## LAW AND THE FAMILY

Visitation and Child Support: Emerging Rights of Children

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CHILDREN'S RIGHTS have always been an important consideration in

matrimonial proceedings. Never have they played more of a role than in

recent years as the Court of Appeals continues to give children

priority above all else. It is a mission that reaches beyond any

particular family. Toward that end, the Court of Appeals appears to be

ready to reconsider whether visitation and child support are dependent

upon one another.

The Appellate Division, Second Department, in Fernandez v. Arturi\*1

affirmed a judgment that denied the father's motion for downward

modification of child support. It stated: Although the mother's

relocation from New York to Florida with the parties' only child

wrongly interfered with the father's visitation rights as contained in

the parties' separation agreement \*\*\* we find that the Family Court

properly denied the father's application \*\*\* since his current support

obligations are significantly below those now required by the Child

Support Standards Act \*\*\*'' [citations omitted]

Fernandez squarely places the right of the child to receive minimal

support ahead of the parent's right to visit.

Fernandez, as well as the dicta in Strahl and Weiss, two 1980 Court

of Appeals decisions, pose the issues: Are child support and visitation

provisions of a matrimonial agreement or judgment still dependent

covenants? Does public policy still permit child support or maintenance

to be terminated or suspended when the custodial parent deprives the

noncustodial parent of his visitation rights? Are the economic needs of

the child now the predominant consideration of the court making such a

determination?

Duty to Provide Support

Visitation has always been considered to be a right of the

noncustodial parent and with that right goes the duty to provide for

the support of the child. As recently as 1980 the Court of Appeals

defined the extent of that right, in Weiss v. Weiss,\*2 stating:

Sometimes referred to as a ``natural'' parental right \*\*\* this

appellation is too narrow. It ignores the primacy of the child's

welfare \*\*\*. Where the physical and emotional well-being of a child is

involved, it is, at best, anomalous that its protection should be

dependent on the vindication of the ``rights'' of the parents.

Visitation is a joint right of the noncustodial parent and of the child

\*\*\*. This view does not lose sight of the fact that, while legal

custody may be in one or both of the parents, the fact that it is

placed in one does not necessarily terminate the role of the other as a

psychological guardian and preceptor.

How valuable the mature guiding hand and love of a second parent

may be to a child is taught by life itself. This is surely so when the

parent-child relationship is carefully nurtured by regular, frequent

and welcomed visitation as here. Therefore, in initially prescribing or

approving custodial arrangements, absent exceptional circumstances,

such as those in which it would be inimical to the welfare of the child

or where a parent in some manner has forfeited his or her right to such

access \*\*\* appropriate provision for visitation or other access by the

noncustodial parent follows almost as a matter of course. [citations

omitted]

The parent's statutory liability for the support of his or her

children is limited to children under the age of 21 years by virtue of

Domestic Relations Law Sec.240 (1-b) (b) (2) and Family Court Act

Sec.413 (1) (b), which define ``Child Support'' to mean ``a sum to be

paid \*\*\* for care, maintenance and education of any unemancipated child

under the age of 21 years.''

The parental duty of child support however, is not absolute. It may

be suspended or terminated before the child is 21 if the child becomes

emancipated by becoming economically independent of his/her parents

through employment, by marriage or entry into the military service.

Under unusual circumstances, a child may be deemed constructively

emancipated if he/she is guilty of egregious misbehavior, such as makes

it inequitable to enforce the support obligation, or if without cause,

he/she withdraws from parental control and supervision.\*3

Dependent Covenants

For more than 100 years, New York's decisional law construed the

visitation and support provisions of a separation agreement to be

dependent covenants and permitted a suspension or cancellation of a

child support obligation, as well as an alimony obligation, upon a

finding of an unjustified denial of visitation rights by the custodial

parent.

Duryea v. Bliven,\*4 decided in 1890, is the leading case. In that

case, the wife sued to enforce the support provisions of a separation

agreement. The husband's defense was that the wife violated the

provision of the separation agreement that gave him the right to visit

with his children. The Court of Appeals held that the agreement of the

wife to permit the husband to visit with his children was a material

part of the parties' separation agreement, `` . . . which could not be

violated by the wife and a recovery sustained in her favor for her

benefit of the sum which he stipulated to pay monthly.''

Seventy years later, the Court of Appeals distinguished the case of

Borax v. Borax.\*5 It held that, unlike a visitation provision, a non-

molestation provision in a separation agreement was an independent

covenant and distinguished it from a visitation provision stating:

Covenants of this kind are different from those providing for

visitation rights for children which are held to be dependent (e.g.,

Duryea v. Bliven, 122 N.Y. 567; Muth v. Wuest, 76 App. Div. 332). There

installments of money are to be paid, at least in part, for the support

of the persons whom the defendant has a right to see and visit under

the terms of a separation agreement. Thefather's right to see his

children is tied into his covenant to provide agreed sums of money for

their support. Neither are visitation rights subject to the factors

which have led to the independent status of covenants of separation and

non-molestation.

Subsequently it was held that, where the child support and

visitation provisions of an agreement survive a judgment of divorce,

they remain dependant covenants.

In Callender v. Callender,\*6 the parties' 1962 separation agreement

provided the defendant husband should pay $90 each a month for the

maintenance and support of the wife and child. The wife was given

custody of the child and the right to live anywhere within the State of

New York, granting the husband the right of visitation. It was

provided, in the event of divorce, that the terms of the agreement

should continue and not be merged in any such judgment.

The husband obtained a bilateral Mexican divorce in 1962. Portions

of the separation agreement were incorporated by reference, and it was

specifically provided that it was not merged in the judgment. Both

parties complied with the terms of the separation agreement until July

1964, when plaintiff wife went to Nairobi, Kenya, and took the child

with her. She returned to New York in August 1967, at which time

defendant resumed payments as agreed, no payments having been made in

the interval while plaintiff was abroad.

Breach of Obligation

Plaintiff brought an action to recover the omitted payments. Her

first cause of action was to recover for breach of the obligation to

make payments as provided in the separation agreement. The second cause

was based on defendant's breach of that obligation pursuant to the

Mexican divorce judgment. Defendant conceded that the payments were not

made and pleaded as an affirmative defense to both causes that the

residence of plaintiff outside of the State of New York was in

violation of his visitation rights in the separation agreement.

The Civil Court granted summary judgment that was affirmed by the

Appellate Term. The Appellate Division reversed the judgment on the

law. It held that the complaint had to be dismissed because the

agreement survived the judgment, and the provision for visitation

rights and the support provisions were dependent.

Callender held that the support and visitation provisions of a

separation agreement remain dependent after they are incorporated in

and survive a judgment of divorce. This rule was extended to include

the child support and visitation provisions of a divorce judgment\*7 and

the alimony and visitation provisions of a divorce judgment\*8 and had

been consistently followed until recently. For example, in Benjamin B.

v. Rifka M.,\*9 the child refused to visit with her father and disobeyed

a visitation order. The court modified the child support order to

provide that no child support would be payable for any week in which

there had not been complete compliance with the order of visitation. In

Catherine W. v. Edward F.,\*10 the court directed that the father's

support obligation was dependent on his being afforded visitation

finding that where there is . . . noncompliance with the duty of the

custodial parent to foster and encourage a positive relationship

between the children and noncustodial parent, our law quite properly

provides a range of remedies, including change of custody, contempt,

suspending child support, or alimony where applicable and making child

support dependent upon visitation.

In Nicolette G. v. Ray S.,\*11 the court interviewed two children,

ages 11 and 15, who adamantly and willfully refused to agree to

cooperate in visiting with their father. Under these circumstances the

court refused to enforce a support order of the Supreme Court.

DRL Sec.241 was enacted in 1978 to codify the law in situations

when court ordered visitation is denied by the custodial parent. The

last sentence was added effective Aug. 5, 1986. DRL Sec.241 now

provides: When it appears to the satisfaction of the Court that a

custodial parent receiving alimony or maintenance pursuant to an order,

judgment or decree of a court of competent jurisdiction has wrongfully

interfered with or withheld visitation rights provided by such order,

judgment or decree, the court, in its discretion, may suspend such

payments or cancel any arrears that have accrued during the time that

visitation rights have been or are being interfered with or withheld.

Nothing in this section shall constitute a defense in any court to an

application to enforce payment of child support or grounds for the

cancellation of arrears for child support.

Although the Legislature did not include any reference to child

support in DRL Sec.241, the statute has not been construed to change

prior decisional law, since it appears that the Legislature may not

have been aware of the existing case law, and the Assembly sponsor of

the bill stated, in a letter to the Governor's counsel, that the new

section is, in effect, a codification of case law citing that dealt

with the cancellation of child support arrears and the suspension of

current child support.\*12

Relief From Support

Thus, in Rosemary N. v. George B.,\*13 the court held that were the

child unjustifiably refused visitation with her noncustodial parent,

the father was relieved from his support obligation for his daughter.

In Welsh v. Lawlor,\*14 the court affirmed an order of the Family Court

of Albany County (Cheeseman, J.), entered Oct. 28, 1987, which granted

petitioner's application, in a proceeding pursuant to DRL Sec.241, to

suspend petitioner's obligation to pay child support and

maintenance.\*15 In Joseph A. v. Andrea A.,\*16 the court held that a

child's unjustifiable refusal to allow his father to visit or call him

was a sufficient basis upon which to suspend the father's obligation to

pay child support.

In Celeste S. v. Jeremiah R.,\*17 the court suspended child support

stating that suspension of future child support payments by the

noncustodial parent is only granted when the court determines that the

custodial parent has severely frustrated visitation either by

relocating the family to a distant location without permission or by

intentionally alienating and brainwashing the children against the

noncustodial parent.

Two 1980 decisions of the Court of Appeals seem to hint that

changes in public policy regarding children may be on the Court's

agenda by placing it ahead of their parents' rights. Fernandez v.

Arturi and decisions like it place the right of the child to receive

adequate support ahead of the parents' right to visitation.

In Strahl v. Strahl\*18 the mother moved to modify the parties'

divorce judgment by deleting the requirement that she reside with the

parties' three children within a 50-mile radius of New York City, to

enable her to relocate with the children to Florida. The plaintiff

father cross-moved for sole custody of the children, or, in the

alternative, for an order conditioning the mother's right to custody on

her continued residency with the children within the 50-mile radius.

The parties' separation agreement, which was incorporated but not

merged in the judgment of divorce, provided that although the children

would reside with the mother, the parents would have joint custody.

The Appellate Division modified the order of the Supreme Court by

denying defendant's motion, holding, in an opinion by Justice Titone,

that there was no evidence that the move to Florida would be any more

beneficial to the children than their remaining in New York. It held

that a parent may not be deprived of his or her right to reasonable and

meaningful access to the children of the marriage unless exceptional

circumstances have been presented to the court.

The Appellate Division directed that should defendant fail to abide

with said directives, the husband ``shall be relieved of his obligation

to pay child support until such time as defendant returns to New York

and resumes her residence with the children.'' The Court of Appeals\*19

affirmed the order of the Appellate Division for the reasons stated in

the opinion by Justice Titone. Significantly it stated: We note,

however, that our holding in this case should not be construed to

represent tacit approval of that aspect of the Appellate Division's

decision which suggested that an individual's obligation to support his

or her children pursuant to a divorce decree may be modified by

conditioning it upon the custodial parent's compliance with a court

order or agreement regulating visitation privileges (cf. Borax v.

Borax, 4 NY2d 113). Although we find no ground for reversal in this

case, we prefer to leave open the question whether such a modification,

under different circumstances might constitute an abuse of discretion.

In Weiss v. Weiss, decided later that year, the Court of Appeals

again alluded to this issue (in footnote 3) stating: Because the order

of the Appellate Division did not incorporate any provision based on so

much of its opinion as dealt with the relationship of support payments

to adherence to a residential removal proscription, we have no occasion

to deal with that question (see Strahl v. Strahl, 49 NY2d 1036, 1038,

supra).

In Brescia v. Fitts,\*20 decided three years later, the Court of

Appeals held that children have the right to receive adequate support,

and are not bound by the terms of a separation agreement. In light of

this enunciation of public policy, can visitation and support remain

dependent covenants?

notes

(1) ---- AD2d ---- , 618 NYS2d 79 (2d Dept., 1994)

(2) Weiss v. Weiss 52 NY2d 170, 436 NYS2d 852.

(3) See Roe v. Doe, 29 NY2d 188, 324 NYS2d 71; Parker v. Stage, 43

NY2d 128, 400 NYS2d 794; Alice C. v. Bernard G.C. 193 AD2d 97, 602

NYS2d 623.

(4) 122 NY 567, 25 NE 980; See also Muth v. Weuest, 76 App. Div.

332.

(5) 4 NY2d 113, 172 NYS2d 805(1958).

(6) 37 AD2d 360, 325 NYS2d 420 (1st Dept. 1971).

(7) Feuer v. Feuer, 50 AD2d 772, 376 NYS2d 546 (1st Dept., 1975).

(8) Abraham v. Abraham, 28 AD2d 864, NYS2d (2d Dept., 1967).

(9) 90 Misc 2d 850 (Family Court, Queens Co., 1977).

(10) 116 Misc 2d 377 (Family Court, Suffolk Co., 1982).

(11) 90 Misc 2d 848 (Family Court, Queens, Co., 1971).

(12) See Hudson v. Husdon (1978) 97 Misc2d 558, 412 NYS2d 242.

(13) 103 Misc2d 1036 (Family Court, Dutchess Co., 1980).

(14) 144 AD2d 226 534 NYS2d 539.

(15) See also Alexander v. Alexander 129 AD2d 882, 514 NYS2d 548.

(16) New York Law Journal, Aug. 5, 1991, p.28, col 5 (Family Court,

Rockland Co.)

(17) NYLJ, Oct. 7, 1991, p.32, col. 1, (Family Court, Queens Co.).

(18) 66 AD2d 571, 414 NYS2d 184 (2d Dept., 1979).

(19) Strahl v. Strahl, 49 NY2d 1036, 429 NYS2d 635 (1980).

(20) (1982) 56 NY2d 132, 451 NYS2d 68.

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