## LAW AND THE FAMILY

Visitation and Child Support: Emerging Rights of Children

By Joel R. Brandes and Carole L. Weidman

[New York Law Journal](http://www.nylj.com/) (p. 3, col. 1)

January 24, 1995

 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.

----------------

Joel R. Brandes and Carole L. Weidman have law offices in New York City

and Garden City. They co-authored, with the late Doris Jonas Freed and

Henry H. Foster, Law and the Family, New York (Lawyers' Co-Operative

Publishing Co., Rochester, N.Y.) Mr. Brandes and Ms. Weidman coauthor the

annual supplements.

----------------