Transfer of Custody Is Dependent Upon Best Interests of the Child, Not Upon Whether Particular Changed Circumstances Can Be Denominated Extraordinary

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an accused who is represented by counsel should not be evaluated subjectively after the fact, but must be scrutinized as of the time of its inception for potential exacerbation of the imbalance between the suspect and the state.\footnote{266}

William J. Birney

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Awards of child custody typically are based upon “the best interests of the child.”\footnote{266} This standard has been applied in initial
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Weitzman & Dixon, Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support, and Visitation After Divorce, 12 U.C.D. L. Rev. 473, 478 (1979). Hence, the father would obtain custody unless it could be shown that he was unfit. Moskwitz, Divorce-Custody Dispositions: The Child's Wishes in Perspective, 18 SANTA CLARA L. Rev. 427, 428 (1978). The presumption in favor of the father eventually evolved into the presumption that a child of “tender years” should remain in the care of the mother. Id. at 429. The maternal presumption, however, is currently being replaced by an approach that favors neither parent on the basis of sex. Brosky & Alford, supra, at 685. But see Comment, The Rights of Children: A Trust Model, 46 FORDHAM L. Rev. 669, 744 (1978) (courts pay “lip service to the ‘best interests of the child’ while they continue to protect the mother's expectations with regard to the child”).


The court derives its power to act in a child's best interests from the concept of parens patriae. Brosky & Alford, supra note 266, at 684-85. Literally, this phrase means “parent of the country.” BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). As originally used by the early chancery courts of England, however, it stood for the courts' function “to assume a guardianship role over persons under a disability,” Brosky & Alford, supra note 266, at 684; see A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPITAL CONTRACTS § 14, at 14-65 (1982). For a discussion of the common-law evolution of parens patriae, see Custer, The Origins of the Doctrine of Parens Patriae, 27 EMORY L.J. 195 (1978). In addition to adjudications incident to divorce or petitions to modify custody, courts have been called upon to exercise their powers as parens patriae in custodial habeas corpus proceedings. See, e.g., Finlay v. Finlay, 240 N.Y. 429, 431-32, 148 N.E. 624, 626 (1925). Indeed, section 70 of the DRL, which governs this type of habeas proceeding, provides that custody shall be determined “solely [by] . . . the best interests of the child, and what will best promote its welfare and happiness.” DRL § 70 (1977).

268 See note 276 and accompanying text infra. Although it is clear that some change in circumstances must occur between the original grant of custody and the subsequent modification or transfer, whether the change warrants a transfer of custody is discretionary in the trial judge. See Ross v. Ross, 77 App. Div. 2d 716, 716, 430 N.Y.S.2d 712, 713 (3d Dep't 1980). Thus, while some courts have required a “material change in circumstances,” see, e.g., Ebert v. Ebert, 38 N.Y.2d 700, 703-04, 346 N.E.2d 240, 242, 382 N.Y.S.2d 472, 474 (1976); DiBello v. DiBello, 78 App. Div. 2d 547, 547, 432 N.Y.S.2d 32, 32-33 (2d Dep't 1980), others have required an “extraordinary” change, see, e.g., DeFrancesco v. MacNary, 74 App. Div.
Court of Appeals held that the proper standard to be applied in a proceeding to change or modify custody “remains the best interests of the child when all of the applicable factors are considered, not whether there exists one or more circumstances that can be denominated extraordinary.”

In Friederwitzer, the parents of two young girls entered a separation agreement that provided for joint custody of the children. This agreement survived the couple’s subsequent divorce.
but the father soon instituted an action to modify the agreement so as to obtain sole custody of the children.\textsuperscript{272} The lower court, after finding various facts tending to indicate the mother's unfitness,\textsuperscript{273} concluded that a modification of the original agreement in the father's favor would be in the best interests of the children.\textsuperscript{274} The Appellate Division, Second Department, affirmed the lower court's order,\textsuperscript{275} despite the dissent's contention that a transfer of custody is warranted only when there is an extraordinary change in circumstances.\textsuperscript{276}

On appeal, the Court of Appeals affirmed, specifically addressing the issue raised by the dissenting opinion in the appellate divi-

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\textsuperscript{273} Id. at 92-93, 432 N.E.2d at 767, 447 N.Y.S.2d at 895. The lower court found that the mother often left the children alone even though they were afraid to be alone, that she slept with a male friend to the children's knowledge, and that she and her male friend frequently violated tenets of the religion in which the children were raised. \textit{Id.}
\textsuperscript{274} Id. In addition to examining other factors relevant to an evaluation of a child's best interests, see note 266 supra, the trial judge noted that the older daughter expressed a strong desire to live with her father, and that the younger child, while wanting to remain with her mother, did not wish to be separated from her sister. 55 N.Y.2d at 93, 432 N.E.2d at 765, 447 N.Y.S.2d at 895.
\textsuperscript{276} Id. at 606, 437 N.Y.S.2d at 713 (Weinstein, J., dissenting). Justice Weinstein, relying upon the Court of Appeals cases of Corradino v. Corradino, 48 N.Y.2d 894, 400 N.E.2d 1338, 424 N.Y.S.2d 886 (1979), and Nehra v. Uhlar, 43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168 (1977), initially stated that "[c]ustody of children already residing with one parent pursuant to an agreement should not be transferred absent extraordinary circumstances." 81 App. Div. 2d at 606, 437 N.Y.S.2d at 713. Finding no such circumstances in the record, Justice Weinstein voted to reverse the trial court's transfer of custody. \textit{Id.}
Recognizing its previous indication that "extraordinary circumstances" are required for a change of custody, the unanimous Court emphasized that such language should be construed to mean that "countervailing circumstances on consideration of the totality of circumstances" must have arisen subsequent to the original custody award. The Court further stated that although custody may not be changed without considering an earlier award, there is no single factor that is determinative of the custody decision. Thus, the Court concluded, the best interests of the child, as determined by an evaluation of all the relevant circumstances, is the standard to be used in a change of custody proceeding. The Court further noted that this is the applicable rule whether the initial custodial award "is made after plenary trial or by adoption of the agreement of the parties."

While the Friederwitzer Court clarified that the best interests standard should be applied in a proceeding to change or modify custody, and that the totality of circumstances must be considered before a determination is made, it is submitted that the decision may be interpreted as undermining the priority that has been accorded earlier custodial awards. If the Court's opinion is

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277 55 N.Y.2d at 93, 432 N.E.2d at 767, 447 N.Y.S.2d at 895.
278 Id. at 94-95, 432 N.E.2d at 767-68, 447 N.Y.S.2d at 895-96.
279 Id. at 95, 432 N.E.2d at 768, 447 N.Y.S.2d at 896. Initially, the Court noted that section 240 of the DRL states that, in all cases, neither parent has a prima facie right to custody. Id. at 93, 432 N.E.2d at 767, 447 N.Y.S.2d at 895; see DRL § 240(1) (McKinney Supp. 1981-1982). To make the original custody award determinative, the Court reasoned, would therefore run contrary to the statute, since such a rule would favor the original custodial parent. See 55 N.Y.2d at 95, 432 N.E.2d at 768, 447 N.Y.S.2d at 896. The Court found additional support for this conclusion in the Court Rules of the Appellate Division, Second Department, id., which provide that separation agreements are not binding on the court, see [1982] 22 N.Y.C.R.R. § 699.9(f)(4), and that transfers of custody are to be determined by "circumstances existing at the time application for that purpose is made to it," id. (approved form J13). Thus, the Court concluded, the "best interests" standard employed by the trial court and approved by the Appellate Division was "not legally incorrect." 55 N.Y.2d at 96, 432 N.E.2d at 769, 447 N.Y.S.2d at 897.
281 Id. at 94, 432 N.E.2d at 767, 447 N.Y.S.2d at 895.
282 Id. at 91, 432 N.E.2d at 767, 447 N.Y.S.2d at 894.
283 See text accompanying note 270 supra.
284 See text accompanying note 281 supra.
construed in this manner, it apparently eliminates one of the few objective guidelines within which the subsequent custodial adjudication may be made.\textsuperscript{286} It is suggested that this increased subjectivity may result in purely de novo determinations of best interests,\textsuperscript{287} and thus may result in the continuous transfer of custody between parents.\textsuperscript{288} Further, although de novo determinations of

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N.Y.S.2d 481, 482-83 (3d Dep't 1979); Austin v. Austin, 65 App. Div. 2d 903, 904, 410 N.Y.S.2d 688, 689 (3d Dep't 1978). See generally A. LINDEY, supra note 267, § 14, at 13-91 to -103. The Friederwitzer Court apparently stressed that the prior custodial award is a mere factor in the subsequent examination of the child's best interests, see 55 N.Y.2d at 94, 432 N.E.2d at 768, 447 N.Y.S.2d at 896, and that the weight to be assigned such factor is in the trial judge's discretion, id. at 93-94, 432 N.E.2d at 767, 447 N.Y.S.2d at 895. Since the court is free to assign little or no weight to the original custodial award, it is possible that a determination to transfer custody may be totally devoid of any consideration of that factor. See, e.g., Noel v. Derrick, 71 App. Div. 2d 704, 704, 418 N.Y.S.2d 481, 482-83 (3d Dep't 1979).
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\textsuperscript{286} See Slifkin, Custody and Visitation: The Judge's Viewpoint, 48 N.Y.S.B.J. 450, 454 (1976). Generally, courts have regarded custody determinations as among the most difficult to render. See, e.g., Thomas J.D. v. Katherine K.D., 79 App. Div. 2d 1015, 1017, 435 N.Y.S.2d 338, 339-40 (2d Dep't 1981). Justice Botein once commented that "[a] judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." Slifkin, supra, at 450 (quoting B. Botein, Trial Judge 273 (1952)). Indeed, the painstaking examination of numerous factors in a best interest determination seems to stem from the expectation that it will not only "protect the child's fundamental rights, but will also assist the court in formulating the best solution for the child." Note, Protecting the Interests of Children in Child Custody Proceedings: A Perspective on Twenty Years of Theory and Practice in the Appointment of Guardians Ad Litem, 12 CREIGHTON L. REV. 234, 235 (1978). It is not surprising, therefore, that in-depth exploration of all possible options in custody proceedings has become the norm. See Comment, supra note 271, at 1084-85. See generally R. Woody, GETTING CUSTODY: WINNING THE LAST BATTLE OF THE MARITAL WAR ix-xii (1978). Concomitant with this exploration of all options is the notion that objective criteria, such as the wishes of the child, see, e.g., Todaro v. Todaro, 76 App. Div. 2d 816, 816, 429 N.Y.S.2d 670, 672 (1st Dep't 1980), are not binding on the court.

\textsuperscript{287} The best interests standard has been criticized as "incapable of definition," Henszey, Visitation by a Non-Custodial Parent: What is the "Best Interest" Doctrine?, 15 J. FAM. L. 213, 225 (1976-1977), and, therefore, of little evaluative aid, Comment, Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties, 73 YALE L.J. 151, 153-54 (1983). At least one court has suggested that a trial judge will not be "required to consider anything other than the best interests of the child" if he chooses to disregard an original custody award. See Noel v. Derrick, 71 App. Div. 2d 704, 704, 418 N.Y.S.2d 481, 482-83 (3d Dep't 1979).

\textsuperscript{288} See Obey v. Degling, 37 N.Y.2d 768, 770, 337 N.E.2d 601, 602, 375 N.Y.S.2d 91, 93 (1976); Baker v. Baker, 59 App. Div. 2d 519, 520, 387 N.Y.S.2d 11, 12 (2d Dep't 1977). Referring to child custody awards as "rational choices," Professor Mnookin observed that "[u]nlike adjudication, rational choice does not require participation of the affected parties, the use of precedents or rules, or review; today's decision need not be reconciled with similar decisions made earlier." R. MNOOKIN, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 484 (1978). Accordingly, it would be possible for the mother in Friederwitzer to petition the court for a modification, and thereby regain custody upon a showing that there has been a change in circumstances. See Friederwitzer v. Friederwitzer,
best interests may discourage noncustodial parents from absconding with their children, such determinations correspondingly may increase the number of noncustodial parents who attempt to obtain legal custody when no circumstantial change has occurred. It is submitted that if earlier custodial grants are properly emphasized in later proceedings to change or modify custody, the probability that adequate consideration will be given to the stability and continuity of parent-child relationships will be enhanced. It is hoped, therefore, that courts will regard the Friederwitzer decision simply as a rejection of the notion that extraordinary circumstances are required for a transfer of custody,
not as a relegation of prior custody to the status of other factors in the subsequent best interests inquiry.

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