

MEMORANDUM

TO: NEW JERSEY LAW REVISION COMMISSION

FROM: JOHN M. CANNEL, EXECUTIVE DIRECTOR

DATED: OCTOBER 13, 2009

RE: CUSTODY OF CHILDREN

This draft replaces the one sent with the October meeting materials. It incorporates changes suggested by Professor Bell as well as the Commission's decisions at the September meeting. While it was clear that the Commission considered that the September draft overstated the effect of *Fawzy v. Fawzy* 199 N.J. 456, (July 1, 2009), it was less clear how much deference courts should give to agreements between divorcing parents as to the custody of children. This draft is intended to provide a basis for further discussion. The changes from the September draft are indicated by underlines and strikeouts.

The basic subject of the chapter is the standard for decisions as to custody of a child when there is a dispute among parties. The most common application is in cases of divorce. The law is related to that for dispositional decisions after findings of child abuse in the use of a "best interests" standard but its application is different. The current statutes are included in the memorandum distributed for that meeting.

**9:2A-1. Custody of child; rights of both parents considered.**

a. It is in the public policy of this State to assure minor children of frequent and continuing contact with both parents ~~after~~ regardless of whether the parents have separated or dissolved their marriage or ~~are not~~ have never been married and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to ~~effect~~ effectuate this policy.

b. In any proceeding involving the custody of a minor child, the rights of both parents shall be equal and the court shall enter an order that may include:

(1) Joint custody of a minor child to both parents, which is comprised of legal custody or physical custody which shall include: (1) provisions for residential arrangements so that a child shall reside either solely with one parent or alternatively with each parent in accordance with the needs of the parents and the child; and (2) provisions for consultation between the parents in making major decisions regarding the child's health, education and general welfare;

(2) Sole custody to one parent with appropriate parenting time for the noncustodial parent; or

(3) Any other custody arrangement that the court determines to be in the best interests of the child.

c. In making an award of custody, the court shall consider but not be limited to the following factors:

(1) the parents' ability to agree, communicate and cooperate in matters relating to the child;

(2) the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse;

(3) the interaction and relationship of the child with its parents and siblings;

(4) the history of domestic violence, if any;

(5) the safety of the child and the safety of either parent from physical abuse by the other parent;

(1) the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;

(6) the needs of the child;

(7) the stability of the home environment offered; the quality and continuity of the child's education;

(8) the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation;

(9) the parents' employment responsibilities; and

(10) the age and number of the children.

d. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.

e. The court, for good cause and upon its own motion, may appoint a guardian ad litem or an attorney or both to represent the minor child's interests. The court shall have the authority to award a counsel fee to the guardian ad litem and the attorney and to assess that cost between the parties to the litigation.

f. The court shall order any custody arrangement that is the result of arbitration that was agreed to by both parents unless ~~it~~ the arrangement involves potential harm to the child.

g. In any case in which the parents cannot agree to a custody arrangement, the court may require each parent to submit a custody plan that the court shall consider in awarding custody. The court shall order a custody plan that is in the best interests of the child.

h. The court shall give deference to any custody arrangement that is freely and knowingly agreed to by both parents. The court shall specifically place on the record the factors that require ordering a custody arrangement other than the one ~~justify any custody arrangement not~~ agreed to by both parents.

Source: 9:2-4

#### COMMENT

Subsection (a) has been expanded to deal with parents who have never been married. Subsection (b) has been reworded slightly but is substantively unchanged. The required considerations in subsection (c) are unchanged. Subsection (d) is the last sentence of subsection (c) of the source statute. Subsections (e) and (h) are substantively identical to subsections (d) and (g) of the source statute.

Subsection (f) is based of 9:2-4(e), but the source statute allowed a court to deviate from the plan agreed by both parents if that was in the “best interests” of the child. The proposed subsection follows the standard of *Fawzy v. Fawzy*, 199 N.J. 456, and allows the court to reject the agreed plan only when necessary to prevent harm to the child.

Subsection (g) is substantively similar to 9:2-4(f). The last sentence is new. It continues the “best interest” standard in cases where there is no agreement between parents. That standard is well established in law and practice. See, e.g. *Vannucchi v. Vannucchi*, 113 N.J.Super. 40, 47 (App. Div. 1971), *certif. den.* 58 N.J. 163 (1971); *Clemens v. Clemens*, 20 N.J.Super. 383, 382 (App. Div. 1952); *Lyon v. Lyon*, 6 N.J.L.J. 89 (Chan. 1883).

### **9:2A-2. Custody of child; between parent and non-parent.**

a. In any proceeding involving the custody of a minor child, where the determination is to be made whether custody is to be given to a parent or to a person who is not a parent, there is a presumption that custody is to be given to the parent unless:

- (1) the parent is found to be unfit, or
- (2) extraordinary circumstances require custody to be given to the non-parent.

b. If the presumption in favor of custody by a parent is overcome, the court shall indicate the basis on the record and the decision as to custody shall be made on the basis of the best interests of the child.

Source: 9:2-5

#### COMMENT

While the section replaces 9:2-5, its substance is based on the decision in *Watkins v. Nelson*, 163 N.J. 237, 248-249 (2000). When there is only one surviving parent, the pure “best interests” approach of 9:2-4 is not taken. Instead, the surviving parent has a right to custody unless that parent is unfit or other extraordinary circumstances require a different result. The determination in these cases is more similar to the standard used in decisions as to the termination of parental rights. The parent is presumed to have a right to custody of the child. The presumption in favor of the surviving parent can be rebutted “by proof of gross misconduct, abandonment, unfitness, or the existence See, *Watkins v. Nelson*, 163 N.J. 237, 248-249 (2000). The presumption can also be overcome by extraordinary circumstances, most often that the parent has become the “psychological parent” of the child, and so the child would be harmed by giving custody to the parent, See, *Guardianship of J.T.*, 269 N.J.Super. 172, 190 (App. Div. 1993) (finding transfer of child from foster mother, who acted as psychological parent, to biological mother was barred because overwhelming evidence existed that psychological harm to child would result). If the presumption in favor of the parent is overcome by a finding of unfitness or extraordinary circumstances, the standard of “best interests” is used. *Watkins v. Nelson*, 163 N.J. 253; *Todd v. Sheridan*, 268 N.J.Super. 387, 398 (App.Div.1993) (applying best interests standard in custody dispute between four year old’s biological father and maternal grandparents, who lived with child and acted as psychological parents). Compare *Zack v. Fiebert*, 235 N.J.Super. 424, 433 (App.Div.1989) holding that maternal grandparents, who were not psychological parents, needed to prove biological father’s unfitness to obtain custody, not simply that custody was in child’s best interests.

**9:2A-3. Person convicted of sexual assault, custody and visitation denied, exceptions.**

a. Notwithstanding any provision of law to the contrary, a person convicted of sexual assault under N.J.S.2C:14-2 shall not be awarded the custody of or visitation rights to any minor child, including a minor child who was born as a result of or was the victim of the sexual assault, except upon a showing by clear and convincing evidence that it is in the best interest of the child for custody or visitation rights to be awarded. However, a court that awards such custody or visitation rights to a person convicted of sexual assault under N.J.S.2C:14-2 shall stay enforcement of the order or judgment for at least 10 days in order to permit the appeal of the order or judgment and application for a stay in accordance with the Rules of Court.

b. Notwithstanding any provision of law to the contrary, a person convicted of sexual contact under N.J.S.2C:14-3 or endangering the welfare of a child under N.J.S.2C:24-4 shall not be awarded the custody of or visitation rights to any minor child, except upon a showing by clear and convincing evidence that it is in the best interest of the child for such custody or visitation rights to be awarded. However, a court that awards such custody or visitation rights to a person convicted of sexual contact under N.J.S.2C:14-3 or endangering the welfare of a child under N.J.S.2C:24-4 shall stay enforcement of the order or judgment for at least 10 days in order to permit the appeal of the order or judgment and application for a stay in accordance with the Rules of Court.

c. A denial of custody or visitation under this section shall not by itself terminate the parental rights of the person denied visitation or custody, nor shall it affect the obligation of the person to support the minor child.

d. In any proceeding for establishment or enforcement of such an obligation of support the victim shall not be required to appear in the presence of the obligor and the victim's and child's whereabouts shall be kept confidential.

Source: 9:2-4.1.

**COMMENT**

This section is identical to its source.

**9:2A-4. Parental access to children's records.**

a. Every parent, except as prohibited by federal and State law, shall have access to records and information pertaining to his or her unemancipated child, including, but not limited to, medical, dental, insurance, child care and educational records, whether or not the child resides with the parent, unless that access is found by the court to be not in the best interest of the child or the access is found by the court to be sought for the purpose of causing detriment to the other parent.

b. The place of residence of either parent shall not appear on any records or information released pursuant to the provisions of this section.

c. A child's parent, guardian or legal custodian may petition the court to have a parent's access to the records limited. If the court, after a hearing, finds that the parent's access to the record is not in the best interest of the child or that the access sought is for

the purpose of causing detriment to the other parent, the court may order that access to the records be limited.

Source: 9:2-4.2.

#### COMMENT

This section is identical to its source.

### **9:2A-5. Visitation rights for grandparents, siblings**

a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. If the application is opposed by the parents of the child, it shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is necessary to prevent potential harm to the child. If a parent supports the application, it shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.

b. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:

(1) The familial connection and the quality of the relationship between the child and the applicant;

(2) The familial connection and the quality of the relationship between each of the child's parents or the person with whom the child is residing and the applicant;

(3) The time that has elapsed since the child last had contact with the applicant;

(4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;

(5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;

(6) The good faith of the applicant in filing the application;

(7) Any history of physical, emotional or sexual abuse or neglect by the applicant;

(8) The reason that the application is opposed; and

(9) Any other factor relevant to the best interests of the child.

c. With regard to any application made pursuant to this section, it shall be prima facie evidence that visitation is in the child's best interest if the applicant had, in the past, been a full-time caretaker for the child.

Source: 9:2-7.1.

#### COMMENT

This section is similar to its source, but the standard for granting an application over the opposition of parents has been changed. Under *Fawzy v. Fawzy*, 199 N.J. 456, custodial decisions agreed by the parents must be accepted by a court unless the decision may cause harm to the child. See also *Troxel v. Granville*, 530 U.S. 37, 120 S.Ct. 2054 (2000), holding specifically that parents have a constitutional right to deny access to grandparents, but not setting a standard for overriding the parental decision.