Matrimonial/Family/Adoption Law

Joint Custody: Is It Time to Retire *Braiman v. Braiman*?

This year we celebrate the 40th anniversary of the landmark custody case of *Braiman v. Braiman*,[1] which holds that "joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion." (In this article, the term "joint custody" refers to joint decision making, not physical custody.) Those of us who litigate custody matters are not awash in stable, amicable clients who behave in a mature civilized fashion.

Judges often cite the principles set forth in *Braiman* as a warning that joint custody cannot be awarded after trial, but only by agreement. Only one party can have legal custody (i.e. decision-making authority) in a trial court decision. After all, *Braiman* is good law. But is it *good* law?

Each party in *Braiman* attributes a variety of vices and wrongs to the other. The court held that such embittered and embattled parents could not enjoy joint custody, as it would only enhance the family chaos. A disturbing aspect of the *Braiman* court decision was its stated belief that "divorce dissolves the family as well as the marriage." In point of fact, it is the nuclear family living arrangement that is terminated, not the family.

Many states now have a presumption of joint custody upon dissolution of a marriage, presuming, that joint custody is in the children's best interests. New York, in decreeing that joint custody can only be achieved by agreement, is, in effect, granting one parent veto power over the other.[2]

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At a hearing in New York, the courts, instead of considering the effect that joint custody may have on the children's welfare, direct their efforts toward determining which parent promotes a child's best interest. The potential ability for parental cooperation need not be assessed in the "heat of the moment."[3] Parties who basically agree on issues pertaining to their children, may be displaying a heightened level of animosity in the midst of a divorce.

In the 2008 case of *Matter of Marriott v. Hernandez*,[4] both parents appealed the lower court denial to modify their prior order of joint custody. The Appellate Division kept the joint custody ruling in place, noting that both parties generally behaved appropriately with the children and that the children were equally attached to both of them. Accordingly, it was in the children's best interest to have a joint custody arrangement.

In the Westchester Supreme Court case of *R.L. v. L.T.*,[5] a trial was held on the issue of custody. Despite a credible history of domestic violence on the part of the father (including an order of protection) and an eleven-month stay in federal prison on a "distributing narcotics" conviction, that court awarded joint legal custody to the parties, with the mother to have final decision-making authority. The court further ordered the services of a parenting coordinator, as suggested by the forensic evaluator. Consultation between the parties on issues pertaining to the children was to occur with the parent coordinator. The court, in making its decision, acknowledged the *Braiman* holding, but noted that, despite the antagonism between the parties, they were able to consult about the children through the Family Wizard Program with some success. The father, despite his serious deficits, was found to be a loving parent.

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Balance of Power?

In addition to, or in place of parent coordinators, courts in New York have opted to assign to each parent separate areas of sole decision-making authority in the children's lives. These decision-making areas are often referred to as "spheres of influence," and usually consist of education, religion, medical, and extra-curricular activities. By giving each parent one or more area of influence, neither party has veto power in all areas. Such balance of power encourages each parent to be reasonable and fair in exercising his or her authority, and avoids a "winner-take-all" result.

In a difficult case of two embittered and embattled parties, a referee in the case of *Chava F. v. Jacob F.*[6] awarded joint custody to the parties despite the children's clear alignment with the father. The court noted that were it to grant full custody to the father, "it might enable him to further alienate the children from the mother, or use it as leverage to hinder the healing process." The referee assigned therapy, medical, and dental issues to the mother as her spheres of influence, whereas the father was granted decision making authority over religious and educational issues.

In the *Matter of Dwyer-Hayde v. Forcier*,[7] the Appellate Division affirmed a family court order granting the parties joint custody. This was done despite the finding of antagonism between mother and father on the basis that the best interests of the children are served by joint custody.

No Prima Facie Right to Custody

Under § 240 of the Domestic Relations Law, neither parent has a prima facie right to custody. Instead, the court is to "give such direction, as in the court's discretion, justice requires, having regard to the respective parties and to the best interests of the child." Does not this language imply that the court has authority to entrust custody of a child to both parents jointly?

In *Matter of Agypon v. Zuniga* , the court held that a court's award of custody shall be based upon the best interests of the children.[8] When doing so, a court shall consider the totality of the circumstances, including, but not limited to which alternative will best promote stability; the available home environments; the past performance of each parent; and each parent's relative fitness, including the ability to guide the children and support the children's overall well being.[9] The determination of these circumstances is in the sound discretion of the trial court.[10] If the trial judge in his sound discretion believes that the children are best served by an award of joint custody, then, in such event, that must be his or her ruling, *Braiman* notwithstanding.

A Child's Precious Right

Procedure by presumption is always easier than individualized determination.[11] The seminal custody case of *Friederwitzer v. Friederwitzer*[12] mandates that custody is to be awarded in the best interests of the children, based upon a totality of circumstances. Furthermore, the law is well settled that it is the best interest of the child to have a relationship with both parents absent extraordinary circumstances.[13] That right is considered more precious than any property right,[14] and a child has the right to be nurtured and guided by both parents.[15] Joint custody after trial is not always right, but neither is it always wrong. Mediation, parent education and the use of auxiliary services like parent coordinators requires more work but produces better results that slavish adherence to the principals of a single case.

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1. 44 N.Y.2d 584, 589-590 (1978).
2. Andrew Shepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 Tex. L. Rev. note 6, at 714 n. 113.
3. *Beck v Beck,* 432 A.2d 63, 72 (N.J. 1981).
4. 55 A.D.3d 613 (2d Dept. 2008).
5. N.Y.L.J. 1513953477 (Sup. Ct. Westchester Co. 2017).
6. N.Y.L.J. 1202676582743 (Fam. Ct., Suffolk Co. 2014).
7. 67 A.D.3d 1011 (2d Dept. 2009).
8. *Matter of Agypon v. Zuniga,* 150 A.D.3d 1226, 1227 (2d Dept. 2017).
9. *Matter of Tofalli v. Sarrett*, 150 A.D.3d 1122, 1123 [(2d Dept. 2017).
10. *Id.* at 1123.
11. *Stanley v Illinois*, 405 U.S. 645 (1975) (holding that unwed fathers cannot automatically be denied custody).
12. *Friederwitzer v. Friederwitzer,* 55 N.Y.2d 89, 93 (1982).
13. *Young v. Young,* 212 A.D.2d 114 (2d Dept. 1995).
14. *Resnick v. Zoldan*, 134 A.D. 2d 246 (2d Dept. 1987).
15. *Bostinto v. Bostinto*, 207 A.D.2d 471 (2d Dept. 1994).