D.2d 958, 612 N.Y.S.2d 718 (4th Dept. 1994).

The legal bases for termination of child support liability may be utilized in a separation agreement to provide like bases for termination of support under the agreement. However, as a separation agreement is a contract, payments required thereunder terminate only in accordance with the contractual provisions and the court may not insert additional terms. Thus, where a separation agreement provided for reductions in support upon the emancipation of the parties' three oldest children but did not provide for a reduction upon the emancipation of the parties' fourth child, no reduction was permissible following the emancipation of the fourth child. *Mitchell v. Mitchell*, 82 A.D.2d 849, 440 N.Y.S.2d 54 (2nd Dept. 1981).

A separation agreement can provide for the continuation of payments even though the support payor might otherwise have a legal basis for terminating support. Thus, parents may agree to support a child beyond the child's attainment of age 21. *Stoneberg v. Stoneberg*, 79 A.D.2d 685, 433 N.Y.S.2d 860 (2nd Dept. 1980). Separation and other marital agreements frequently provide for extended support in the context of college education for children. Where a child commences a four-year college program at age 18, at least one year of post-21 support may be appropriate to enable the child to have parental support in connection with the completion of the program. Separation agreements, however, need to be drawn with precision in order to make plain whether the parents are, or are not, liable for college expenses after the child attains age 21.

The parties can agree that child support liability is to survive the death of the payor spouse and be a charge on his or her estate. Cf. *Matter of Seidman*, 51 Misc.2d 339, 273 N.Y.S.2d 316 (Surr.Ct. Nassau County 1966).

The foregoing discussion has concentrated on the fixation of events which trigger the complete cessation of child support liability. The parties can provide in their agreement for payments to increase or decrease upon the happening of stated events. Thus, where the parties agreed that the father would pay for private school and related boarding expenses and would, in the event that the child attended public school and resided with the mother, pay increased support, it was held that the mother was entitled to the increased support only while the child was in attendance at public school and not after he graduated therefrom. *Lewin v. Lewin*, 91 A.D.2d 649, 457 N.Y.S.2d 92 (2nd Dept. 1982). It is fairly common for separation agreements to provide that child support payments are to be increased to account for inflation based upon such formulas as the federally maintained Cost of Living Index.

Child support provisions in separation and other marital agreements are subject to the supervision of the courts. The courts retain the authority to assure that a child is receiving adequate support irrespective of the provisions of the agreement made between the parents. However, this authority is subject to important case law regulation. In *Boden v. Boden*, 42 N.Y.2d 210, 397 N.Y.S.2d 701, 366 N.E.2d 791 (1977), it was held that the child support provisions of an agreement should not be disturbed absent a showing of unanticipated and unreasonable change in circumstances. Subsequently, in *Matter of Brescia v. Fitts*, 56 N.Y.2d 132, 451 N.Y.S.2d 68, 436 N.E.2d 518 (1982), the Court of Appeals held that *Boden* applies only where the child's needs are being adequately provided for and the dispute involves an effort to obtain a readjustment of the parents' respective obligations, i.e., one parent seeks to have the other pay a greater percentage of the child's needs. However, if the child's needs are not being adequately met because of a change in circumstances, then a modification to increase child support may be obtained. The factors that may be considered in determining whether there has been a change in circumstances include increased needs of the child due to special circumstances or additional activities, increased costs of living which entail greater child care expenses, a parent's loss of income or improved financial condition and the current and past life-styles of the children. In other words, if a child's needs are not being adequately provided for, it is not necessary to establish, in order to obtain an increase in child support, that the changed circumstances resulted from an unanticipated or unreasonable change in circumstances as *Boden* seemed to suggest.

This being said, the Child Support Standards Act contains a provision for adjustment of child support where the support is being collected by the Support Collection Unit. DRL § 240 (subd. 5); [DRL § 240-c](#). A new order must be entered by the Support Collection Unit when the total of the annual average changes in the consumer price index is greater than 10%. [DRL § 240-c](#). While there is a process for objecting to the revised order, the court, which is the Family Court, is to decide, not whether the COLA increase should be applied, but must make a new order de novo, applying the CSSA. [DRL § 240-c](#).

Consequently, as to those support orders paid through the Support Collection Unit, this adjustment process, in effect, replaces the *Brescia/Boden* standard applicable to cases in which child support was fixed by an agreement of the parties. Both the change in circumstance and *Brescia/Boden* standards remain applicable in cases which are not being

enforced through the Support Collection Unit. Thus, substantive principles change depending upon the method of support collection.

While the statute (DRL § 240 [subd. 2]) requires that all support orders be payable through the Support Collection Unit, the court is permitted to make an exception upon a finding upon good cause or where the parties have stipulated to an alternate payment arrangement. The payee party may wish to insist upon payment through the Support Collection Unit in order to take advantage of the modification procedure three years down the road. The payor party may wish to avoid that. Even if initial payments are not made through the Unit, a payor party whose finances and income have improved since his or her child support obligations were determined has a powerful incentive to stay current and avoid coming within the jurisdiction of the Support Collection Unit. Conversely, a parent who wishes a modification of an order should try to have the court invoke the collection authority of SCU.

### **C240:28: Health Insurance and Health Insurance Premiums**

The Equitable Distribution Law empowers the court, in matrimonial actions, to direct one spouse to purchase, maintain or assign an insurance policy covering “health and hospital care and related services” for the other spouse or the children for as long as maintenance, child support or a distributive award is being paid. [DRL § 236, Part B \(subd. 8 \[a\]\)](#); see *Sinha v. Sinha*, 17 A.D.3d 131, 793 N.Y.S.2d 347 (1st Dept. 2005) (husband ordered to pay for children's health insurance, at his sole expense, until wife obtains health care coverage through an employer at which point cost of health insurance to be prorated according to income).

Medical insurance coverage is vital in this age of expensive medical care. Moreover, coverage under a “group” plan, for group members and dependents, is frequently available through employment, through unions and professional associations and other organizations. It would seem to be a proper exercise of discretion to compel one spouse to provide coverage, through any available plan, for the other spouse and children, assuming that they do not have coverage of their own. However, some parents are not willing to cooperate and the Legislature, to assure that there is health insurance coverage to protect children, has mandated that matrimonial courts take action to assure that such coverage is provided.

As of October 9, 2009, when the person on whose behalf a petition is brought is a child, the court is required to consider the availability of health insurance benefits to all parties and must take actions to ensure that health insurance benefits are provided for the protection of the child. DRL § 240 (subd. c). While, at times, orders of protection are sought on behalf of children, matrimonial and custody litigation is not typically brought as petitions on behalf of the children. Rather, they usually involve actions for divorce or other marital status relief between parties. Nevertheless, given the statutory intent, the statute should be applicable where the adult parties to the case have a minor child.

For purposes of the statute, health insurance benefits are defined as any medical, dental, optical and prescription drugs and health care services or other health care benefits that may be provided for a dependent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans. Health insurance benefits are considered to be available where the cost of obtaining them is reasonable and the benefits are reasonably accessible to the child. These terms are further defined by the statute. DRL § 240 (subd. b).

Health insurance benefits are presumed reasonable in cost if the cost of the benefits (meaning the premium and the deductible allocable to the child) does not exceed five percent of the combined parental gross income. This presumption of reasonableness may be rebutted by a showing that the cost is unjust or inappropriate, taking into account the circumstances of the case, the cost and comprehensiveness of the health insurance benefits for which the child would otherwise be eligible, and the best interests of the child. However, in no instance are health insurance

benefits to be considered “reasonable in cost” if a parent's share of the cost of extending such coverage would reduce the income of that parent below the self-support reserve. DRL § 240 (subd. b).

Health insurance benefits are presumptively “reasonably accessible” if the child lives within the geographic area covered by the plan or lives within thirty minutes or thirty miles of travel time from the child's residence to the services covered by the health insurance benefits or through benefits provided under a reciprocal agreement. The presumption may be rebutted upon a showing of good cause, including, but not limited to, the special health needs of the child. DRL § 240 (subd. b).

Where the child is presently covered by health insurance benefits, the court is required to direct that the coverage be maintained, unless either parent requests the court to make a direction for health insurance benefits coverage. Where the child is not presently covered or either parent asks for a direction as to health insurance benefits coverage, the court is to make a determination:

- (1) if only one parent has available health insurance benefits, the court is to direct that such parent provide the health insurance benefits;
- (2) if both parents have available health insurance benefits, then the court is to direct either or both of them provide the benefits. The court is to make this decision based on the circumstances of the case, including, but not limited to, the cost and comprehensiveness of the respective health insurance benefits and the best interests of the child;
- (3) if neither parent has available health insurance benefits, the court is to direct that the custodial parent for participation in governmental medical assistance and health insurance programs. DRL § 240 (subd. c).

Where the court determines that health insurance benefits are available, the court is to require that the legally responsible relative immediately enroll the eligible dependents and direct that the legally responsible relative maintain such benefits as long as they remain available. The court is also to direct the legally responsible relative to assign all insurance reimbursement payments for health care expenses incurred for his or her eligible dependents to the provider of such services or the party actually having incurred and satisfied such expenses, as appropriate. DRL § 240 (subd. f).

The costs of providing insurance, or contributions to governmental programs, are considered to be cash medical support, meaning an amount ordered to be paid toward the cost of health insurance provided by a public entity or by a parent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans, and/or for other health care expenses not covered by insurance. DRL § 240 (subd. d), (subd. 1-b[5]). The court is to determine the obligation of either or both parents to contribute to the costs. Where the benefits are provided through insurance, the cost of providing health insurance benefits shall be prorated between the parties in the same proportion as each parent's income is to the combined parental income. If the custodial parent is ordered to provide such benefits, the non-custodial parent's pro rata share of the costs is added to the basic support obligation. If the non-custodial parent is ordered to provide the benefits, the custodial parent's pro rata share of such costs shall be deducted from the basic support obligation. DRL § 240 (subd. 1-b(5)). If the court finds that health insurance is not available but the child is eligible for health coverage through a public program, the court is to provide for parental contribution to the costs thereof. DRL § 240 (subd. 1-b [5][iii], [iv]).

Consequently, the cost of providing health insurance is a separate item to be covered, at least partially, by the non-custodial parent, in addition to basic child support and in addition to the other “add-ons” for child care, health care expenses, and educational expenses.

In the event that a parent fails to obtain insurance, in violation of the court's order, that parent is presumptively liable for all the medical expenses incurred from the first date that coverage could have been obtained after the making of the order. The use of the phrase “presumptively liable” suggests that the defaulting parent should be held liable for the additional expenses that would have been avoided had insurance been in place, unless the obligated parent can show a good reason why he or she was unable to obtain the ordered coverage. DRL § 240 (subd. i).

When the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance, the court is to issue a separate order which shall include the necessary directions to ensure that the order qualifies as qualified medical support order. This means that the order must: (i) clearly state that it creates or recognizes the existence of the right of the named dependent to be enrolled and to receive benefits for which the legally responsible relative is eligible under the available group health plans, and shall clearly specify the name, social security number and mailing address of the legally responsible relative, and of each dependent to be covered by the order; (ii) provide a clear description of the type of coverage to be provided by the group health plan to each such dependent or the manner in which the type of coverage is to be determined; and (iii) specify the period of time to which the order applies. The court may not require the group health plan to provide any type or form of benefit or option not otherwise provided under the group health plan except to the extent necessary to meet the requirements of federal law. DRL § 240 (subd. h); [29 U.S.C.A. 1169](#). When the court issues an order of child support or combined child and spousal support on behalf of persons in receipt of public assistance, the order is to provide that the provision of health care benefits shall be immediately enforced pursuant to [CPLR 5241](#). DRL § 240 (subd. g).

This discussion has focused on health insurance benefits for children. As to spouses, the Legislature has addressed the issue separately, most recently in [DRL § 255](#), to which reference should be made.

### **C240:29: Child Support Enforcement**

Much of what DRL § 240 (subd. 1) has to say on the subject of enforcement is to highlight the applicability of other statutes and, therefore comment is reflected to those statutes.

Subdivision 2(a) of DRL § 240 reminds us that child support orders are enforceable by the income execution for support enforcement ([CPLR 5241](#)) and by the income deduction order for support enforcement ([CPLR 5242](#)). Of course, child support orders may be enforced by many other remedies apart from [CPLR 5241](#) and [5242](#). DRL § 240 (subd. 2) acknowledges as much by providing that child support orders are enforceable “in any other manner provided by law”. The statute makes specific provision for the enforcement of orders or judgments for child support and maintenance by any of the enforcement procedures and remedies allowed by Article 52 of the CPLR, which applies to enforcement of civil judgments of all kinds. But this is more than just a restatement of existing statute. Subdivision 2 provides that defaults in the payment of periodic support, not reduced to judgment, are enforceable under CPLR Article 52. This is a strong, new enforcement tool. Under the statute, any enforcement device authorized by CPLR Article 52, for example a property execution, may be invoked upon a default. Default is given the same meaning as it has in [CPLR 5241](#), which authorizes an income execution for support enforcement. A default includes amounts owed from retroactive support. Likewise, a default can be contested only on the same grounds as allowed by [CPLR 5241](#).

When a child receiving child support is a public assistance recipient, the court must direct that payments be made the support collection unit. DRL § 240, subd. 2(b)(1). State and local social services departments and districts are required by law to make services relating to the establishment of support obligations available to persons not in receipt of certain public assistance benefits, provided request for such services is made. [Social Services Law, § 111-g](#). Where the courts order that payments be made into the support collection unit for a person not in receipt of certain public assistance benefits, that order by itself is deemed to be an application for services. A fee may be charged for applying

for services and costs incurred in excess of the fee may be deducted from the support collected. [Social Services Law, § 111-g](#). This program is optional to those who are not in receipt of public assistance.

Prior to 1998, the government kept track of child support orders and payments only where the children were in receipt of public assistance or the custodial parent had requested child support enforcement services. However, 1997 legislation directed the state government establish a child support state case registry which, in addition to listing each case receiving support enforcement services, lists each support order issued or modified in New York on or after October 1, 1998. *See* [Social Services Law, § 111-b \(subd. 4-a\)](#), added by [L.1997, ch. 398](#). For this purpose, the term support order is broadly defined to include all judgments, decrees or orders, whether temporary or final, issued by a court or administrative agency, for the support of a child, including a child over 18, which provides for monetary support, health care, arrears, or reimbursement.

The case registry is required to include a record of the amounts owed, the amounts paid, the amounts distributed (where payments were made to a support collection unit), the birth date of the children, and the amount of any lien imposed by virtue of public assistance. This information is to be gathered on the basis of information from administrative and judicial proceedings, information obtained from federal, state and local governments, or other relevant information or information sources. *See* [Social Services Law, § 111-b \(subd. 4-a\)](#). It should be noted that Section 111-p has been added to the Social Services Law to give to the support collection unit broad authority to issue subpoenas to any person or entity to provide financial or other information needed to establish paternity or to establish, modify or enforce a support order. In addition, under new Section 111-r, employers may be required to provide information pertaining to the employment, compensation and benefits of any employee for purposes of establishing paternity or establishing, modifying or enforcing a support order.

To enable the state case registry to open a file a case, various provisions of the Domestic Relations Law and Family Court Act have been amended to provide that, as of October 1, 1998, the court must direct that a copy of any child support order, or order for child support and maintenance, be provided promptly to the state case registry. *See* [DRL §§ 236, Part B \(subd. 7 \[c\]\); 236, Part B \(subd. 9\[d\]\); 240 \(subd. 5\)](#).

To further implement the tracking of child support orders and to aid enforcement, all orders directing the payment of child support are required to set forth the social security numbers of the named parties. [DRL § 240 \(subd. 1\)](#).

### **C240:30: Orders of Protection**

Subdivision 3 of [DRL 240](#) authorizes the court, in any matrimonial action or custody or visitation proceeding subject to [DRL § 240](#), to enter orders of protection. Such orders may be made during the pendency of the action, in the final judgment, and even after the final judgment. The order of protection may remain in effect after entry of a final matrimonial judgment and during the minority of any child whose custody or visitation was determined in the final judgment or any order. However, the court may limit the duration of the order, if it so chooses. However, the court must specify the time that the order of protection is to be observed. An order of protection may be granted even if the court refuses to grant the main relief sought in the proceeding, except where the relief was denied for lack of jurisdiction.

The order of protection may set reasonable conditions of behavior and may be entered as a free-standing, self-contained order or may be made as part of any other order made pursuant to [DRL § 240](#). An order of protection may require any party: (1) to stay away from the home, school, business or place of employment of the child, the other parent or of any other party; (2) to permit a parent, or person entitled to visitation by court order or separation agreement (such as grandparents) to visit the child at stated periods; (3) to refrain from committing a family offense (as that term is defined in [Criminal Procedure Law § 530.11](#)) or any criminal offense against the child or the other parent or against any custodian of the child, or from harassing, intimidating or threatening such persons; (4) to permit

a designated party to enter the residence during a specified period of time to remove personal belongings not in issue in any matrimonial or Family Court Act proceedings; the parent or against any custodian of the child; (5) to refrain from acts, whether of commission or omission, that create an unreasonable risk to the health, safety or welfare of a child; (6) to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order; and (7) to refrain from intentionally injuring or killing, without justification, any companion animal that the respondent know is owned or kept by the persons protected by the order or the minor child. The court may also order the respondent to observe such other conditions as are necessary to further the purposes of protection. This list of permissible terms of orders of protection is comparable to similar listings which appear in the Family Court Act. *See* [Family Court Act, §§ 446, 656, 842](#).

It is now clear that in addition to requiring the offender to stay away from the home, the court can require the offender to stay away from school, business, employment or other location of the other party or child. While an order of protection may allow for visitation, it may do so only with respect to visitation that has been set forth in a separation agreement or court order. The statute has also been revised to eliminate some ambiguous or confusing terminology.

The chief administrator of the court is charged with the responsibility to developing standard forms of orders of protection. Not only is the use of such forms intended to make police and other law enforcement authorities more comfortable with enforcing them, the use of such forms will assure compatibility with a statewide computer registry of such orders. Forms of orders of protection, including forms based upon the official forms promulgated by the chief administrator, appear in West's McKinney's Forms for Matrimonial and Family Law.

The statute does not expressly provide standards to be employed in granting orders of protection. It would appear that the substantive law to be applied is that supplied by Article 8 of the Family Court Act. *See* [Ahmed v. Ahmed](#), 180 Misc.2d 394, 689 N.Y.S.2d 357 (Sup.Ct. Nassau County 1999).

Where, by virtue of DRL § 240, application for an order of protection, or a temporary order of protection, is made in Supreme Court, the procedure is regulated, not by the Family Court Act, but by the CPLR. This generally requires that an order of protection be sought by motion in the action, brought on either by notice of motion or order to show cause. To secure relief during the pendency of the motion, the movant may request a temporary order of protection be granted in an order to show cause. Where the movant's allegations of abuse are corroborated by affidavits from independent witnesses, by admissions of the respondent, or by medical or documentary proof, the court may grant an order of protection without a hearing. *See* [Peters v. Peters](#), 100 A.D.2d 900, 474 N.Y.S.2d 785 (2nd Dept. 1984). Where such corroboration is absent and the movant's allegations are denied by the respondent, credibility cannot be determined on the basis of affidavits and a hearing should be held before an order of protection is granted. A temporary order of protection, however, may be granted under appropriate circumstances, pending the hearing.

An order of protection issued under Section 240 shall bear in a conspicuous manner, on the front page of said order, the language "Order of protection issued pursuant to section two hundred forty of the domestic relations law". However, the absence of such language does not affect its validity. The presentation of the order to any police officer, or to any peace officer acting pursuant to his or her special duties, constitutes authority for the officer to arrest a person for violation of such an order and bring that person before the court or to aid in securing the protection the order is intended to afford. DRL § 240 (subd. 3).

The order of protection may be made in the final judgment or in any temporary order, or in any post-judgment order. The order may remain in effect even after the entry of final judgment and may be made even if the court refuses to grant any relief, as long as jurisdiction has been obtained. DRL § 240 (subd. 3).

Subdivision 3-b provides a procedure for arraigning a respondent who has been arrested, or taken into custody on an arrest warrant, for violation of an order of protection issued by a court which is not in session when the arrest

is made. The situation addressed by the statute arises where the Supreme Court or Family Court issues an order of protection but the respondent is arrested for a violation at night, on a weekend, or on a court recess day. On those occasions, access to the local criminal court is usually available, whether the local criminal court is a city court, town court or justice court.

Sensibly, the new statutory provision directs that, where the court that issued the order of protection is not in session, the respondent is to be arraigned before a local criminal court in the county of arrest or, if the arrest was pursuant to a warrant, before a local criminal court in the county in which the warrant is returnable. The local criminal court may then order the commitment of the respondent, fix or accept bail, or release the respondent on his or her recognizance pending further proceedings before the court which issued the order of protection. If the Supreme Court or Family Court issued a warrant and made a bail recommendation on the warrant, the local criminal court is to consider that recommendation.

The local criminal court is to schedule such further criminal court proceedings as may be appropriate. In addition, the local criminal court is to make “such matter” returnable in the Supreme Court or Family Court, as applicable, on the next court date. The statutory reference to “such matter” is somewhat confusing since, if it includes criminal charges, the criminal matter might not be pending in the Supreme Court or Family Court, but in a criminal court. Indeed, if “such matter” is the criminal matter, the need to make the matter returnable the next court date in Supreme Court or Family Court is somewhat inconsistent with the direction to the local criminal court to schedule the further criminal court proceedings. Perhaps, the reference to “such matter” is really intended to be a broader reference to the underlying matrimonial or Family Court “matter”, such as a divorce action, custody case, or family offense proceeding. In that regard, it makes sense to have the local criminal court, which is acting only because the Supreme Court or Family Court is not session, refer the parties to the court which is dealing with their family issues as expeditiously as is possible.

The statute seemingly permits the petitioner or complainant to prevent, or veto, the local criminal court from making the matter returnable in the Supreme Court or Family Court. This is because the statute provides that the local criminal court may schedule further proceedings in Supreme Court or Family Court except where the petitioner or complainant “requests otherwise”. If the statute is read as prohibiting the local criminal court from scheduling the immediate return of the matter to the Supreme Court or Family Court because of the objection of the complainant or petitioner, such a construction of the statute would seem unfortunate. If the local criminal court believes that the handling of the matter would be benefitted by a prompt return to Supreme or Family Court, it should have the authority to so direct, no matter the positions of the parties. However, this may be something of a tempest in a teapot since, if the local criminal court recommends a prompt return to Supreme Court or Family Court, nothing would prevent the respondent from contacting the superior court as soon as it opens and asking it to hear the matter immediately. Indeed, nothing would prevent the local criminal court from contacting the superior court and advising the superior court of the proceedings which took place while the superior court was not in session.

### **C240:31: Visitation With Children in Foster Care**

In 1988, the Legislature enacted a sweeping set of provisions relating to visitation by non-custodial parents and grandparents with children placed in foster care either by written instrument ([Social Services Law §§ 358-a, 384-a](#)) or by court directive obtained in a child protective proceeding (Family Court Act, Article 10). *See* [L.1988, c. 457](#). The primary thrust of this legislation is to provide a mechanism whereby non-custodial parents and grandparents who secured visitation rights with children, either by court order or by a formal written agreement, may seek continued visitation after the child has been placed in foster care. The principal statutory guidelines for continuing visitation in this context, fixing both procedure and substance, are found in Part 8 of Article 10 of the [Family Court Act \(§§ 1081 through 1084\)](#).

As part of this legislative reform, DRL § 240 was amended to insert a sentence in subdivision 1 which coordinates visitation determinations made in the context of proceedings under DRL § 240 with the remedies opened to non-custodial parents and grandparents for securing continued visitation. The statute provides that, when visitation rights are conferred by a court pursuant to the authority conveyed in DRL § 240, those rights may be enforced as against persons holding the child in foster care pursuant to Part 8 of Family Court Act Article 10, pursuant to coordinate provisions of [Sections 358-a and 384-a of the Social Services Law](#), or pursuant to any other applicable statute.

The statutory provision requires that the visitation rights be obtained by court order or by written, formal agreement prior to the child's placement in foster care. Indeed, the focus of the statutory language is on enforcement of rights already granted, rather than on determination of rights not previously conveyed. If no such rights have been granted by court order or agreement prior to placement, parents, and relatives legally responsible for the child, must pursue their rights within the context of the foster care proceeding in chief.

The habeas corpus, and petition and order to show cause, proceedings allowed by DRL § 240 are broad enough to allow a parent to seek a writ of habeas corpus as against a non-parent who assumed custody of a child, including foster care agencies. However, where appropriate child protective proceedings have been brought in the Family Court, either pursuant to the Family Court Act or the Social Services Law, the Supreme Court should not ordinarily interfere with those proceedings and should decline to act under its writ authority. Nonetheless, a writ of habeas corpus may appropriately issue in situations where the foster care agencies are holding the child illegally or have not commenced, as required, judicial proceedings with respect to the removal or placement of the child.

#### [Notes of Decisions \(3434\)](#)

##### Footnotes

- 1 [50 App. USCA § 501 et seq.](#)
- 2 So in original.
- 3 So in original. "and" should be "an".
- 4 So in original. Probably should be "a.".
- 5 So in original ("give" should be "given").

McKinney's D. R. L. § 240, NY DOM REL § 240

Current through L.2013, chapters 1 to 56 and 60 to 66.

McKinney's Consolidated Laws of New York Annotated  
Domestic Relations Law (Refs & Annos)  
Chapter 14. Of the Consolidated Laws (Refs & Annos)  
Article 13. Provisions Applicable to More Than One Type of Matrimonial Action (Refs & Annos)

McKinney's DRL § 241

§ 241. Interference with or withholding of visitation rights; alimony or maintenance suspension

Currentness

When it appears to the satisfaction of the court that a custodial parent receiving alimony or maintenance pursuant to an order, judgment or decree of a court of competent jurisdiction has wrongfully interfered with or withheld visitation rights provided by such order, judgment or decree, the court, in its discretion, may suspend such payments or cancel any arrears that may have accrued during the time that visitation rights have been or are being interfered with or withheld. Nothing in this section shall constitute a defense in any court to an application to enforce payment of child support or grounds for the cancellation of arrears for child support.

**Credits**

(Added L.1978, c. 232, § 1. Amended L.1980, c. 281, § 13; L.1986, c. 892, § 7.)

**Editors' Notes**

**PRACTICE COMMENTARIES**

by Alan D. Scheinkman

DRL § 241 provides a remedy where a custodial parent who is receiving spousal support (*i.e.*, maintenance) pursuant to a court order or judgment has wrongfully interfered with or withheld visitation rights provided by the order or judgment. Where the court finds that visitation was wrongfully interfered with, the court may, but need not, suspend any spousal support payments or cancel any arrears that accrued during the time that visitation was wrongfully interfered with. That visitation has been interfered with does not obligate the court to suspend support payments. *Nir v. Nir*, 174 A.D.2d 657, 571 N.Y.S.2d 519 (2nd Dept. 1991). Whether to suspend payments depends upon the nature and extent of the visitation interference, the wilfulness involved, as well the financial consequences that the suspension would bring about upon both parents and the child or children involved. As an alternative to suspension of spousal support, the court may impose fines for contempt, which may be self-executing, and order that the custodial parent may the counsel fees of the non-custodial parent for enforcing visitation rights. *See Rodman v. Friedman*, 33 A.D.3d 400, 826 N.Y.S.2d 1 (1st Dept. 2006), *leave to appeal dismissed*, 8 N.Y.3d 895, 832 N.Y.S.2d 898, 865 N.E.2d 7 (2008).

The concluding sentence of the statute provides that nothing contained in in DRL § 241 is to constitute a defense in any court to an application to enforce child support payments or grounds for the cancellation of arrears in child support. The purpose of this last sentence is to restrict the use of DRL § 241 as justification for nonpayment of child support.

To appreciate this aspect of the statute, it must be first noted that, while DRL § 241 authorizes suspension of spousal support, case law holds that the court retains the authority to suspend child support payments as well. *See Hudson v. Hudson*, 97 Misc.2d 558, 412 N.Y.S.2d 242 (Sup.Ct. N.Y. County 1978); *see also Burkart v. Montemarano*, 72

[A.D.2d 561, 420 N.Y.S.2d 754 \(2 Dept. 1979\)](#). The statute was revised in 1986 to limit self-help by the visiting parent where child support is concerned. The amendment does not apply retroactively and cannot be used as a basis for invalidating orders made prior to its August 5, 1986 effective date. [Fuerst v. Fuerst, 131 A.D.2d 426, 515 N.Y.S.2d 862 \(2nd Dept. 1987\)](#).

With respect to spousal support, the visiting spouse may, upon wrongful withhold of visitation, refuse to make payments of spousal support until visitation is restored. If the custodial spouse seeks to enforce the spousal support payments, the visiting spouse may set up DRL § 241 as a defense and, if the defense was sustained, the court could cancel the arrears that accrued. With respect to child support, the 1986 addition of the last sentence of the statute makes the rule different. The statute does not strip away the court's power to suspend child support payments. It does, however, limit the court's authority to awarding suspension relief prospectively only. The suspension of child support may not be applied retroactively. Thus, if child support is not paid, in the absence of an order of suspension, the denial of visitation, even if absolutely established, may not be used as a defense to the enforcement of child support payments. Likewise, the court may not cancel child support arrears which have already accrued. *See, e.g., Rivera v. Echavarría*, 48 A.D.3d 578, 852 N.Y.S.2d 236 (2nd Dept. 2008); *Doyle v. Doyle*, 198 A.D.2d 256, 603 N.Y.S.2d 525 (2nd Dept. 1993). It should be noted, however, that in *Rivera*, the Second Department read the statute more broadly as providing that child support payment not be suspended at all, even prospectively, as a punishment for denial of visitation. But in a subsequent decision, the Second Department recognized that the statute permits suspension of both child support (prospectively) and maintenance where visitation has been wrongfully withheld. [Katz v. Katz, 55 A.D.3d 680, 867 N.Y.S.2d 100 \(2nd Dept. 2008\)](#).

The lesson for the visiting spouse is that he or she must make prompt affirmative application for relief under DRL § 241. The visiting spouse cannot simply refuse to pay and assert DRL § 241 as a defense to child support payments. However, the sooner an order suspending payments is sought and obtained, the sooner the payor can legitimately cease payments.

Under the statute, a noncustodial parent may affirmatively move the court for an order suspending spousal or child support payments where the custodial parent has wrongfully interfered with visitation. A high level of proof must be met in order to obtain an order suspending support. The conduct of the custodial parent must rise to the level of “deliberate frustration” or “active interference” with the non-custodial parent's visitation rights. [Hecht v. Hecht, 222 A.D.2d 589, 635 N.Y.S.2d 280 \(2nd Dept. 1995\)](#).

#### [Notes of Decisions \(61\)](#)

McKinney's D. R. L. § 241, NY DOM REL § 241  
Current through L.2013, chapters 1 to 56 and 60 to 66.