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LEGAL FACT SHEET

CUSTODY DISPUTES BETWEEN NON-PARENTS AND PARENTS*

Non-parents who are caring for children often need to seek custody or guardianship of children. If the parents' consent and the caregiver is suitable, there should be no problem in getting a court order granting legal custody or guardianship.

If the parent objects, then the court must hold a trial. Trials involving a parent and a nonparent caregiver happen frequently, and there is a large number of cases that supply precedents for these proceedings. Of these, one of the most important is Bennett v. Jeffreys, 40 N.Y.2d 543 (1976). In Bennett, the New York State Court of Appeals expanded the circumstances whereupon a trial court must decide custody based upon the best interests of children in a custodial dispute involving a parent and a non-parent. The Court's decision in Bennett specifically added a new threshold circumstance – "an extended disruption of custody." Since then, numerous courts have decided such circumstance exist in fact finding hearings responsive to the prima facie facts alleged in the non-parent's petition for custody.[1]

Importantly, courts consistently find that an extended disruption of custody, when accompanied by evidence that the non-parent had a close relationship with the children and the failure of the parent to make efforts to resume their parental role, is an extraordinary circumstance.[2]

Often petitions for custody by third parties are filed after the parents have regained informal custody. Such circumstances do not necessarily stop courts from finding that an extended disruption of custody is an extraordinary circumstance.[3]

A finding of extraordinary circumstances does not end the inquiry. An inquiry into what custodial arrangement is in the best interests of children must still be made.[4]

Legal Principles[5]

Custody standards that give preference to biological parents reflect the historical view of the relationship between parents and their children.[6] Although society no longer regards children as the property of their parents, the view that biological parents have a natural right to the custody of their children has endured.[7] The United States Supreme Court has not specifically addressed whether courts should apply a parental preference in custody disputes between a biological parent and a third party.[8] Several recent Supreme Court decisions

[1] See for instance, *Tyrell v. Tyrell*, 67 A.D.2d 247, *Matter of Gray v. Chambers*, 222 A. D.2d 753 (1995).
[2] *Matter of McDevitt* v. Stimpson, 281 A.D.2d 860, 862 (2001); Cote v. Brown, 299 A.D.2d 876 (2002).
[3] *Bevins v. Witherbee*, 20 A.D.3d 718, 798 N.Y.S.2d 245 (2005)
[4] *Doe v. Doe*, 399 N.Y.S.2d 977 (1977)
[5] See "*C.R.B. v. C.C. and B.C.* 132 Akron L. Rev. 371: Protecting Children's Need for Stability in Custody Modification Disputes Between Biological Parents and Third Parties(1999)
[6] Melanie B. Lewis, Note, Inappropriate Application of the Best Interests of the Child Standard Leads to Worst Case Scenario*: In re C.C.R.S.*, 68 U. COLO. L. REV. 259, 262 (1997). Until the nineteenth century, the state refused to intrude on the parent-child relationship and gave parents total command over their children. Id. By the twentieth century, society recognized that children are individuals, and that they also require protection. Id. However, the state continued to refuse to intervene unless the parental care endangered the child. Id.
[7] *Id.;* see also Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879 (1984). Bartlett discusses the role of natural law in the concept of parenthood as an exclusive status. Id. at 886. Natural law dictates that parental rights "arise from a relationship that is entirely apart from the power of the State." *Id.* These rights exist regardless of whether a parent acts in the child's best interest. *Id.* at 889. Also, individuals, and that they also require protection. Id. However, the state continued to refuse to intervene unless the parental care endangered the child. Id.
[8] Suzette M. Haynie, Note, Biological Parents v. Third Parties: Whose Right to Child Custody Is Constitutionally Protected?, 20 GA. L. REV. 705, 728-29 (1986).

suggest that parental rights are derived from the biological parent's relationship with their child rather than the biological connection.[9]

In initial custody disputes between a biological parent and a third party, a majority of states apply a parental preference standard.[10] First, several states[11] have adopted a parental rights standard, which precludes a court from considering a third party as a custodian without a threshold showing of extraordinary circumstances.[12] Second, most states apply a rebuttable presumption that favors the biological parent.[13] Many courts adopted this presumption based on the assumption that granting custody to a biological parent promotes the child's best interests. Courts applying a parental preference will award custody to a "fit" parent[14] even if a child has been residing with a third party for an extended period of time.

Bennett was the seminal case in New York, and established the best-interests standard as operative here.[15] However, it is fundamental that this best-interests standard should not be based upon which contestant can provide better financially for the child.[16]

Grandparent Rights in Child Custody Disputes

Grandparents have some special statutory protections in disputes with absent parents. Domestic Relations Law Section 72(2), specifically states that an extended disruption of custody for twenty-four months or more is an extraordinary circumstance in a custodial contest with an “absent” parent.[17]

It is fundamental case and statutory law that when children reside with a grandparent for an extended period of time, the court must hold a fact finding hearing to ascertain the existence of an extraordinary circumstance and then base the future custody of the children on its determination of their best interests.

[9] Haynie, *supra* note 19 at 729; *see, e.g., Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (concluding that the Constitution protects a family unit, even if the family members are not the child's biological parents, if it is providing for the child's needs*); Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (emphasizing that "the importance of the family relationship . . . stems from the emotional attachments that derive from the intimacy of daily association . . ."). Haynie argues that any standard used in custody disputes that provides a preference to a biological parent is unconstitutional. Haynie, *supra* note 19, at 706.

[10] See Haynie, supra note 19, at 711. States that do not apply a parental preference standard include Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, New Hampshire, North Dakota, South Carolina, Texas, and Wyoming. *Id.* at 721 & n.58. Instead, these states apply a best interests standard, which focuses solely on the needs and welfare of the child. *Id.* at 721. The best interests standard emerged in the mid-1960's in response to the erosion of the nuclear family. Paden, supra note 8, at 156. In states that apply the best interests standard, nonparents have a greater chance of obtaining custody since the court may find that nonparental custody is in the child's best interests. *Id.* This standard "has been criticized as resulting in an indeterminacy perhaps unparalleled in any other area of the law."

[11] Florida, Georgia, Idaho, Kansas, Montana, Oklahoma, and West Virginia clearly utilize a parental rights standard. Haynie, supra note 19, at 708 & n.12. Mississippi uses the language of the parental rights standard but seems to be willing to consider additional evidence.

[12] Some jurisdictions consider this standard to be required by the United States Constitution, while other jurisdictions have adopted it as a matter of policy. Id. In New York, extraordinary circumstances include abuse, abandonment, neglect, or parental unfitness. See, e.g., *Bennett v. Jeffreys*, 356 N.E. 2d 277, 280 (N.Y. 1976).

[13] Haynie, supra note 19, at 711. Haynie categorizes three types of presumptions. First, the fitness presumption standard presumes that the biological parent will be the best parent unless the third party proves that extraordinary circumstances make the third party more fit than the parent. *Id.* at 712. The third party's burden remains "almost unsurmountable." Id. Second, in the convincing presumption standard the biological parent has a prima facie right to custody unless the third party shows by clear and convincing evidence that they should have custody based on the best interests of the child. *Id.* at 715. Third, under the disappearing presumption standard, the courts consider factors regarding he best interests of the child, and the presumption gives custody to the biological parent only if all other factors are equal. Id. at 720.

[14] Factors indicating that a parent is not fit include "misconduct, neglect, immorality, abandonment and/or general dereliction of custodial duties."

[15] “The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody,” *Bennett*, supra.

[16] *Torch v. Roberts*, 232 N.Y.L.J. 51 (N.Y. Fam. Ct. 2004)

[17] See also *Tolbert v Scott*, 15 AD3d 493, (2004)