Chapter 9

CUSTODY AND VISITATION

Synopsis

PART A: PROCEDURAL CONTEXT

§ 9.01 Procedural Context—Custody and Visitation

Child custody may become an issue in several settings. The most common custody award is made as incidental relief in a matrimonial action. But child custody can also be obtained through a writ of habeas corpus or by a petition, and order to show cause.

Both the supreme court and the family court have subject matter jurisdiction to determine custody applications brought by habeas corpus or by petition. Only the supreme court has original jurisdiction over an application for child custody, as relief in a matrimonial action. However, the supreme court can refer such applications to the family court. Such referrals are quite common in light of the social services support and counseling resources available through the family court.

The predominant concern in custody disputes involving children is their best interests. Best interest is only a general standard. In deciding particular cases, the courts will consider many factors before awarding custody. The parents' respective abilities to satisfy their children's physical, emotional, educational, and spiritual needs; their ability to make suitable child care arrangements; the quality of the relationship between each parent and the child; the child's custodial preference; and the parents' ability to satisfy the child's need for stability will all be considered.

The parent, who is denied sole custody, does not lose all contact with the child. Instead, he or she will receive visitation rights as a means of maintaining a relationship of love and counsel with the child, and the custodial parent will normally be directed to consult and confer, in a meaningful way, with the non-custodial parent before making major decisions on behalf of the child. In certain instances, grandparents and siblings can also acquire visitation rights.

A New York court's jurisdiction to enter an initial custody, or visitation order, or to modify or enforce a custody order, in an interstate custody dispute is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which provides rules for deciding which state has jurisdiction over the

proceeding, and fosters cooperation between the courts of different states in deciding custody matters.

Child custody and visitation orders are subject to being enforced in the same manner as any other order or agreement. The enforcement remedies for violation of an agreement or an order of the court are discussed in Chapter 14 of this work (*see* Ch. 14 *below*Modification of Orders). However, since these orders and agreements relate directly to the children, they are often enforced with a judicial view as to how the violation has affected the children and their best interests, rather than how the parent has been damaged by the actual violation. For example, a parent who refuses to permit the children to go on a visitation, because the other parent arrives in a state of intoxication to pick up the children, will not be punished by the court for refusing to let the children go, if the parents can demonstrate that it was in the best interest of the children to refuse.

Modification of custody and visitation orders are also based upon what is in the best interest of the child at the time the modification petition is brought. However, a substantial change in circumstances is required, because stability in the child's life is a major concern of the court. Procedures for modification of an agreement or a court order are discussed in Ch. 15 *below*. The reasons for modification will always relate to what the court believes is in the best interest of the child. For example, even when a party violates a court's order to the custodial parent not to relocate the residence of the child beyond a certain mile radius, the court must still fashion a remedy that is in the best interest of the child. The court cannot simply punish the child by changing custody. The court must hold a hearing to determine if a change in custody is in the best interest of the child, or is some other remedy (for example, reduction or suspension of support, modification of visitation, the posting of a bond, or other security). *Rybicki v. Rybicki*, 176 A.D.2d 867, 575 N.Y.S.2d 341 (2d Dep't 1991).

PART B: DETERMINING JURISDICTION

§ 9.02 Checklist for Determining Jurisdiction

- ☐ Determine whether there is a choice of forum between supreme and family court. *See* § 9.03 *below.*
- ☐ Choose preferred forum for initiating proceeding. *See* § 9.04 *below.*
- ☐ Consider UCCJEA implications. *See* § 9.05 *below.*
- ☐ **Search Advisor:**

  Family Law > Child Custody > Jurisdiction

  Family Law > Child Custody > Uniform Child Custody Jurisdiction & Enforcement Act

- ☐ **Investigate Parties on *lexis.com*®** *See* § Intro.09 *above*.

§ 9.03 Determining Whether Court Has Subject Matter Jurisdiction

[1] Understanding Limits of Subject Matter Jurisdiction Regarding Child Custody and Visitation

No judicial order, with respect to child custody and visitation rights between parents, can be made unless the court has proper subject matter jurisdiction in an authorized action or proceeding. *See Finlay v. Finlay*, 240 N.Y. 429, 432, 148 N.E. 624, 626 (1925). Child custody may only be determined as follows:

1. By writ of habeas corpus;
2. By petition and order to show cause; or
3. When adjudged as an incident to a matrimonial action, for example:
   a. An action for annulment;
   b. An action to declare nullity of a void marriage;
   c. An action for separation; or
   d. An action for divorce.

DRL §§ 70, 71, 72, 240; FCA § 651.

Supreme court and family court have concurrent jurisdiction over custody and visitation proceedings. DRL § 70 *et seq.*, DRL § 240, and FCA § 651 *et seq.* address the courts' authority to make custody and visitation orders. New York, in addition, follows the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), found in DRL Art. 5-A (DRL § 75 *et seq.*), which governs the subject matter jurisdiction of a court to hear both sister state, and international custody, and visitation matters.

[2] Understanding Original Jurisdiction of Supreme Court

The supreme court has original jurisdiction over custody and visitation matters. N.Y. Const. art. VI, § 7 (Judiciary); DRL §§ 70, 72, 240; FCA §§ 651, 652. As noted above, this jurisdiction can be invoked as an incident to matrimonial actions, or in the traditional special proceedings of a habeas corpus writ or petition, and order to show cause.

[3] Understanding Original Jurisdiction of Family Court

Under the state constitution, the family court holds original jurisdiction over the custody of minors, except for custody incidental to actions and proceedings for marital separation, divorce, annulment of marriage, and dissolution of marriage. However, such jurisdiction is subject to the requirement that it be exercised "in the manner provided by law." N.Y. Const. art. VI, § 13 (Judiciary).

The family court's constitutionally recognized original jurisdiction over custody matters is implemented by statute as follows:

1. The family court has jurisdiction to determine habeas corpus proceedings and proceedings brought by petition and order to show cause for the determination of the custody or visitation of minors (FCA § 651(b));
2. The family court is authorized to determine an application to modify the custodial arrangement in an order or judgment of a court of competent jurisdiction not of the State of New York upon a showing that a change of circumstances has occurred subsequent to the entry of the order or judgment (FCA § 654); and

3. The family court has jurisdiction over child custody and visitation issues that arise in independent family court proceedings. FCA §§ 651(b), 654. These include:

    a. Support proceedings (FCA Art. 4 (FCA § 411 *et seq.*));

    b. Paternity proceedings (FCA Art. 5 (FCA § 511 *et seq.*));

    c. Family offense proceedings (FCA Art. 8 (FCA § 811 *et seq.*)); and

    d. Child protective proceedings (FCA Art. 10 (FCA § 1011 *et seq.*)).

[4] Understanding Family Court Jurisdiction Regarding Matters Initially Brought in Supreme Court

In a matrimonial action, the supreme court may refer to the family court any of the following applications:

1. To fix temporary custody;
2. To fix permanent custody;
3. To enforce judgments and orders of custody; and
4. To modify judgments and orders of custody.

FCA § 652(a).

On such referral, the family court has jurisdiction to determine such applications with the same powers possessed by the supreme court.

In addition, even if the supreme court makes no referral, the family court may enforce the order or judgment awarding custody or visitation, or it may modify the order or judgment upon a showing that there has been a subsequent change of circumstances and modification is required. FCA § 652(b).

Exception: Family court may not assert jurisdiction to modify or enforce a custody, or visitation order, or judgment if supreme court reserves ongoing exclusive

jurisdiction over modification or enforcement to itself. FCA §§ 467, 652(b).

The family court has authority to decline to exercise jurisdiction and refuse to hold a hearing, where the same matter is pending before the supreme court in a pending matrimonial action. *Schneider v. Schneider*, 127 A.D.2d 491, 511 N.Y.S.2d 847 (1st Dep't), *aff'd*, 70 N.Y.2d 739, 519 N.Y.S.2d 962, 514 N.E.2d 382 (1987).

FCA § 651(a) also authorizes discretionary referrals from the supreme court to the family court of habeas corpus proceedings and proceedings brought by petition and order to show cause, seeking determinations with respect to the custody and visitation of minors.

PRACTICE RESOURCES:

- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 13.02.
- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 40.02(2).
- *New York Practice Guide: Domestic Relations* § 34.21.
- *Schneider v. Schneider*, 127 A.D.2d 491, 511 N.Y.S.2d 847 (1st Dep't), *aff'd*, 70 N.Y.2d 739, 519 N.Y.S.2d 962, 514 N.E.2d 382 (1987).

§ 9.04 Choosing Forum

In deciding whether to seek an initial custody determination in the supreme or family court, counsel will need to weigh a variety of factors, allowing for differences in local practice, and the quality of judicial personnel in the different courts. Among the factors to consider are the following:

1. More formal, but sometimes speedier, proceedings in the supreme court;
2. Supreme court proceedings are generally are open to the public, while family court proceedings are generally closed to the public;

3. Proceedings in supreme court are governed by the Civil Practice Law and Rules, both in matrimonial actions, and when initiated by a writ of habeas corpus or a petition in equity. In family court, the Civil Practice Law and Rules is applicable pursuant to FCA § 165, unless the Family Court Act specifically prescribes its own procedure, but a test of appropriateness is also used. This may have a significant impact on the conduct of the proceeding. For example, many family courts do not enforce the time limits imposed by the Civil Practice Law and Rules for the submission and service of pleadings and motion papers.
4. As compared with the supreme court, many family courts have a limited clerical staff, whose task it is to process written applications to the court, and accordingly, getting an order to show cause signed or a judicial subpoena issued can prove to be a major undertaking. Moreover, although time is often of the essence in custody cases, it may be difficult to obtain a short return date and a speedy hearing, when initiating a custody proceeding in the family court.
5. Family court has been held to lack the power to issue an injunction restraining a parent from removing a child, since injunction is part of the general equitable power vested in supreme court, but not in family court. *Y. v. Y.*, 93 Misc.2d 893, 403 N.Y.S.2d 855 (Fam. Ct. Kings County 1978).
6. Under FCA Art. 2 (FCA § 211 *et seq.*), various ancillary services are available in custody and visitation proceedings, and can generally be more quickly implemented, at a much lower cost to the litigant, than is the case in supreme court. These services, include medical examinations, probation services, psychiatric services, and other auxiliary services. Of course, if proceeding in supreme court, the attorney often has more input in selecting the law guardian and the forensic expert, enabling the attorney to lobby for a more experienced individual, or one who had been previously on the case and knows the history of the case. Consideration of the social services available through the family court, and the history of the case, may be the decisive factor in determining the forum in which to initiate a proceeding.

PRACTICE RESOURCES:

- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 13.03.
- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 40.02(2)(c).
- *New York Practice Guide: Domestic Relations* § 34.21(1).
- *Y. v. Y.*, 93 Misc.2d 893, 403 N.Y.S.2d 855 (Fam. Ct. Kings County 1978).

§ 9.05 Understanding Impact of UCCJEA

[1] Understanding Purpose and Applicability of UCCJEA

A New York court's jurisdiction to enter an initial custody, or visitation order, or to modify, or enforce a custody order in an interstate custody dispute is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). DRL Art. 5-A (DRL § 75 *et seq.*). Briefly, the UCCJEA does the following:

1. Provides rules for deciding which state has jurisdiction over an initial custody determination, including a provision giving the child's home state priority;
2. Gives the court that entered the initial custody determination exclusive continuing jurisdiction over that determination, as long as one of the parties resides within the state;
3. Provides rules for when a child's home state should relinquish or decline jurisdiction in favor of another state;
4. Requires courts of different states to communicate with each other to resolve questions of jurisdiction;
5. Requires cooperation between the courts of different states in gathering evidence and conducting hearings;
6. Authorizes a state to assume temporary emergency jurisdiction of a custody matter when necessary to protect the child, the child's parent, or the child's sibling, and limits the duration of orders issued by a court with temporary emergency jurisdiction; and

7. Creates new mechanisms for enforcing custody and visitation orders issued in another state, including registration of such orders, expedited enforcement proceedings, and enforcement by prosecutors and law enforcement officials.

The Uniform Child Custody Jurisdiction Enforcement Act repealed and replaced the Uniform Child Custody Jurisdiction Act, effective in New York on April 28, 2002. One of the major purposes of the UCCJEA is to harmonize the prior UCCJA (DRL Art. 5-A (DRL § 75 *et seq.*)) and the Parental Kidnapping Act (PKPA) found in 28 USCS § 1738A. The new Act provides efficient, speedy enforcement procedures, effectuating interstate access and custody provisions.

The Act broadly describes a "child custody proceeding" as follows:

> ". . .a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. . . " DRL § 75-a.

Exceptions: UCCJEA is not applicable to proceedings involving juvenile delinquency, persons in need of supervision, or contractual emancipation. DRL § 75-a(4). UCCJEA, likewise, does not apply to adoption proceedings or proceedings for the authorization of emergency medical care for a child. DRL § 75-b.

The UCCJEA is designed to be compatible with the Federal Parental Kidnapping Prevention Act (PKPA) and with the Uniform Interstate Family Support Act (UIFSA) that governs child and spousal support. Under the PKPA, custody and visitation determinations are afforded full faith and credit. 28 USCS § 1738A. The inter-relationship of UCCJEA with the PKPA puts teeth into the enforcement of custody and visitation decrees, in that persons who flee with, or kidnap, a child could be subject to the federal parental

locator service. Furthermore, warrants issued by state criminal courts are subject to PKPA provisions which provide that such fugitives are chargeable with felonies.

[2] Applying UCCJEA to International Custody Determinations

DRL § 75-d is designed to provide a uniform application of custody proceedings. Under DRL § 75-d(1), a foreign country is treated as if it were a state of the United States. A custody determination made in a foreign country that substantially conforms with the jurisdictional standards of the UCCJEA must be recognized and enforced under Title 3 (DRL § 77 *et seq.*). There is, however no recognition or enforcement of custody law from a foreign country, if such law, as written or applied, "violates fundamental principles of human rights". DRL § 75-d(3).

[3] Qualifying as "Person" or "Person Acting as a Parent" Under UCCJEA

Under the UCCJEA, the term *person* means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity. DRL § 75-a(12). This broad definition of "person" brings actions brought by governmental agencies, such as proceedings for termination of parental rights, within the scope of the UCCJEA.

A *person acting as a parent* is a non-parent who has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absences, within one year immediately before the commencement of a child custody proceeding, and has either been awarded legal custody by a court or claims a right to legal custody under New York law. DRL § 75-a(13). Persons acting as parents are treated in the same way as custodial parents in various provisions throughout the Act.

[4] Understanding Effect of Child Custody Determination

A custody determination, by a court with proper jurisdiction, binds the following:

1. All persons served in accord with New York law;
2. All persons notified pursuant to DRL § 75-q; or
3. All persons who have submitted to court's jurisdiction *and* have had an opportunity to be heard.

A custody determination is conclusive as to adjudicated issues of law and fact, except as such determination may be modified, or if such determination would be violative of either DRL § 240(1-c) or FCA § 1085. DRL § 75-e.

PRACTICE RESOURCES:

- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 13.02(2).
- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* Ch. 41.
- *Bender's Forms for the Civil Practice* Form No. DRL 76:1 *et seq.*
- DRL Art. 5-A (DRL § 75 *et seq.*).

PART C: OBTAINING INITIAL CHILD CUSTODY JURISDICTION

§ 9.06 Checklist for Obtaining Initial Child Custody Jurisdiction

- ☐ Establish jurisdictional basis. *See* § 9.07 *below*.
- ☐ Ensure that required notice is provided. *See* § 9.08 *below*.
- ☐ Determine whether continuing jurisdiction is present to make custody modification. *See* § 9.09 *below*.
- ☐ Establish grounds for exercise of temporary emergency jurisdiction where required. *See* § 9.10 *below*.
- ☐ Determine whether proceeding has been commenced elsewhere. *See* § 9.11 *below*.
- ☐ Provide information for evaluation of proper forum. *See* § 9.12 *below*.
- ☐ Determine whether proceeding should be stayed or dismissed on basis of unjustifiable conduct. *See* § 9.13 *below*.
- ☐ **Search Advisor:**

  Family Law > Child Custody > Jurisdiction

  Family Law > Child Custody > Uniform Child Custody Jurisdiction & Enforcement Act

- ☐ **Investigate Parties on *lexis.com*®** *See* § Intro.09 *above*.

§ 9.07 Establishing Initial Custody Jurisdiction

[1] Understanding Statutory Jurisdictional Bases

New York has jurisdiction to make initial child custody determinations in the following circumstances only:

1. New York is the child's home state ("home state jurisdiction");
2. The child has a significant connection with New York and substantial evidence concerning the child is located within New York ("significant connection jurisdiction");
3. All states having home state or significant connection jurisdiction have declined to exercise such jurisdiction in

favor of New York, as the more appropriate forum ("most appropriate forum jurisdiction"); or

4. No state would have jurisdiction under any of the above criteria ("vacuum jurisdiction").

DRL § 76.

The UCCJEA strictly prioritizes these jurisdictional bases, in the order listed above. In addition to the above bases for exercising jurisdiction, a New York court may exercise jurisdiction in an emergency, when it is necessary to protect the child, the child's parent, or the child's sibling. However, such jurisdiction is temporary, and limited in nature, and does not provide a basis for entering a permanent order.

Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination. *See* DRL § 76(3).

[2] Establishing Home State Jurisdiction

The *home state* of the child is the state in which the child lived with a parent or parent substitute for at least six consecutive months prior to the commencement of a child custody proceeding. In the case of an infant less than six months of age, the term means the state in which the infant lived from birth with the parent or parent substitute. A period of temporary absence of the child, or parent, or the parent substitute does not renew the requirement for a six month period, but is deemed to be included in such period. DRL § 75-a(7).

[3] Seeking Significant Connection

In the event that the child has no home state, or the home state has declined jurisdiction on inconvenient forum grounds (*see* DRL § 76-f), or due to conduct of petitioner (*see* DRL § 76-g), jurisdiction may be based upon the "significant connection" test set forth in DRL § 76(1)(b). A significant connection exists, for jurisdictional purposes, if two conditions are met:

1. The child and his or her parents, or the child and at least one parent or person acting as a parent have a significant

connection with New York, other than mere physical presence; and

2. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

The term *substantial evidence* means "optimum access to relevant evidence." *See Vanneck v. Vanneck*, 49 N.Y.2d 602, 610, 427 N.Y.S.2d 735, 404 N.E.2d 1278 (1980). The significant connection principle may be used to establish jurisdiction where there is no home state jurisdiction.

[4] Determining Lack of Alternative Jurisdiction

New York may assume jurisdiction if no court of any other state would have jurisdiction under the criteria set forth in DRL § 76(1)(a), (b), (c). Under this "last resort" provision, a state court may elect to hear a custody proceeding for which no other jurisdictional predicate exists.

PRACTICE RESOURCES:

- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 13.02(2)
- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.10.
- *Bender's Forms for the Civil Practice* Form No. DRL 76:1, Form No. DRL 76:2, Form No. DRL 76:3.
- DRL §§ 75, 76, 76-g.
- *Vanneck v. Vanneck*, 49 N.Y.2d 602, 610, 427 N.Y.S.2d 735, 404 N.E.2d 1278 (1980).

§ 9.08 Providing Notice and Opportunity to be Heard

Before a child custody determination is made under the UCCJEA, notice and opportunity to be heard must be given to all parents, parent substitutes, and any other necessary parties or agencies. DRL § 76-d(1).

Notice and opportunity to be heard requirement applies to any parent whose rights have not been terminated, and to any person having physical custody of the child.

● **Warning:** Custody determinations, made without an opportunity to be heard, are not enforceable under UCCJEA.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.21.
- DRL § 76-d.

§ 9.09 Determining Whether Court Has Continuing Exclusive Jurisdiction

Child custody determinations are never final, in that they are always subject to modification, upon a showing of a substantial change in circumstances. The change in circumstances shall be measured from the last order or determination, not from the initial order or determination. A court that has made a child custody determination consistent with the UCCJEA has exclusive, continuing jurisdiction over the determination, as long as at least one of the parties continues to reside within the state and the child has a significant connection with the state. If a New York court has exclusive continuing jurisdiction over a custody determination, then another state may not modify that determination, except when exercising temporary emergency jurisdiction as provided in DRL § 76-c.

A New York court that has made a proper initial custody determination loses its exclusive, continuing jurisdiction over that determination if:

1. New York determines that the child and one parent or parent substitute no longer have a "significant connection" with New York, and New York no longer has substantial evidence available concerning child's care, protection, training, and personal relationships; or
2. A court of New York or another state determines that the child, the child's parents, and any parent substitute do not presently reside in New York. DRL § 76-a.

A New York court which has made a custody determination, but does not have exclusive continuing jurisdiction under DRL § 76-a, may only modify that determination, if it has original jurisdiction under DRL § 76.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.13(1).
- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 13.22(1).
- DRL § 76-a.

§ 9.10 Seeking Temporary Emergency Jurisdiction

[1] Defining Emergency

A New York court can exercise temporary emergency jurisdiction in a custody proceeding, if the child is present in New York, and:

1. The child has been abandoned; or
2. It is necessary in an emergency to protect the child, a sibling, or parent of child.

DRL § 76-c.

Abandoned is defined in DRL § 75-a(1) as "left without provision for reasonable care or supervision." In order to invoke emergency jurisdiction, the child must be physically present. *See Blend v. Jones,* 248 A.D.2d 808, 670 N.Y.S.2d 249 (3d Dep't 1998). Emergency jurisdiction exists if the child, or sibling, parent, or parent substitute is subject to or threatened with mistreatment or abuse. This extraordinary jurisdiction is reserved for extraordinary circumstances. When there is child neglect, without emergency or abandonment, jurisdiction cannot be based upon this section. *See* UCCJEA, National Conference on Uniform State Laws, 1997, Comment to Section 104, p. 32.

[2] Understanding Limited Duration of Emergency Custody Jurisdiction

Where there is no existing child custody order, the temporary emergency order remains in effect only until an order is issued from a court with permanent jurisdiction. In cases where the child is in imminent risk of harm, a temporary emergency order remains in effect until the state with proper claim to permanent jurisdiction (as per DRL § 76) has taken steps to assure the protection of the child.

[3] Communicating With Other State Court

When a New York court asked to exercise temporary emergency jurisdiction learns that an out-of-state court with permanent jurisdiction has a proceeding pending, or has made a determination as to custody, it must immediately communicate with that other court. DRL § 76-c(4). If a New York court, that has jurisdiction over a custody proceeding through the regular jurisdictional provisions of the UCCJEA, is informed that a court in another state is exercising temporary emergency jurisdiction, and that a child custody proceeding has been commenced, or a child custody determination has been made by that court, the New York court has a duty to communicate immediately with the other state court for the purpose of:

1. Resolving the emergency;
2. Protecting the safety of the parties' and child; and
3. Determining a time period for the temporary order.

DRL § 76-c(4).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.12.
- DRL § 76-c.
- *Blend v. Jones,* 248 A.D.2d 808, 670 N.Y.S.2d 249 (3d Dep't 1998).
- *See* UCCJEA, National Conference on Uniform State Laws, 1997, Comment to Section 104, p. 32.

§ 9.11 Preventing Simultaneous Proceedings

[1] Deferring Jurisdiction to Another State

New York State may not exercise jurisdiction over a custody proceeding, if a proceeding has already been commenced in another state having jurisdiction, unless:

1. New York State invokes temporary emergency jurisdiction pursuant to DRL § 76-c; or
2. Proceeding in other state has been terminated or stayed on the grounds that New York is a more convenient forum.

DRL §§ 76-e, 76-f.

[2] Staying New York Proceeding

If, upon reviewing documents and other information supplied by the parties to the initial child custody proceeding (*see* DRL § 76-h), the New York court determines that a court of another state with jurisdiction has commenced a custody proceeding, it must:

1. Stay the New York proceeding;
2. Communicate with the court of the other state; and
3. Unless New York is a more appropriate forum, dismiss its proceeding.

DRL § 76-e(2).

[3] Modifying Custody Determination Commenced Elsewhere

When asked to modify a child custody determination, the New York court must first determine if proceedings to enforce the determination have begun in another state. If such a proceeding has begun elsewhere, the New York court may:

1. Stay the New York proceeding, pending entry of the other state's order enforcing, denying, or dismissing the proceeding for enforcement;
2. Enjoin the parties from continuing the enforcement proceeding; or

3. Proceed with the modification as it deems appropriate.

DRL § 76-e(3).

PRACTICE RESOURCES:

- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 13.22.
- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.11.
- *Bender's Forms for the Civil Practice* Form No. DRL 76-b:1, Form No. DRL 76-b:2.
- DRL § 76-e.

§ 9.12 Determining Appropriate Forum

[1] Evaluating Circumstances to Choose Proper Forum

A party, the child, or the law guardian may raise the issue of inconvenient forum. DRL § 76-f(1). The court may raise the issue upon its own motion, or upon request of another court. In determining whether New York or another state is an appropriate forum, the court must allow the parties to submit information regarding the following:

1. The occurrence of domestic violence or child abuse;
2. The length of time the child has resided in New York;
3. The distance between the courts in question;
4. The relative financial circumstances of the parties;
5. The existence of an agreement between the parties as to jurisdiction;
6. The nature and location of relevant evidence; and
7. The familiarity of each court with the facts of the case, and its relative ability to expeditiously resolve the issues.

DRL § 76-f(2).

[2] Assessing Each Court's Familiarity With Facts

Before deciding whether to accept or decline jurisdiction, the New York court must, upon reviewing the information placed

before it, consider the ability of each court to decide the issues expeditiously. DRL § 76-f(2)(g). In deciding whether another state is an inconvenient forum, the New York court must assess the familiarity each court has with the facts and issues. DRL § 76-f(2)(h).

[3] Determining That Forum Is Inconvenient

If a New York court determines that it is an inconvenient forum, it must stay the proceedings, upon condition that a child custody proceeding be promptly commenced in another designated state. It may also impose any other conditions it deems to be just and proper. DRL § 76-f(3). Any decision to retain or decline jurisdiction must be made in the best interest of the children. DRL § 75(2).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.15(1).
- DRL § 76-f.

§ 9.13 Declining Jurisdiction Based Upon Unjustifiable Conduct

A court, which would otherwise have jurisdiction under the UCCJEA, must decline to exercise jurisdiction, because the person seeking to invoke jurisdiction has engaged in "unjustifiable conduct" unless:

1. The parents and all persons acting as parents have acquiesced to jurisdiction;
2. Another state court, otherwise having jurisdiction determines that New York, is a more appropriate forum; or
3. No court of any other state would have jurisdiction under DRL § 76-b.

DRL § 76-g(1).

In such cases, the court declining jurisdiction may stay the proceeding, until it is brought in a court having jurisdiction, or it may fashion an appropriate remedy to insure protection of the child. If the court declining jurisdiction dismisses the petition or stays

a proceeding pursuant to DRL § 76-g, it shall assess reasonable expenses including:

1. Communication expenses;
2. Attorney's fees;
3. Investigative fees;
4. Expenses for witnesses;
5. Travel expenses; and
6. Child care expenses.

DRL § 76-g(3). The party, in whose favor costs are assessed, may decline them. No fees or expenses shall be assessed against a party fleeing domestic violence or child abuse. DRL § 76-g(3).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.15(2).
- DRL § 76-g.

PART D: INITIATING CUSTODY AND VISITATION PROCEEDING IN FAMILY COURT

§ 9.14 Checklist for Initiating Custody and Visitation Proceeding in Family Court

- ☐ Determine proper venue for proceeding. *See* § 9.15 *below*.
- ☐ Establish that venue is improper or show good cause for change of venue, if change of venue is sought. *See* § 9.15 *below*.
- ☐ Draft petition. *See* § 9.16[1] *below*.
- ☐ Include, in petition or affidavit, information required under UCCJEA. *See* § 9.16[1] *below*.
- ☐ Consider safety of party or child when making disclosures. *See* § 9.16[1] *below*.
- ☐ Verify and sign. *See* § 9.16[2] *below*.
- ☐ Determine number of copies to be filed. *See* § 9.16[2] *below*.
- ☐ File with clerk of court. *See* § 9.16[2] *below*.
- ☐ Seek appearance of necessary parties. *See* § 9.17 *below*.
- ☐ Seek travel expenses, as appropriate. *See* § 9.17 *below*.
- ☐ Request communication with out-of-state court, where required. *See* § 9.18 *below*.
- ☐ **Search Advisor:**

  Family Law > Child Custody > Jurisdiction

  Family Law > Child Custody > Uniform Child Custody Jurisdiction & Enforcement Act

- ☐ **Investigate Parties on *lexis.com*®** *See* § Intro.09 *above*.

§ 9.15 Determining Proper Venue

Although FCA §§ 171, 174 set forth pertinent venue rules, the rules in custody and visitation cases are primarily governed by the venue rules that apply to special proceedings, contained in CPLR

Art. 5 (CPLR 501 *et seq*.). Pursuant to CPLR 506(a), special proceedings can be commenced in any county within the judicial district where the proceeding is triable. CPLR 503 provides that the place of trial shall be in the county in which one of the parties resides.

Custody and visitation modification or enforcement proceedings may be brought in family court in the county that entered the original order, or in any other county where the respondent resides or can be found. FCA § 171.

When the determination of custody and visitation issues, in a matrimonial action, is referred by the supreme court to the family court, the following rules apply:

1. The referring supreme court may designate a county within its judicial district as the county in which the application is to be determined;
2. If the supreme court fails to make such a designation, venue will be governed by the venue provisions of FCA § 421, that provides for venue in the county in which one of the parties resides or is domiciled at the time of the filing of the petition; and
3. The family court may change the place of trial in accordance with CPLR Art. 5 (CPLR 501 *et seq*.).

FCA § 469(b).

Change of venue in the family court is governed by the following rules:

1. If a family court proceeding is improperly venued, a change of venue is mandatory on the initiative of either party or of the court itself; and
2. Any other change of venue is discretionary, for example, the movant must demonstrate good cause to effect a transfer to another county.

FCA § 174.

Transfer may be sought to the county where the custodial parent and child reside. *See Van Loan v. Dillenbeck*, 97 A.D.2d 935, 471 N.Y.S.2d 19 (3d Dep't 1983); *Bridgewater v. Bridgewater*, 82 Misc.2d 812, 372 N.Y.S.2d 355 (Fam. Ct. New York County 1975).

PRACTICE RESOURCES:

- *Bridgewater v. Bridgewater*, 82 Misc.2d 812, 372 N.Y.S.2d 355 (Fam. Ct. New York County 1975).
- *Van Loan v. Dillenbeck*, 97 A.D.2d 935, 471 N.Y.S.2d 19 (3d Dep't 1983).

§ 9.16 Preparing and Filing Petition

[1] Complying With UCCJEA Requirements in Preparing Custody Pleadings

In a custody or visitation proceeding, each party must provide, under oath, in his or her first pleading (or attached affidavit) reasonably ascertainable information concerning:

1. The child's present address or location;
2. The locations where the child has resided for each of the past five years; and
3. The names and current addresses of any persons with whom the child has resided during each of the past five years.

DRL § 76-h(1).

The pleading (or attached affidavit) must advise if a party:

1. Has knowledge of any other proceeding that may affect the case at bar, including any custody or visitation proceedings, enforcement proceedings, terminations of parental rights, orders of protection, or adoptions;
2. Has participated as a party or witness in any court, regarding custody or visitation with subject child, and if so, identify the court, index number, and date of disposition; and
3. Knows the names and addresses of any non-party who has physical custody of the child, visitation with the child.

DRL § 76-h(1)(a), (b), (c).

A party who answers yes to any of the above questions, must provide additional information under oath as directed by the court. DRL § 76-h(3).

The duty of a party to inform the court as to any proceeding (anywhere) that may affect the instant proceeding is a continuing

one. DRL § 76-h(4). If the required information is not provided, the court may stay the proceedings until the information is furnished. DRL § 76-h(2).

Upon a finding by the court that the health or safety of a party or child would be at risk by disclosing his or her location, the court may order such address be made confidential, and not appear in any pleadings or other documents. A party who resides in a residential shelter for victims of domestic violence shall not have his or her address revealed. DRL § 76-h(5).

Forms for child custody and visitation proceedings may be obtained from the court clerk or found on the Unified Court System website: *www.nycourts.gov/forms/familycourt/general.shtml*.

[2] Filing Petition

After the document is prepared, it must be signed and verified by the petitioning party. Once signed, the petition is filed with the clerk of the court. Consult with the clerk's office prior to filing the petition to ascertain local practice and custom concerning the number of copies to be filed and the hours the clerk is open for receiving new petitions.

Once filed, the clerk of the court will advise the petitioning party of the date and time that the proceeding will be heard, and will inform the party of the name of the judge who will hear the matter, and will provide the part number (or room number) in the courthouse, if applicable.

PRACTICE RESOURCES:

- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 2.02(2).
- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.23.
- *Bender's Forms for the Civil Practice* Form No. DRL 76:1, Form No. DRL 76-b:1, Form No. DRL 76-h:1.
- DRL § 76-h.
- FCA §§ 214, 216-b, 216-c.

§ 9.17 Requiring Party and Child to Appear

A New York court, in a custody proceeding, may order the personal appearance of a party who is physically in the state. A person who is in New York and has physical control or custody of the child may be ordered to appear in person with the child. DRL § 76-i(3).

The court may order a party who is outside New York to appear in person with or without the child. When making such an order, the court must give notice as prescribed in DRL § 76-g. When directing the appearance of such party, the court may require another party to pay reasonable and necessary travel and other expenses of the out-of-state party and child. DRL § 76-i(4).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.3.
- DRL § 76-i.

§ 9.18 Communicating With Another State Court

[1] Communicating to Resolve Issues Regarding Choice of Forum

The UCCJEA encourages the courts of different states to communicate with each other to avoid jurisdictional conflicts and to ensure that child custody issues are resolved in the most appropriate forum, if possible. The New York court may communicate with a court in another state at any time concerning a child custody proceeding. DRL § 75-i. Communication is expressly mandated in the following situations:

1. If court documents or information submitted by the parties indicate that another proceeding is simultaneously pending in a court in another state having jurisdiction substantially in accordance with the UCCJEA (*See, e.g., Jenkins v. Jenkins*, 9 A.D.3d 633, 780 N.Y.S.2d 211 (3d Dep't 2004));
2. If the New York court has been asked to exercise temporary emergency jurisdiction, and a child custody proceeding has

been commenced in another court, or a custody determination has been made by another court (DRL § 76-c(4)); or

3. If an enforcement proceeding is brought in New York, at the same time a modification proceeding is pending in a court with jurisdiction to modify, the New York court must communicate with the other court to determine how it should proceed. DRL § 77-f.

[2] Permitting Communication by Parties

The parties may be allowed to communicate with the out-of-state court at the direction of the New York court, or if not allowed must be given an opportunity to present facts and legal argument. *See* DRL § 75-i(2). A record must be kept of any communication between courts under DRL § 75-i. *Record* is defined as information that is:

1. Inscribed on a tangible medium, or
2. Stored in an electronic or other medium, and retrievable in perceivable form.

DRL § 75-i(5). The allowable communication between state courts may be by telephone or by other (written) means.

[3] Taking Testimony in Another State

A party to a child custody proceeding may offer testimony of an out-of-state witness by deposition or other allowable means. The court, on its own motion, may order testimony of a person in another state and prescribe the manner in which such testimony is to be taken. DRL § 75-j(1).

Strategic Point: Transmission of documentary evidence between states by a technological means that does not produce an original writing, may not be excluded from evidence on the basis that it is not an original document. DRL § 75-j(3).

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[4] Requesting Specific Actions by Other State Court and Preserving Records

A New York court may request a court of another state to do one or more of the following:

1. Hold evidentiary hearing;
2. Order the production of evidence;
3. Order a forensic evaluation;
4. Produce and forward a certified transcript of any proceeding; and
5. Order the appearance of a party, child or both.

DRL § 75-k(a), (b), (c), (d), (e).

A New York court shall preserve pleadings and other pertinent records of a child custody proceeding, until the child is 18. DRL § 75-k(4).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.20.
- *Bender's Forms for the Civil Practice* Form No. DRL 75-j:1, Form No. DRL 75-k:1.
- DRL §§ 76-i, 75-j, 75-k.

PART E: PREPARING FOR INITIAL COURT APPEARANCE

§ 9.19 Checklist for Preparing for Initial Court Appearance

- ☐ Request order for temporary custody, where appropriate. *See* § 9.20 *below*.
- ☐ Request appointment of law guardian, where appropriate. *See* § 9.21 *below*.
- ☐ Request psychological or social evaluations of the parents and children, where appropriate. *See* § 9.22 *below*.
- ☐ **Search Advisor:**

  Family Law > Child Custody > Jurisdiction

  Family Law > Child Custody > Uniform Child Custody Jurisdiction & Enforcement Act

- ☐ **Investigate Parties on *lexis.com*®** *See* § Intro.09 *above*.

§ 9.20 Applying for Temporary Order

Because all the supreme court powers to determine custody and visitation set forth in DRL § 240 apply to the family court (*see* FCA § 651(b)), either court may fix custody temporarily by order issued prior to final judgment. Generally, all custody determinations, including temporary determinations, require a full and fair hearing. *See Cornell v. Cornell*, 8 A.D.3d 718, 778 N.Y.S.2d 193 (3d Dep't 2004). Application for temporary custody, however, may be granted without a hearing, if one party has defacto custody, the parties do not reside together, or one party is clearly unable, unfit, or unwilling to take immediate custody of the child. *See, e.g., Hoenig v. Hoenig*, 245 A.D.2d 262, 664 N.Y.S.2d 823 (2d Dep't 1997).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* § 40.02[7].
- *New York Practice Guide: Domestic Relations* § 34.13.

- *Bender's Forms for the Civil Practice* Form No. FCA 651:10, Form No. FCA 651:11.
- DRL § 240.
- FCA § 651.
- *Cornell v. Cornell*, 8 A.D.3d 718, 778 N.Y.S.2d 193 (3d Dep't 2004).
- *Hoenig v. Hoenig*, 245 A.D.2d 262, 664 N.Y.S.2d 823 (2d Dep't 1997).

§ 9.21 Understanding Role of Law Guardian

A law guardian is an attorney admitted in New York State, who is qualified to represent children, and is a member of the law guardian panel. The court may appoint a law guardian to represent a minor child at the initial appearance, or at any time prior to a hearing. *See* FCA § 249. The appointment of a law guardian is discretionary and, accordingly, the court's failure to appoint a law guardian does not in and of itself mandate reversal of a custody determination in most cases. *Lee v. Halayko,* 187 A.D.2d 1001, 590 N.Y.S.2d 647 (4th Dep't 1992); *Nolfo v. Nolfo,* 149 Misc.2d 634, 566 N.Y.S.2d 472 (Sup. Ct. Nassau County 1991). However, once appointed, the law guardian must be given the opportunity to participate in the proceedings. *Ciannamea v. McCoy,* 306 A.D.2d 647, 760 N.Y.S.2d 774, 775 (3d Dep't 2003).

The Law Guardian Representation Standards, adopted by the New York State Bar Association, provide the following outline of the law guardian's responsibilities as they relate to child custody proceedings:

1. Investigation:

   a. Obtain all relevant documents;

   b. Interview child;

   c. Advise child of his or her rights, and advise other attorneys of the role of the law guardian;

   d. Visit home; and

   e. Interview the parties and any other relevant persons, including potential factual or expert witnesses.

2. Obtain court orders:
    a. Orders of protection;
    b. Temporary relief;
    c. Visitation;
    d. Participate in any proceeding affecting child; and
    e. Court-ordered evaluations or studies.
3. Pre-trial discovery:
    a. Documents and financial statements; and
    b. Expert evaluations and witness statements.
4. Pre-trial preparation:
    a. Strategy;
    b. Pre-trial conferences and negotiations;
    c. Contact with child;
    d. Preparation;
    e. Ex-parte communication; and
    f. Pre-trial report.
5. Trial:
    a. Move for protective orders;
    b. Present independent case;
    c. Ensure that necessary witnesses testify and relevant material is introduced into evidence;
    d. Cross-examine witnesses;
    e. Deliver a summation and prepare memoranda of law, if necessary; and
    f. Protect child through properly conducted in camera interview.
6. Post-trial:
    a. Explain outcome to the child;
    b. Advise child of right to appeal and possibility of future modification;
    c. Examine court order; and

d. File notice of appeal, if necessary, and perfect appeal.

7. Subsequent representation:

a. Represent child in modification, violation, or enforcement action.

Law Guardian Representation Standards, Volume II: Custody Cases, New York State Bar Association (1999).

Regarding custody cases, the standards suggest that when the child is not impaired, the law guardian is bound by the child's preference. The law guardian should always examine whether one parent has so influenced the child, or turned the child against the other parent, as to render the child's preference to be impaired.

PRACTICE RESOURCES:

- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 50.06.
- *New York Practice Guide: Domestic Relations* § 34.14(7).
- FCA § 249.

§ 9.22 Understanding Role of Social Services Representative

FCA § 653 authorizes the promulgation of court rules to govern the conduct of court-ordered investigations by the probation service in custody cases commenced pursuant to FCA § 651. 22 NYCRR 205.56 authorizes the court to request such an investigation from the probation service, an authorized child care agency, and any disinterested person.

⊠ **Strategic Point:** If counsel has any objections to the person or agency designated to conduct an investigation, whether the objection is to the designee's lack of qualifications, incompetence, or bias, the objections should be stated at the outset. *See Shapiro v. Shapiro,* 89 A.D.2d 538, 452 N.Y.S.2d 626 (1st Dep't 1982).

Custody recommendations by probation officers and law guardians are not determinative and, accordingly, the fact that the custody decision is not in accordance with those recommendations is not a basis for setting it aside. *Palumbo v. Palumbo*, 292 A.D.2d 358, 738 N.Y.S.2d 90, 91 (2d Dep't 2002); *McGivney v. Wright*, 298 A.D.2d 642, 748 N.Y.S.2d 794, 795 (3d Dep't 2002).

A custody determination may be made without psychological or social evaluations of the parents and children, where the parties have not requested such evaluations, and there is no indication in the record that the children or the parties display emotional problems necessitating expert attention. *Nunnery v. Nunnery*, 275 A.D.2d 986, 713 N.Y.S.2d 417 (4th Dep't 2000); *Thompson v. Thompson*, 267 A.D.2d 516, 699 N.Y.S.2d 181 (3d Dep't 1999).

PRACTICE RESOURCES:

- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 40.02(5)(b).
- *New York Practice Guide: Domestic Relations* § 34.11.
- FCA § 653.
- 22 NYCRR § 205.56.
- *McGivney v. Wright*, 298 A.D.2d 642, 748 N.Y.S.2d 794, 795 (3d Dep't 2002).
- *Nunnery v. Nunnery*, 275 A.D.2d 986, 713 N.Y.S.2d 417 (4th Dep't 2000).
- *Palumbo v. Palumbo*, 292 A.D.2d 358, 738 N.Y.S.2d 90, 91 (2d Dep't 2002).
- *Shapiro v. Shapiro*, 89 A.D.2d 538, 452 N.Y.S.2d 626 (1st Dep't 1982).
- *Thompson v. Thompson*, 267 A.D.2d 516, 699 N.Y.S.2d 181 (3d Dep't 1999).

PART F: INITIATING CUSTODY AND VISITATION PROCEEDING IN SUPREME COURT

§ 9.23 Checklist for Initiating Custody and Visitation Proceeding in Supreme Court

- ☐ Determine proper venue. *See* § 9.24 *below*.
- ☐ Seek change of venue, where appropriate. *See* § 9.24 *below*.
- ☐ Draft and file complaint or petition and accompanying documents. *See* § 9.25 *below*.
- ☐ Ensure compliance with UCCJEA requirements. *See* § 9.16 *above*.
- ☐ Serve process upon defendant or respondent. *See* § 9.26 *below*.
- ☐ Seek appointment of forensic evaluator. *See* § 9.27 *below*.
- ☐ Seek appointment of law guardian, where appropriate. *See* § 9.21 *above*.
- ☐ **Search Advisor:**

  Family Law > Child Custody > Jurisdiction

  Family Law > Child Custody > Uniform Child Custody Jurisdiction & Enforcement Act

- ☐ **Investigate Parties on *lexis.com*®** *See* § Intro.09 *above*.

§ 9.24 Determining Proper Venue

[1] Determining Venue in Matrimonial Action

In actions for divorce, separation, or annulment seeking custody, visitation relief, or both and in subsequent modification and enforcement proceedings, venue is determined by the rules applicable in the main matrimonial action, since all aspects of custody and visitation are deemed a mere incident of the main action. The following rules apply:

1. The county in which one of the parties resides when the action is commenced is deemed a proper venue. A party

residing in more than one county is deemed a resident of each of those counties (CPLR 503(a));

2. The venue designated by the plaintiff governs, unless venue is changed to another county by order upon motion, or by consent (CPLR 509);

3. Venue may be changed where:

   a. The action is brought in an improper county (CPLR 510(1));

   b. There is reason to believe an impartial trial cannot be had in the county;

   c. The convenience of material witnesses and the ends of justice will be promoted by the change; or

4. The court has discretionary power to change the prescribed venue of actions or issues, triable without a jury, to any county within the judicial district where the action is triable. CPLR 512.

[2] Determining Proper Venue of Other Proceedings in Supreme Court

Custody or visitation applications, initiated in supreme court by petition and order to show cause, are subject to the venue rules applicable to special proceedings under the Civil Practice Law and Rules. A special proceeding may be commenced in any county within the judicial district where the proceeding is triable. CPLR 506(a).

A petition for a habeas corpus writ may be made to:

1. The supreme court in the judicial district in which the child is detained;

2. The appellate division department in which the child is detained;

3. Any supreme court justice; or

4. A county court judge being or residing within the county in which the child is detained, where there is no judge within the county capable of issuing the writ, or if all within the county capable of doing so have refused, the petition may

be made to a county judge being or residing within an adjoining county.

CPLR 7002(b).

The writ must be made returnable in the county where it was issued, except that where the petition was made to the supreme court or to a supreme court justice, the writ may be made returnable before any judge authorized to issue it in the county of detention. CPLR 7004(c).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 40.02(3).
- *New York Practice Guide: Domestic Relations* § 34.14(5).
- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Chs. 503, 506, 512, 7002, 7004.
- CPLR 503(a), 506(a), 512, 7002(b), 7004(c).

§ 9.25 Drafting Pleadings

[1] Including Necessary Language in Matrimonial Complaint

No detailed pleading of a claim to custody as ancillary relief is normally required in a complaint filed in a matrimonial action. It is generally sufficient to pray for custody in the wherefore clause of the complaint. While this general rule applies where both the parents and their children have been residents of New York for an extended period of time, and there is no real question as to the court's jurisdiction to determine custody, it must be noted that the UCCJEA requires jurisdictional facts to be demonstrated to the court at the commencement of a proceeding. Therefore, it is advisable to allege in the complaint the facts and legal basis upon which custody jurisdiction pursuant to DRL § 76-h is premised. *See* § 9.16 *above*.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 41.23.

- *Bender's Forms for the Civil Practice* Form No. DRL 76:1, Form No. DRL 76-b:1, Form No. DRL 76-h:1.
- DRL § 76-h.

[2] Including Required Information in Habeas Corpus Petition

To secure the issuance of a writ of habeas corpus, a petition addressed to the supreme court must be submitted. For purposes of expediency, the proposed writ is generally submitted with the petition. The content of the petition, who may file the petition, and who has authority to issue the writ, are prescribed by CPLR 7002.

The petition must be verified and must state, or must be accompanied by an affidavit that must state the following:

1. That the child in whose behalf the petition is made is detained, naming the person by whom he or she is detained, and the place of detention if they are known, or describing them, if they are not known;
2. The cause or pretense of the detention, according to the best knowledge and belief of the petitioner;
3. That a court or judge of the United States does not have exclusive jurisdiction to order release of the child;
4. If the writ is sought because of an illegal detention, the nature of the illegality;
5. Whether any appeal has been taken from any order by virtue of which the person is detained, and, if so, the result;
6. The date, and the court or judge to whom made, of every previous application for the writ, the disposition of each such application, and of any appeal taken, and the new facts, if any, presented in the petition that were not presented in any previous application; and
7. If the petition is made to a county judge, outside the county in which the child is detained, the facts that authorize such judge to act.

CPLR 7002(c).

Where the detention is by virtue of a mandate, a copy of it must be annexed to the petition, or sufficient reason why a copy could not be obtained must be stated.

A request for judicial intervention must be completed and filed with the petition. 22 NYCRR § 202.6. Service of the petition and the writ are governed by CPLR 7005.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 40.02(1)(c).
- *New York Practice Guide: Domestic Relations* § 34.15.
- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 7004.
- *Bender's Forms for the Civil Practice* Form No. FCA 651:1, Form No. FCA 651:2, Form No. FCA 651:3.
- CPLR 7002.

[3] Including Required Information When Proceeding by Petition and Order to Show Cause

A proceeding brought on by petition and order to show cause is a special proceeding governed by CPLR Art. 4 (CPLR 401 *et seq.*). The general pleading requirements set out under CPLR Art. 30 (CPLR 3001 *et seq.*) are made applicable to special proceedings by CPLR 402. In addition to satisfying the Civil Practice Law and Rules pleading requirements, the petition should include the following:

1. The petition should state in clear and concise terms the factual and legal bases for awarding custody of the child to the petitioner;
2. It should include allegations necessary to support custody jurisdiction under DRL § 76-h. *See* § 9.16 *above;*
3. Because it is submitted in support of an order to show cause that must be supported by a sworn document, the petition should be verified (CPLR 2217(b));
4. To support the issuance of the order to show cause, the petition should state whether a previous application for

similar relief was made, where no previous application for similar relief was made, the petition should so state; (CPLR 2217(b));

5. If a previous application was made, the petition should specify new facts supporting the relief requested (CPLR 2217(b)); and
6. A request for production of the child before the court and other requests for interim or permanent relief should also be included in the petition.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* § 40.02(1)(d).
- *New York Practice Guide: Domestic Relations* § 34.16.
- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Ch. 7002.
- DRL § 240.
- CPLR Art. 4, Art. 30 (CPLR 401 *et seq.*, CPLR 3001 *et seq.*

§ 9.26 Serving Process

[1] Serving Process in Matrimonial Action Seeking Custody Award as Ancillary Relief

Actions for separation, divorce, annulment, and to declare the nullity of a void marriage may be initiated by the service of a summons with notice or by the service of a summons together with a verified complaint. DRL §§ 211, 232. If a summons is served without a complaint, a default judgment containing a custody determination cannot be obtained, unless the summons specifies both the type of matrimonial relief sought and that custody is sought as ancillary relief. DRL § 232. If a complaint is served with the summons, the request for custody as ancillary relief does not have to be noted on the summons, but it must be included in the complaint. CPLR 3017. Service of process, generally, is governed by the provisions of CPLR Art. 3 (CPLR 301 *et seq.*).

Under the UCCJEA, governing proceedings involving child custody, notice required for the exercise of jurisdiction when a person is outside New York, may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice, but may be by publication, if other means are not effective. DRL § 75-g.

[2] Serving Process in Habeas Corpus Proceeding

Where the proceeding is brought on by petition for a writ of habeas corpus, the writ and petition may be served on any day:

1. By delivery to the respondent;
2. If the respondent cannot be found with due diligence, by delivery to any person who has physical custody of the child at the time;
3. Where the respondent conceals himself or herself, or refuses admittance, by the nail and mail method of service; or
4. Where good cause is shown, the court may dispense with the mailing specified above, or may direct service in some other manner "reasonably calculated to give notice" to the respondent.

CPLR 7005.

The original petition and writ and proof of service of both documents must be filed with the court on, or prior to, the return date of the writ for the case to appear on the calendar. 22 NYCRR § 202.8.

[3] Serving Respondent With Petition and Order to Show Cause

Where custody proceedings are initiated by petition and order to show cause, the papers are served at a time and in a manner as specified by the court in the show cause order. CPLR 2214(d).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Actions* §§ 29.01, 40.02[1][c], [d].

- *New York Practice Guide: Domestic Relations* §§ 34.14, 34.15, 34.16.
- *Weinstein, Korn & Miller, New York Civil Practice: CPLR* Chs. 301, 2214, 7005.
- CPLR Art. 3 (CPLR 301 *et seq.*), CPLR 2214(d), 7005.
- DRL §§ 75-g, 211, 232.

§ 9.27 Obtaining Appointment of Forensic Evaluator

The use of court-ordered forensics has long been recognized as a useful and valuable tool in the resolution of custody disputes. *See Kessler v. Kessler*, 10 N.Y.2d 445, 225 N.Y.S.2d 1, 180 N.E.2d 402 (1962). The court, however, is not required to accept the opinion of an expert who has been appointed or retained. *See State of N.Y. ex rel. H.K. v. M.S.*, 187 A.D.2d 50, 53, 592 N.Y.S.2d 708 (1st Dep't 1993). But the rejection of such opinion by the court may not be arbitrary and must be explained. *See Krebsbach v. Gallagher*, 181 A.D.2d 363, 587 N.Y.S.2d 346 (2d Dep't 1992). Expert testimony may be rejected by a trial court "if it is improbable, in conflict with other evidence or otherwise legally unsound." *See Desnoes v. State of New York*, 100 A.D.2d 712, 713, 474 N.Y.S.2d 602 (2d Dep't 1984).

The American Academy of Child and Adolescent Psychiatry has promulgated Practice Parameters for Child Custody Evaluations. These parameters apply to parent interviews and suggest that the following topics be addressed by the forensic evaluator:

1. A description and history of the marriage and separation;
2. The parent's perception of his or her relationship with the child;
3. The parent's understanding and sensitivity to any special need of the child;
4. The parent's specific plans for the future should custody be awarded or not awarded;
5. The parent's history, including family of origin, social history, and psychotherapeutic experience, if any;
6. The developmental history of the child; and

7. The usual routine of the child.

In addition, the evaluator should look into any allegations made by a party against the other, and allow the party to respond. The evaluator is to conduct a psychiatric interview with each child, and diagnose when appropriate. Children as young as three years can be interviewed separately from their parents. It is not necessary for an evaluator to render DSM-IV diagnosis or perform psychological testing. *See* J. Brandes, *Child Custody Evaluations,* N.Y.L.J., Jan. 11, 2001, p. 3. (DSM-IV refers to the Diagnostic and Statistical Manual of Mental Disorders).

The testimony, reports and recommendations made by forensic evaluators like any other evidence, can be of great assistance to the judge. The court however, may not relinquish its responsibility to make a determination by deferring to a forensic expert. Recommendations and opinions based upon inadequate information may, and should, be rejected by the court. *See Zelnick v. Zelnick*, 196 A.D.2d 700, 601 N.Y.S.2d 701 (1st Dep't 1993). The primary aim of the evaluator is to determine whether either party is suffering from a psychiatric disorder that would interfere with or impair their ability to act as a proper custodial parent, or make them less fit than the other parent, and if possible, to determine with whom the child has developed the stronger, healthier psychological bond, based upon scientifically recognized data. The parent who was the primary caretaker during the child's early years is usually the one with the stronger, healthier bond. It is not possible to make such judgments in a vacuum. A forensic evaluator can provide important and relevant information with regard to the following:

1. The wishes and capacities of the parents;
2. The capacities of other significant adults living in each home;
3. The needs and wishes of the child (with older children, the wishes of the child might be asked directly);
4. The child's adjustment to the home, school, and community;
5. The interaction and inter-relationship of the child with the parents, siblings, and other siblings, and other significant people in the home; and
6. The mental and physical health of all individuals involved.

Recommendations of a law guardian, opinions of a forensic evaluator, or both are factors for the court to consider in awarding custody or visitation. Such recommendations are entitled to some weight, but are not determinative. *See Miller v. Papia,* 297 A.D.2d 362, 746 N.Y.S.2d 729 (2d Dep't 2002).

PRACTICE RESOURCES:

- *Carrieri & Lansner, New York Civil Practice: Family Court Proceedings* § 13.11(6).
- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* § 40.02(11).
- *New York Practice Guide: Domestic Relations* § 34.11.
- *Bender's Forms for the Civil Practice* Form No. FCA 651:6, Form No. FCA 651:7, Form No. FCA 651:8.
- *Kessler v. Kessler*, 10 N.Y.2d 445, 225 N.Y.S.2d 1, 180 N.E.2d 402 (1962). The court, however, is not required to accept the opinion of an expert who has been appointed or retained.
- *State of N.Y. ex rel. H.K. v. M.S.*, 187 A.D.2d 50, 53, 592 N.Y.S.2d 708 (1st Dep't 1993). But the rejection of such opinion by the court may not be arbitrary and must be explained.

PART G: PREPARING FOR CUSTODY HEARING

§ 9.28 Checklist for Preparing for Custody Hearing

- ☐ Utilize discovery devices to uncover information and obtain documents. *See* § 9.29 *below*.
- ☐ Marshal evidence for trial. *See* § 9.30[1] *below*.
- ☐ Select witnesses for trial. *See* § 9.30[2] *below*.
- ☐ Prepare client to testify. *See* § 9.30[3] *below*.
- ☐ Review expert reports. *See* § 9.30[4] *below*.
- ☐ **Search Advisor:**

  Family Law > Child Custody > Awards

  Family Law > Child Custody > Enforcement & Modification

  Family Law > Child Custody > Procedures

- ☐ **Investigate Parties on *lexis.com*®** *See* § Intro.09 *above*.

§ 9.29 Conducting Pre-trial Discovery

CPLR 3101 *et seq.*, may be useful in uncovering important information. Among the devices that may be helpful are the following:

1. Deposition of party (CPLR 3107);
2. Deposition of non-party (CPLR 3106(b));
3. Discovery and inspection (CPLR 3120); and
4. Demand for statements. (CPLR 3101(e)).

● **Warning:** The right to depose an adverse party (CPLR 3107) in a custody proceeding is limited and may be prohibited. *See Rosenblitt v. Rosenblitt,*170 A.D.2d, 486 N.Y.S.2d 741 (2d Dep't 1995). In the Third Department, depositions are permitted with regard to grounds, and so a deposition with regard to custody issues is easier to obtain

than in the other Judicial Departments, where depositions are permitted only with regard to finances.

Often the purpose of pre-trial discovery is to establish allegations of unfitness, or to defend against them. Helpful in this regard are the following:

1. Certified copies of records/orders;
2. Affidavits from third parties; and
3. Motions/subpoenas for alcohol, drug, or mental health records, prior criminal convictions, and treatment records.

● **Warning:** A party cannot assert the physician (psychiatrist) or therapist–patient privilege in a custody case. When custody is requested, a party places their mental and physical condition in issue and it is a waiver of any privilege they would otherwise be able to assert.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* Ch. 31.
- *New York Practice Guide: Domestic Relations* § 34.10.
- *Bender's Forms for the Civil Practice* Form No. 3101:1 *et seq.*
- CPLR Art. 31 (CPLR 3101 *et seq.*).

§ 9.30 Preparing to Present Evidence

[1] Marshaling Evidence for Trial

The court must determine custody in the best interests of the child based upon the totality of circumstances. *See Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 447 N.Y.S.2d 843, 432 N.E.2d 765 (1982). Specific factors include the relative ability of each parent to provide for the child's social, intellectual, and emotional development. The quality of each parent's home environment, and their

relative fitness as parents, and as role models are key factors. In awarding custody, courts will consider the effect that the award will have on the child's relationship with the non-custodial parent. Additional considerations, include the wishes of the child, the existence of a prior agreement of the parties, or prior order of a court, and whether the prior order was granted after a full hearing or was granted upon the agreement of the parties. *See Cornell v. Cornell*, 8 A.D.3d 718, 778 N.Y.S.2d 193 (3d Dep't 2004). If a court finds allegations of domestic violence to be credible, the court must consider the effect of such violence upon the best interests of the child. *See* DRL § 240(1)(a). The best interests test for custody is a subjective one. The practitioner should marshal tangible evidence that supports the argument that the client is more fit, and that the child's best interest is better served by granting the client custody. Some tangible evidence relevant to the issue of custody is as follows:

1. School records and attendance; (does only one parent communicate with the teachers and school personel, attend parent teacher conferences, help the child with or monitor the child's homework, attend the child's school and extra curricular activities, play an active role in selecting and enrolling the child in activities [for example, sports, cultural, music, religion, scouting]);
2. Parents' work schedules (does one parent work extended hours, or do they travel for any extended periods);
3. Home environment and neighborhood (does only one parent arrange for the social activities of the children and does one parent provide the homemaker services for the children [for example, the laundry, cooking, shopping, etc.]);
4. History of past parenting;
5. Testimony of therapist for child or parent;
6. Extracurricular activities;
7. Presence of extended family;
8. Domestic violence;
9. Past agreements of parties; and
10. Prior orders of a court.

[2] Selecting Witnesses for Trial

Witnesses who have observed interaction of parent and child may testify. Only expert witnesses can present opinion testimony. Teachers, caregivers, and neighbors can testify as to the child's behavior, development, and progress, and the parent's interaction with them and with the child in their presence. A child's doctor can attest to the child's physical health and the medical judgment made by a parent. The child can testify in open court, if of sufficient age and maturity. Young children can testify in camera. A stenographic record is made of the child's in camera testimony for appellate review. Such record is not available to counsel at the trial level.

[3] Preparing Client to Testify

The client witness must be prepared to testify as to the following:

1. His or her educational background;
2. His or her occupation;
3. His or her daily schedule;
4. His or her financial circumstances;
5. His or her present and previous involvement in the child's school and other activities;
6. His or her willingness and efforts to promote a positive relationship between the child and the other parent, if he or she wins custody.
7. The history of their contributions as a parent and their involvement in the education, religious training, medical decisions, social activities, and daily care of the children (cooking, providing clean clothing, physically providing for the nutritional and clothing needs of the children).

[4] Reviewing Experts' Reports

A forensic evaluator, if one is appointed, will render a written report detailing the mental health of the parties and the child. That report is delivered to the court prior to the trial date. Counsel may read the report and take notes. Personality and behavioral disorders are classified pursuant to a manual known as the Diagnostic and

Statistical Manual of Mental Disorders. Counsel should thoroughly become acquainted with all aspects of any DSM classifications referenced in the forensic report.

⊠ **Strategic Point:** Many judges permit counsel to have a copy of the forensic report prior to trial, on condition that it not be shown to the client. However, an attorney should also insist that the court not read the forensic report, until the expert testifies, and can be examined as to the data they used as a basis for their opinion, and the reasons for their opinion can be fully explored by cross-examination. Many times, the court will want the party who is challenging the report to pay for the expert to testify and be examined at the trial regarding the basis for their opinion.

● **Warning:** Once the parties agree upon, or the court selects a neutral expert to conduct a forensic evaluation, a party will not be able to then have their own expert conduct their own evaluation of the children and the other party, unless they first demonstrate to the court that the report is inadequate or incomplete. *See Rosenblitt v. Rosenblitt,*170 A.D.2d, 486 N.Y.S.2d 741 (2d Dep't 1995).

⊠ **Strategic Point:** If the opinion of the expert, as set forth in the report, does not rely upon data that is recognized in the field of psychiatry or psychology, counsel can request a hearing to determine whether it is admissible under the standards set forth in *Daubert* and *Fry*. *See Commonwealth ex rel. Daubert v. Daubert*, 270 Pa. Super. 124, 410 A.2d 1280 (1979); *Fry v. Fry*, 186 Neb. 521, 184 N.W.2d 636 (1971).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* § 40.03.
- *New York Practice Guide: Domestic Relations* §§ 34.20, 34.22, 34.23.
- *Cornell v. Cornell*, 8 A.D.3d 718, 778 N.Y.S.2d 193 (3d Dep't 2004).
- *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 447 N.Y.S.2d 843, 432 N.E.2d 765 (1982).
- *Rosenblitt v. Rosenblitt,* 170 A.D.2d, 486 N.Y.S.2d 741 (2d Dep't 1995).

PART H: NAVIGATING CUSTODY HEARING

§ 9.31 Checklist for Navigating Custody Hearing

- ☐ Demonstrate that award of custody to client is in best interests of child. *See* § 9.32 *below*.
- ☐ Elicit testimony from expert regarding his or her qualifications, examination of parties, review of records, opinion in case, and basis for that opinion. *See* § 9.33[1] *below*.
- ☐ Attempt through cross-examination to discredit opinion of opposing expert, or to demonstrate that opinion does not meet standard of admissibility under *Daubert* and *Fry*. *See* §§ 9.30[4], 9.33[2] *below*.
- ☐ Determine whether joint custody is feasible. *See* § 9.34 *below*.
- ☐ **Search Advisor:**

  Family Law > Child Custody > Awards

  Family Law > Child Custody > Enforcement & Modification

  Family Law > Child Custody > Procedures

- ☐ **Investigate Parties on *lexis.com*®** *See* § Intro.09 *above*.

§ 9.32 Presenting Evidence of Child's Best Interests

The court must consider the totality of the circumstances and must use its discretion to fashion an order that will protect and promote the best interests of the child. DRL §§ 70, 240. The trial court must make a full and meticulous review of the evidence concerning the child's needs and the qualifications of the prospective custodians to meet those needs. *See Storch v. Storch*, 282 A.D.2d 845, 725 N.Y.S.2d 399 (3d Dep't 2001).

Neither parent is presumed to have a right to custody of the child based on gender alone. Instead, the court must evaluate the child's needs, and the custodial abilities of each parent, and then render a decision that is in the child's best interests. DRL §§ 70, 240.

In presenting evidence of the child's best interests, counsel may wish to focus on the following:

1. The parents' respective abilities to satisfy their children's physical, emotional and spiritual needs;
2. The parents' child care arrangements;
3. The quality of the relationship between each parent and the child, including consideration of the child's custodial preference, and the reasons why the child is stating their preference for one parent (for example, if it can be shown that the child is favoring one parent, because that party is inappropriately permissible (not setting appropriate limits), lacking in proper discipline, attempting to "buy" the affection of the child, undermining the authority of the other parent, then the child's preference should be discounted); and
4. The parents' ability to satisfy their child's need for stability.

A number of factors may have a negative impact on the court's perception of a parent's fitness to be granted custody. In order to properly consider the totality of circumstances, the court should be made aware of the following:

1. Diagnosed serious mental illness, even where quiescent;
2. A history of alcohol or substance abuse;
3. Indiscreet or unconventional sexual behavior, but only to the extent that it may negatively impact on the child;
4. Parental neglect, including inappropriately leaving children unattended, permitting excessive absence from school, or failure to obtain needed medical or psychological treatment for the child;
5. Physical or sexual abuse directed at the child or other family members;
6. Fabrication of false allegations of abuse against the other parent;
7. Behavior of others in the household, such as a paramour of the parent, creating an unsafe, or undesirable environment for the child;
8. Inability to provide a stable economic environment for the child, although economic status may be equalized by the court through maintenance and child support awards;

9. Failure to comply with child support obligations;
10. Abandonment; and
11. Interference with visitation rights of the other parent.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* § 40.03.
- *New York Practice Guide: Domestic Relations* § 34.02(1).
- DRL §§ 70, 240.
- *Storch v. Storch*, 282 A.D.2d 845, 725 N.Y.S.2d 399 (3d Dep't 2001).

§ 9.33 Examining Expert Witnesses

[1] Presenting Expert Testimony

Expert testimony may be divided into three component parts:

1. The expert will establish his or her qualifications. A lawyer, with a well-qualified expert, has the right to fully develop the expert's qualifications on direct examination, although the trial court may use discretion in curtailing an unnecessarily protracted qualification of an expert;

⊠ **Strategic Point:** When an adversary offers the testimony of highly qualified professional, it is best to concede quickly that the person is qualified to give expert testimony, lest the court be unduly swayed by his or her credentials. If possible, counsel should stipulate that the opposing witness is a qualified expert, rather than giving the adversary the opportunity to develop a record as to impressive credentials.

⊠ **Strategic Point:** An expert can rely upon the out of court statements of others in rendering their opinion if it is customary practice for an expert in this field to obtain

this information as part of their evaluation process (for example, statements of the child, statements of a teacher, or surrogate care giver, such a person hired to care for the child after school). *See People v. Sugden*, 35 N.Y.2d 453, 363 N.Y.S.2d 923, 323 N.E.2d 169 (1974).

2. The expert will testify as to the investigation conducted into the mental health of the parties examined, and their family functioning, making reference to specific clinical examinations and interviews, as well as any documents he or she read concerning the party to substantiate the thoroughness of the examination conducted, and his or her familiarity with the facts of the case; and
3. The expert will offer an opinion as to custody or visitation, explaining the reasoning underlying the opinion.

[2] Cross-examining Opposing Party's Expert

There are several methods whereby counsel may attack the opposing expert's credibility or knowledge:

1. Counsel may use statements of recognized authorities that contradict the expert's opinion. When the statements are in a treatise, counsel should ask the expert, if he or she accepts the author of the treatise as a recognized authority. If the answer is no, counsel should go no further, and can then introduce this contradiction through a rebuttal expert. If the answer is yes, counsel should simply read the contradiction into the record.

Strategic Point: The most recent edition of the treatise should be used to make sure that the author did not later change his or her views. To choose a text the expert is likely to consider authoritative, counsel should consult someone in the same profession, or find out what text the expert's graduate school now uses, or used when the expert attended.

● **Warning:** One's own expert should also be prepared for this kind of questioning. If opposing counsel reads from a particular treatise, and the expert on the stand does not understand the passage, counsel should stop the cross-examination and read the passage. Sometimes a passage does not mean what opposing counsel claims it does.

2. Expose any defect in the clinical examination conducted by the expert, such as, by asking:

   a. Whether the timing of the examination, after commencement of the proceedings, could have had an effect on the parent's psychological state;

   b. The duration of the examination, because the results of a truncated examination may be inaccurate;

   c. Who was also present during the examination, because the presence of someone, other than the expert and client, may have distorted the findings; and

   d. Whether there were language barriers between the client and the expert, that may have undermined the diagnosis.

3. Attempt to show that the effect of a client's alleged psychopathology on his or her parenting ability is mere conjecture.

4. Always request all written material the expert received and make sure the witness gives the dates and notes of the examination. If the expert had insufficient information to make a proper diagnosis, his or her testimony is impeachable on that basis.

⊠ **Strategic Point:** Keep the cross-examination brief, and use it to bring out such additional facts as will support the theory of the case, and to show why the adverse witness is not credible. It does not matter if the court does not immediately grasp the full significance of a cross-examination; the contradiction can be brought out through

a rebuttal expert, and theoretical arguments can be left for the close of the trial or for a post-trial brief.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* § 40.03(11).
- *New York Practice Guide: Domestic Relations* § 34.22.
- *People v. Sugden*, 35 N.Y.2d 453, 363 N.Y.S.2d 923, 323 N.E.2d 169 (1974).

§ 9.34 Seeking Joint Custody Arrangement

Joint legal custody de-emphasizes physical control of children and permits both parents to retain the full responsibilities of parenthood, after their marriage is dissolved. In a joint custody arrangement, one of the parents may be granted primary physical custody, or physical custody may be alternated between them.

In a joint custody arrangement known as split custody, physical custody of the siblings may be split between the parents. A split custody decree is proper where the best interests of each child lie with a different parent. *See Bilodeau v. Bilodeau*, 161 A.D.2d 906, 557 N.Y.S.2d 471 (3d Dep't 1990); *Mitzner v. Mitzner*, 209 A.D.2d 487, 619 N.Y.S.2d 51 (2d Dep't 1994).

Joint custody may be granted where:

1. The award is in the best interests of the subject children;
2. Both parents are adjudged fit custodians;
3. Each parent is willing to cooperate with the other in the performance of parental duties; and
4. The parents are able to stay in close geographic proximity.

Generally, the court will not award joint legal custody (joint decision making) where there is acrimony and disagreement between the parents on major decisions effecting the child. *See Braiman v. Braiman*, 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978). The parents themselves can enter into an agreement that provides for joint custody, but the agreement will

not be binding unless joint custody is found to be in the children's best interest.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* § 40.03(7).
- *New York Practice Guide: Domestic Relations* § 34.03.
- *Bilodeau v. Bilodeau*, 161 A.D.2d 906, 557 N.Y.S.2d 471 (3d Dep't 1990).
- *Braiman v. Braiman*, 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978).
- *Mitzner v. Mitzner*, 209 A.D.2d 487, 619 N.Y.S.2d 51 (2d Dep't 1994).

PART I: ESTABLISHING VISITATION RIGHTS

§ 9.35 Checklist for Establishing Visitation Rights

- ☐ Fix rights of visitation on behalf of noncustodial parent. *See* § 9.36 *below*.
- ☐ Seek imposition of conditions upon visitation, where appropriate. *See* § 9.36 *below*.
- ☐ Establish standing and show impact upon child's best interests, where grandparent visitation is sought. *See* § 9.37 *below*.
- ☐ Show impact upon child's best interests, where sibling visitation is sought. *See* § 9.38 *below*.
- ☐ **Search Advisor:**Family Law > Child Custody > Visitation
- ☐ **Investigate Parties on *lexis.com*®** *See* § Intro.09 *above*.

§ 9.36 Obtaining Order Fixing Visitation

Visitation is considered a right of the child and the noncustodial parent. *Weiss v. Weiss*, 52 N.Y.2d 173, 436 N.Y.S.2d 862, 418 N.E.2d 377 (1981). DRL § 240 authorizes visitation determinations to be made in actions to annul or declare the nullity of a void marriage, separation actions, divorce actions, and proceedings commenced by a writ of habeas corpus or by a petition, and order to show cause.

The court may fix a specific visitation schedule, or it may allow the parents to define visitation times, consistent with the child's best interests.

In fixing visitation rights, the court must consider the physical and emotional health of the child, as well as the general fitness of the noncustodial parent. Denial of visitation or supervised visitation is considered an extreme measure, that requires a clear and affirmative demonstration that unsupervised visitation would be injurious or detrimental to the child's well-being. *See, e.g., Robert TT. v. Carol UU.*, 300 A.D.2d 920, 753 N.Y.S.2d 180, 182 (3d Dep't 2002); *Youngblood v. Amrhein*, 217 A.D.2d 475, 628 N.Y.S.2d 386 (2d Dep't 1995).

An agreement or stipulation between the parents concerning visitation rights is not necessarily binding; however, such an agreement will usually be enforced, if it is found to serve the best interests of the subject children.

The court may impose reasonable terms and conditions upon the noncustodial parent's visitation rights. These may include the following:

1. The grant or denial of overnight visitation;
2. Visitation supervised by another adult;
3. Imposition of travel expenses upon one or both parents; and
4. Posting of a bond as security against interference with the other parent's custodial rights.

Wrongful interference with visitation may justify suspension of payment of spousal support (DRL § 241) or in extreme cases a change of custody. There have been cases where a parent has been held in contempt and incarcerated as a result of their unjustified interference with visitation.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* § 40.04.
- *New York Practice Guide: Domestic Relations* § 34.04.
- *Robert TT. v. Carol UU.*, 300 A.D.2d 920, 753 N.Y.S.2d 180, 182 (3d Dep't 2002).
- *Weiss v. Weiss*, 52 N.Y.2d 173, 436 N.Y.S.2d 862, 418 N.E.2d 377 (1981).
- *Youngblood v. Amrhein*, 217 A.D.2d 475, 628 N.Y.S.2d 386 (2d Dep't 1995).

§ 9.37 Obtaining Grandparent Visitation

Grandparents have a statutory right to seek visitation under DRL §§ 72, 240, and FCA § 651. Grandparents may apply to supreme court or family court by commencing a special proceeding for a writ, or by petition for visitation of a grandchild residing in New York State:

1. If either or both parents is (are) deceased; or
2. Where conditions exist in which equity would see fit to intervene.

DRL § 72.

Grandparents always have standing to petition for visitation, if either or both parents is (are) dead. In cases involving equity, grandparents have standing only if they can show that equitable considerations exist to support such application. DRL § 72 serves merely as a vehicle by which grandparents may assert their rights and does not grant an automatic right to visitation. *See Lo Presti v. Lo Presti*, 40 N.Y.2d 522, 387 N.Y.S.2d 412, 355 N.E.2d 372 (1976). In equity cases there is a two-step analysis:

1. Do grandparents have standing? If yes;
2. Is it in the best interest of the child to have grandparent visitation?

Whether or not grandparents have standing will depend upon the specific facts of the case including:

1. Extent of prior contact with child;
2. Care giving role of grandparents;
3. Frequency of contact prior to the start of action;
4. Recency of contact with child; and
5. Resources of grandparents to assist in child's development.

In reaching a determination on any issue involving custody, visitation, or both, the court must consider the best interests of the child based upon the totality of circumstances. *See Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 477 N.Y.S.2d 893, 432 N.E.2d 765 (1982). In assessing the needs and best interests of the child, the court acts as parens patriae, that is, the court must act as a "wise, affectionate, and careful" parent. *See Matter of Findlay,* 240 N.Y. 429, 148 N.E. 624 (1925).

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* § 40.04(7)(a).
- *New York Practice Guide: Domestic Relations* § 34.04(8).

- *Bender's Forms for the Civil Practice* Form No. DRL 72:1 – Form No. DRL 72:6.
- DRL § 72.
- FCA § 651.
- *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 477 N.Y.S.2d 893, 432 N.E.2d 765 (1982).
- *Lo Presti v. Lo Presti*, 40 N.Y.2d 522, 387 N.Y.S.2d 412, 355 N.E.2d 372 (1976).
- *Matter of Findlay,* 240 N.Y. 429, 148 N.E. 624 (1925).

§ 9.38 Obtaining Visitation Between Siblings

Where circumstances are such that the court finds it equitable to intervene, a brother or sister, or half-brother or sister, or a proper person on behalf of a minor child, may apply to the supreme court by habeas corpus proceeding, or to the family court pursuant to FCA § 651(b), for an order granting visitation rights for the brother or sister in respect to such child. DRL § 71.

PRACTICE RESOURCES:

- *Lansner & Reichler, New York Civil Practice: Matrimonial Action* § 40.04(7)(b).
- *New York Practice Guide: Domestic Relations* § 34.04(9).
- *Bender's Forms for the Civil Practice* Form No. DRL 71:1.
- DRL § 71.
- FCA § 651(b).