Sole Custody: Does It Still Exist?

by Ivette Alvarez

Absent a noncustodial parent's gross misconduct or abandonment, it is increasingly rare to find a New Jersey Court awarding *sole legal custody* to a custodial parent. Has sole custody truly been done away with in all but the most extreme cases? Or has it perhaps been replaced by presumptions and other favored status given to the primary caretaker, sometimes referred to as the custodial parent or residential parent?

N.J.S.A. 2A:34-23 provides the court wide latitude to fashion a remedy regarding custody of minor children.[1] N.J.S.A. 2A:34-23 provides that "the court may make such order regarding the care, custody, education and maintenance of the children as under the circumstances of the case shall be fit, reasonable and just." Further, N.J.S.A. 9:2-4 states, in part, that:

> 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 which may include:
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> a. 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 the child shall reside either solely with one parent or alternatively with each parent in accordance with the needs of the parent and the child; and (2) provisions for consultation between the parents in making major decisions regarding the child's health, education and general welfare;
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> b. Sole custody to one parent with appropriate parenting time[2] for the non-custodial parent; or
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> c. Any other custody arrangement as the court may determine to be in the best interest of the child.
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> In making an award of custody, the court shall consider but not be limited to the following factors: the parents ability to agree, communicate and cooperate in matters relating to the child; the parents willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; this history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geological proximity of the parents' homes; the extent and quality of time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.
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> 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 in the litigation.
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> d. The court shall order any custody arrangement which is agreed to by both parents unless it is contrary to the best interests of the child.
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> e. In any case in which the parents cannot agree to a custody arrangement, the court may require each parent to submit a custody plan which the court shall consider in awarding custody.
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> f. The court shall specifically place on the record the factors

> which justify any custody arrangement not agreed to by both parents.

Notwithstanding what appears to be an unrestricted ability to fashion custodial arrangements in the best interest of the child, in the preamble to this statute the Legislature is clear regarding the public policy goals that guide the court's award. It states: "The Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage *parents to share the rights and responsibilities of child rearing in order to effect this policy*."[3]

So, what is sole custody, and what are the benefits of sole custody when both parents are essentially equally fit? While no case clearly articulates what sole custody is, as distilled from the cases that speak about what joint custody is, sole custody means that one party has residential custody of the child as well as the right to, without consultation, make the day-to-day and major decisions concerning the child's health, education and welfare. The other party to the sole custody arrangement is entitled to visitation.[4] It is not surprising, therefore, that sole custody—the antithesis of the goals of shared "rights and responsibilities"—the public policy of our state, would not be favored.

It seems that today joint custody is favored. But what does joint custody mean? As the court in *Boardman v. Boardman*[5] articulated, "[j]oint custody can take many forms." The elements of joint custody began to be defined with *Beck v. Beck*.[6] There, the court stated:

> Joint custody attempts to solve some of the problems of sole custody by providing the child with access to both parents and granting parents equal rights and responsibilities regarding their children. Properly analyzed, joint custody is comprised of two elements—legal custody and physical custody. Under a joint custody arrangement legal custody—the legal authority and responsibility for making "major" decisions regarding the child's welfare—is shared at all times by both parents. Physical custody the logistical arrangement whereby the parents share the companionship of the child and are responsible for "minor" day-to-day decisions, may be alternated in accordance with the needs of the parties and the children.[7]

In a footnote, the *Beck* court distinguished joint custody from "alternating" custody, which it described as an arrangement where the parties alternate both physical and legal custody, and from "split custody," which it described as when there are two or more children and each party is awarded sole custody of one or more of the children. Although this case has often been credited with creating a presumption in favor of joint custody, in *Beck*, the court stated that despite its belief "that joint custody will be the preferred disposition in some matrimonial actions, we decline to establish a presumption in its favor or in favor of any particular custody determination."[8] The *Beck* court also stated that "such an arrangement will prove acceptable in only a limited class of cases."[9]

In the landmark decision of *Pascale v. Pascale,*[10] the court sought to further clarify the terms used in this area of the law. In that case, the parenting order issued upon the parties' divorce granted them joint custody of the children and designated the mother as the "residential custodial parent." The father, who had a schedule of visitation, which he termed nontraditional, sought to be exempted from the application of the child support guidelines. The *Pascale* court discarded the term "joint custody" and recommended that in the future the parties differentiate between "legal custody" and "physical custody" in defining the relief they are seeking. Citing *Beck*, the court, at 595-596, stated: "[t]herefore, we reaffirm that properly analyzed, joint custody is comprised of two elements—legal custody and physical custody," and found it important to break down the term "joint custody" into legal and physical in reviewing the court's determination of child support.

The *Pascale* court further stated that joint legal custody with "physical custody" given to only one parent, the "primary caretaker—the custodial parent " and "secondary caretaker—the non-custodial parent" is much more common in New Jersey, while joint physical custody is as rare in New Jersey as in other states.[11]

Of importance to the decision-making ability of the primary caretaker over the secondary caretaker is the *Pascale* court recognition that:

> In producing a stable financial and legal foundation post-divorce for children of divorce, courts should allow the primary caretaker to provide the children with the basic needs and the secondary caretaker to maintain a close relationship with the children. For the success of that structure, it makes sense that the person who has assumed the role of primary caretaker not be involved in a daily relationship with the secondary caretaker about the financial needs of the children. Rather when joint custody is merely legal in nature, the primary caretaker should be accorded autonomy over the day-to-day structure of the new family in which he or she is the primary caretaker. That structure is established by the courts not to leave out the secondary caretaker, but to assure that the child is as undisturbed as possible in the implementation of the child's parents' decision to make one parent

the child's primary caretaker. The primary caretaker who makes those day-to-day decisions needs autonomy over the financial resources drawn from both parents 'salaries to effectuate those decisions without endless discussion with the secondary caretaker.[12]

The *Pascale* court went even further; it approvingly cited the reasoning in *Brzozowski v. Brzozowski*,[13] a case that granted the residential parent alone the authority to have the child undertake non-emergency surgery. The *Pascale* court referred to this grant of authority to the residential parent as a "child centered view," and stated:

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One court recently reasoned:

[R]egardless of the words used to describe the custodial relationship, the residential custodial parent has been afforded somewhat more authority to decide issues in the event of disagreement. The rationale for this, as expressed in *Boerger v. Boerger*, 26 N.J. Super. 90, 104, 97 A.2d 419 (Ch. Div. 1953) is that the parent with whom the child resides most of the time probably knows that child best, because of the day-to-day exposure to the child and to the child's problems.

…It is fully consistent with the reasonable expectations of the parties, that that parent given the responsibility for the day-to-day rearing of the children should be able to discharge that responsibility (subject, as always, to notification to, and dialogue with, the joint custodial parent).

The contrary holding will produce applications, emergent and otherwise, to the court whenever the parties cannot reach agreement.

We agree with the *Brzozowski* court. To provide for the children of divorce, finalize living structures, and relieve stress from the child's life and the lives of both parents, grants of authority to the primary caretaker are necessary.[14]

What other grants of authority to the primary caretaker or erosions of authority to the secondary caretaker are there? In *Gubernat v. Deremer*,[15] a father who had originally denied paternity but was confirmed as the natural father of the child after tests, sought joint custody and that the child's surname be changed from the mother's surname to the father's. The trial court granted his application, and the Appellate Division affirmed. Granting certification, the Supreme Court reversed, finding there is a presumption that parents who exercise primary physical custody or sole legal custody should determine the name of the child.

The *Gubernat* Court stated:

> The presumption that the parent who exercises physical custody or sole legal custody should determine the surname of the child is firmly grounded in the judicial and legislative recognition that the *custodial parent will act in the best interest of the child*. Accordingly we adopt a strong presumption in favor of the surname chosen by the custodial parent…Although we accord the presumption substantial weight, it is not irrefutable.[16]

Another area where the primary caretaker enjoys a favorable position is in being able to make the decisions regarding the religious upbringing of the child. In *Feldman v. Feldman*,[17] the court was faced with the issue of "the primary caretaker's authority post-divorce to decide the religious upbringing of the children and the secondary caretaker's limitation upon religious training and education when exercising visitation which includes overnights stays where the parties have joint legal custody."[18]

While being sensitive to the subject matter and recognizing that the "judiciary should be loathe to embark" in religious matters, the *Feldman* court held that "the primary caretaker has the sole authority to decide the religious upbringing of the children and the secondary caretaker shall not enroll the children in training and education classes for programs in a different religion over the primary caretaker's objection when exercising visitation rights."[19] The secondary caretaker, however, is permitted to take the children to his or her religious services during his or her time.

A preferred status for the custodial parent is found in the relocation area. The seminal case, *Baures v. Lewis*,[20] provides that:

> Where the parties are exercising true, shared joint custody, the court is required to undertake the more stringent "best interest" analysis applicable to a change of custody application. Conversely, where the party seeking removal already exercises primary custody, his or her burden is to establish, (1) a good faith reason for the move and (2) that the move is not inimical to the child's interest.[21]

The case of *Shea v. Shea*[22] amply recognizes the favorable position of the primary custodial parent in a relocation case under the *Bauers* standard. In *Shea*, the plaintiff was the noncustodial parent who only three months before had settled the parties' matrimonial action by consenting to his spouse having primary residential custody. The primary custodian, shortly thereafter, filed an application for removal/relocation, and the noncustodial parent opposed the move, as well as the custodial parent's attempt to apply the lesser standard afforded the primary custodian in a relocation application under *Baures* as "a deceptive manipulation."

The court stated:

> Defendant is entitled to a plenary hearing on the issue of relocating to the State of North Carolina. Likewise, plaintiff has the right to establish that

> the *Baures* removal procedures were manipulated by defendant in filing her removal action shortly after entry of the Final Judgment, when the issues could have been joined in the divorce litigation. If proven fundamental fairness would require that plaintiff be restored to the position he was at in terms of litigating custody, at the time that the final judgment was entered. Under such circumstances, the court would utilize the best interest of the child, custody standard, in lieu of the *Baures* criteria.[23]

What decisions remain for the secondary caretaker to equally share with the primary caretaker, especially when the primary caretaker's decision is often considered to be made in the best interest of the child? One area of relevance is when a secondary caretaker may be financially impacted if the primary custodian does not include him or her in the consultation process. In *Gac v. Gac*,[24] the parties had joint legal custody but no visitation was ordered between the children and the noncustodial parent because of the children's estrangement. In this case, the custodial parent was denied any reimbursement for the daughter's college costs. In denying the custodial parent's application for compulsory contribution by the noncustodial parent, the court focused on the lack of notification and consultation by the custodial parent and the estranged daughter with the other parent.

The court stated:

> A relationship between a noncustodial parent and a child is not required for the custodial parent or the child to ask the noncustodial parent for financial assistance to defray college expenses. Even though Alyssa did not have a relationship with her father, the plaintiff nonetheless received child support for Justin and Alyssa during this entire period, and could have sought additional support for Alyssa's education. Also, if Alyssa wanted financial assistance from her father, she could have made the request before she incurred her college expenses. Neither the plaintiff nor Alyssa made such a request until after the defendant sought to terminate child support, and Alyssa had graduated from college. The failure of both the plaintiff and Alyssa to request the defendant assist in paying Alyssa's educational expenses at a time that would have enabled the defendant to participate in Alyssa's educational decision, as well as plan for his own financial future weighs heavily against ordering him to contribute to her educational expenses after her education was completed.[25]

Would the decision of the primary caretaker hold over the objections of the secondary caretaker if more than just cost was the objection, so long as the decision was not detrimental to the child? It would appear so, if the primary caretaker is presumed to act in the best interest of the child.

How then does this square with the state's public policy that "it is in the public interest to encourage parents to share the rights and responsibilities of child rearing"?

Many attorneys have had cases in which the parties are generally both fit parents, but are nonetheless locked in heated conflict, which fuels the litigation and thwarts reasonable settlement opportunities. Even after such cases resolve, the parties often return to court on post-judgment motions and applications over perhaps the most mundane parenting decisions long after the parties are divorced. This conflict can be the result of different parenting styles, or personality disorders that do not substantially interfere with the parenting abilities of the parties. These cases are called high conflict cases, and can be handled by seeking the appointment of a parent coordinator. While the parenting coordinator may reduce the number of applications to an overburdened court, even if successful this alternative only defers the decision making, adding another layer of outside involvement, cost and stress to the family.

As society becomes more plural, that is, "that no shared ideal dictates or defines proper work roles, proper family structure, or proper family values,"[26] there is a high probability that the number of high conflict cases will increase. So what is the benefit of having a sole custodian make all the decisions or having the primary custodian presumed to be making decisions in the best interest of the child, and thus have the final say? As the court in *Pascale* recognized, the unfortunate victims of the decision making conflict are the children for whom even day-to-day events are fraught with anxiety and dread. Having one parent—the parent entrusted with the children during the majority of the time, the parent who knows the children best—be given the final say to make the decisions when no agreement is possible has the salutary effect of ending litigation and reducing the court's intrusion into the family life. And after all, isn't that in the best interest of the children? ⚖

Endnotes

1. *Mayer v. Mayer*, 150 N.J. Super. 556 (Ch. Div. 1977).
2. The term visitation was substituted with parenting time by the Supreme Court in 1999 rule revisions to avoid the negative connotations of the former and enhance the role of the noncustodial parent. 2006 Supplement, *New Jersey Family Law*, Alan Grosman.
3. *Id.* N.J.S.A. 9:2-4(Emphasis added).
4. Skoloff & Cutler, II *New Jersey Family Law Practice*, (13th ed. 2008),Sec. 4.1, at p. 4:12.
5. 314 N.J. Super. 340, 348 (App. Div.

1998).

6. 86 N.J. 480 (1981).
7. *Id*. at 486, 487.
8. This is ironic, since the grant of joint custody was made by the trial court *sua suponte* as neither litigant had requested it. *Id*. at 484.
9. *Id*. at 488.
10. 140 N.J. 583 (1995).
11. *Id*. at 597, 598.
12. *Id*. at 599, 600.
13. 265 N.J. Super. 141 (Ch. Div. 1993).
14. *Pascale, supra* at 606.
15. 140 N.J. 120 (1995).
16. *Id*. at 144, 145. Most tragically, following the court's decision Mr. Gubernat killed himself and the child. *See* Alan M. Grosman, Parental Disputes Over the Surname of a Child, *N.J. Law. Mag.* (May 1997).
17. 378 N.J. Super. 83 (App. Div. 2005).
18. *Id*. at 85, 86.
19. *Id*. at 85, 86.
20. 167 N.J. 91 (2001).
21. *Id*. at 118.
22. 384 N.J. Super. 266 (Ch. Div. 2005).
23. *Id*. at 273, 274.
24. 186 N.J. 535 (2005).
25. *Id*. at 546 (Emphasis supplied).
26. Jonathan W. Gould and David A. Martindale, *The Art and Science of Child Custody Evaluations*, 33 (The Guilford Press 2007) *citing* Elster, 1987; Scott, 1992.

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