CHILD CUSTODY AND VISITATION RIGHTS

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Issues of Child Custody and Visitation are generally governed by the Family Court Act as well as the Domestic Relations Law. Custody and Visitation will generally be decided by one of three methods: (1) by agreement of the parents; (2) Upon petition to Family Court; or (2) Within the scope of a divorce proceeding commenced in Supreme Court. In methods (2) and (3) discussed below, the court will appoint an attorney for the child(ren) who will be responsible with representing the position of the child in court.

A. Petition for Visitation

Introduction and Standard

Courts deem visitation to be an extremely important right of both the noncustodial parent and of the child, and only a showing of "exceptional circumstances" will warrant the denial of that right. In Family Court judges will use the term "parenting time" when referring to visitation.

In New York State, the applicable provisions related to visitation are contained in Articles 6 and 10 of the Family Court Act and Articles 5 and 13 of the Domestic Relations Law. A court may order visitation as part of a divorce judgment; additionally, a person may file a Petition for Visitation (General Form 17) with the local Family Court. As with most areas of family law, the standard applied by the courts in determining issues of visitation is the "Best Interest of the Child" standard.

Who Has Standing to Seek Visitation?

The general rule in New York State is that the people who statutorily have standing to seek visitation with a child are parents (DRL §70), grandparents (DRL §72) and siblings (DRL §71).

Noncustodial Parents: The most commonly thought of scenario is that of a noncustodial parent petitioning for visitation with his/her child, who is in the custody of the other parent. Domestic Relations Law §70 allows for "either parent" to petition the court for visitation. Another common instance is when a child is in foster care, and one or both parents are petitioning for visitation with their children. A noncustodial parent may also petition the court for visitation with a child placed in the care of a social services official, such as foster care, as set out in §1081 of the Family Court Act.

Nonparents: Statutes as well as case law in New York State have proscribed certain circumstances in which some nonparents also have standing to seek visitation. Visitation is not only the right of a noncustodial parent, it is also the right of the child, and the child has an interest in maintaining relationships with certain individuals. Domestic Relations Law §71 allows for siblings of half or whole blood to petition the court for visitation with a minor child. Section 72 of the DRL, which is sometimes referred to as the "grandparent statute," sets out certain circumstances in which grandparents also have standing to petition the court for visitation. Statutorily grandparents and siblings are the only nonparents who may seek visitation.

There have been certain circumstances where courts have found that individuals other than those addressed in the statute have standing to seek visitation. For example, in *Trapp v. Trapp* the Family Court of Onondaga County found that a stepfather had standing to seek visitation rights with his stepchildren. 126 Misc. 2d 30. Again in *Tripp v. Hinckley*, the court found that based on the circumstances, a sperm donor had standing to seek visitation. 290 A.D.2d 767. However, while these cases do exist, they are rare. Courts generally maintain the position that as against a nonparent, a parent has a superior right to decide who their child interacts with.

The specific substantive and procedural legal aspects involved with a nonparent seeking visitation or custody of a minor child are discussed more thoroughly in Section "F" below.

Incarcerated Parents: One situation which can arise is that of an incarcerated parent seeking visitation with his/her child. Applying the same line of thinking, that both the child and parent have a right to maintain a meaningful relationship with one another, courts have consistently held that incarceration does not affect a noncustodial parent's standing to seek visitation. This is not to say that visitation is always granted in such cases, only that the incarcerated parent still has standing to petition. In other words, "[t]he fact that a noncustodial parent may be incarcerated does not, as a general rule, render visitation inappropriate." *Ward v. Jones* 303 A.D.2d 844.

Factors Considered By the Court

In the case of a noncustodial parent seeking visitation, courts are unwavering in their position that visitation with a noncustodial parent is presumed to be in the child's best interest. Absent "extraordinary circumstances," a noncustodial parent will be granted visitation. When making a best interest determination in a visitation case, the court will consider certain factors, including:

A. Child's Wishes

The preferences of the child are a factor which the courts may consider, although they are not determinative. Visitation can be granted, even over adamant objections by the child, if the court finds that visitation to be in the child's best interest. Additionally, when considering the weight to give to a child's wishes, a court will take into account the age of the children, the reasons for their preference, as well as the potential for influence by either of the parents.

B. Domestic Violence

Domestic Violence is the only factor which the court statutorily must consider in a best interest determination. Domestic Relations Law §240 states that where either party to a visitation proceeding alleges an act of domestic violence against the other party or a family or household member of either party, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant. This is not to say that a finding of domestic violence automatically deprives a party of visitation; it simply is a factor that the court must consider in the overall determination of what is in the best interest of the child. Courts have generally found domestic violence to be more egregious when it takes place in the presence of the child.

C. Danger or Risk to Child

Only in the most extreme of situations will the court deprive a parent of his or her right to visitation. In order to do so, substantial evidence must support the idea that visitation with a noncustodial parent would be detrimental to a child's welfare. Some examples of cases where courts have denied visitation include *David V v. Rosalind W.*, in which a finding of neglect was entered against a father based on allegations that he sexually abused his daughter when she was an infant, in the presence of his son. 62 A.D.3d 717.

D. Mental Health of Parent

Courts have found that visitation with a noncustodial parent is not in the child's best interest due to the mental illness of the parent (*se,e Williams v. O'Toole,* 4 A.D.3d 371)

Terms and Conditions of Order of Visitation

Generally, when a court grants visitation to a parent, the next issue it must address is setting out the terms and conditions of the visitation. Not only have courts historically and consistently held that parents should be granted visitation with their children, they have also held that such visitation should be "reasonable and meaningful" so as to foster the relationship between the child and noncustodial parent. *Strahl v. Strahl*, 66 A.D. 2d 571. The court can regulate the frequency or duration of the visits, where the visitation will take place, who can or cannot be present, who must be present, the conduct of the parties in the presence of the children and much more.

A. Schedule

Courts have found that it is in the child's best interest for the visitation with his/her parent to be meaningful, which often translates into frequent and regularly scheduled visits. In order to ensure this, courts will often times include a specific schedule in the visitation order. The schedule can be as specific or as general as the court deems proper. For example, in the case of two parents who are able to conduct themselves amicably, the court might simply order visitation "as agreed upon by the parties." However, in the case of two parents with an acrimonious relationship, the court might set out a much more structured schedule, outlining specific dates, times and locations of the visits as well as who is responsible for transportation.

As part of a schedule, the court can place restrictions on whether or not a child can spend the night with the noncustodial parent. The court will consider whether it is in the best interest of child to do so, taking into account factors such as the living arrangements of the noncustodial parent, the preferences of the child and custodial parent, and any other relevant information.

B. Supervised Visitation

Depending on the circumstances, the courts may order supervised visitation. The court can order that visitation be supervised by the custodial parent, an authorized agency, such as a caseworker with the Department of Social Services or a foster parent, or some other third party. A court will apply the best interest of the child standard in determining whether visitation should be supervised. Supervised visitation can be part of a final visitation order, or as a temporary order pending further investigation by the court. Some of the factors which the court may consider in determining whether or not to order supervised visitation include:

- Domestic Violence
- Allegations or findings of abuse or neglect against a parent

- Violent or abusive tendencies
- The safety of the living arrangement of the parent
- A parent's past conduct of absconding with the child
- The age and sex of the child

C. Conduct of Parent During Visitation

Courts have the power to regulate the conduct of a parent as a term or condition of visitation. For example, in *Nelson v. Nelson*, the appellate court held that the family court had the authority to impose reasonable restrictions on the noncustodial parent's visitation rights, as necessary to protect the best interests of his five and eight year old daughters, including directives not to sleep or appear nude in his home during the visitation. 290 A.D.2d 826. Again in *Sheehan v. Sheehan* the court held that a father was prohibited from taking his three-year-old child on flights in his private plan during his visitation time. 152 A.D.2d 942.

In addition to ordering who must be present during visitation, i.e. supervised visitation, the court can also regulate who may not be present. After evaluating all relevant factors and surrounding circumstances, a court may find that it is not in the child's best interest to associate with a certain individual; in such cases, the court may order that during visitation periods, that person is not to be present. For example, in *Barnett v. Barnett*, a court ordered that during either parents' parenting time with their son, the parties' respective paramours were not to be present, as it contributed to the son's "apparent divorce-related anxiety".

D. Therapy

Where the court finds that it is in the best interest of the child, therapeutic visitation may be ordered, in which the court orders that visitation take place in a counseling session.

Consequences of Interference with an Order of Visitation

The consequences for failing to abide by the terms and conditions set out by the court in an order of visitation can be severe. A custodial parent's deliberate interference with a noncustodial parent's visitation can warrant a change in custody. As discussed later on in Section C, there are only a limited number of instances which warrant a change of custody once an order has been issued and this behavior is deemed by the court to be egregious enough to be one of those circumstances.

Noncustodial parent's visitation rights are not to be frustrated by the custodian or denied him as a punitive measure. *Raysor v. Stern,* 68 A.D.2d 786.

Relationship to Child Support

As a policy matter, courts generally will not use visitation as a punitive measure. The right of a parent and a child to visit with one another is a separate and important right. Courts will generally not suspend visitation solely for a noncustodial parent's failure to pay child support.

Relocation of Parent

In general, a custodial parent may not relocate if the result of such relocation would be to deprive the noncustodial parent of visitation rights. *Savino v. Savino,* 110 A.D.2d 642. When there is a visitation order in place, the custodial parent may have to petition the court for permission to relocate. A court can deny the petition if it is found that is it in the child's best interest to continue visitation with the noncustodial parent and relocation would make that impossible.

Registry Search

Pursuant to the Family Court Act §651(e), prior to the issuance of any permanent or initial temporary orders of visitation, the court must conduct a review of: (1) any related decisions in court proceedings, and all warrants issued under the Family Court Act; and (2) reports of the statewide registry of orders or protection and reports of the sex offender registry.

B. Petition for Custody

Introduction and Standard

Articles 5 and 13 of the Domestic Relations Law and Article 6 of the Family Court Act contain provisions which govern the area of child custody in New York State. As with Visitation, in a dispute between two parties regarding custody of minor children, the court must make a determination based on the best interest of the child. A party may petition the court for custody (using the same petition that would be used for Visitation, General Form 17), or it may be determined as part of a divorce proceeding. A custody dispute may arise between two parents, between parent(s) and nonparent(s), or between the custodian (could be parent or nonparent) and an authorized agency.

Dispute Between Two Parents

Generally, the most common custody dispute which arises is between two parents. This can happen in the context of a divorce, if the parents were married, or in the case of two parents living apart, either parent may, at any time before a child turns eighteen, petition the court for an order of custody (note: although custody may only be governed by the court until a child turns eighteen, child support can be ordered until the age of twenty one). Pursuant to Domestic Relations Law §240, neither parent has a prima facie right to custody. Rather, a court will consider a multitude of factors in determining what arrangement will best serve the interests of the child.

A. Factors Considered By the Court

In determining a custodial arrangement, the court must apply the best interest of the child standard by evaluating the "totality of the circumstances." Courts have set out numerous factors which may be considered in this overall determination. The factors include:

- Domestic Violence – as discussed above, pursuant to Domestic Relations Law §240, Domestic Violence is the only factor which the court statutorily must consider in determining what custodial arrangement will be in the best interest of the child.
- Maintaining stability in the child's life, including a consideration of which parent has been the primary caretaker in the past and avoiding the separation of siblings (*Clupper v. Clupper* 56 A.D.3d 1064; *Moon v. Moon* 120 A.D.2d 839; *Lucey v. Lucey* 60 A.D.2d 757)
- The home environment of both parents (*Clupper v. Clupper* 56 A.D.3d 1064)
- Each parent's willingness to foster a relationship with the other parent (*Clupper v. Clupper* 56 A.D.3d 1064)
- A parent's past performance and ability to provide for the child's overall well-being, including any special needs of the children
- The child's wishes (*Clupper v. Clupper* 56 A.D.3d 1064)
- The ages of the child and of the parents (*Streid v. Streid* 46 A.D.3d 1155)
- The financial status and ability of each parent to provide for the child (*Pollack v. Pollack* 56 A.D.3d 637)
- The physical and psychological health of the parents (*Stern v. Stern* 225 A.D.2d 540)
- Drug or alcohol abuse by either party (*Duplessis v. Duplessis*, 131 A.D.2d 673)
- A parent's moral character including sexual preferences, religion, living situations, etc. cannot be determinative of custody but are relevant to the extent that they affect the well-being of the child (*S. v. J.*, 81 Misc. 2d 828; *Aldous v. Aldous*, 99 A.D.2d 197)

- A finding by a court or authorized agency of abuse or neglect by either party is an extremely important factor in a best interest determination (*Przelski v. Mower*, 242 A.D.2d 923)
- *Primary Caretaker*

B. Types of Custody

After a comprehensive evaluation of all of the relevant factors, a court must make a determination as to the custody of the minor child. In general, a court will either award joint custody or sole custody. As their titles suggest, joint custody refers to a sharing by both parents of responsibility for and control over the upbringing of their child, this would include religious, education, medical, etc.; and sole custody refers to only one parent being responsible for the same. There are also two subcategories, primary physical and shared custody. Primary physical custody refers to where a child primarily lives and shared custody means the child spends an equal amount o f time with both parents.

A court will order joint custody where it has been demonstrated that the parents are able to cooperate with one another. Where parents are unable to communicate civilly with one another, it is most likely not in the child's best interest to award joint custody.

Involvement of an Authorized Agency

A second type of custody dispute which can arise is that between a parent(s)/guardian and an authorized agency. In this case, an agency (in New York State this will usually be the Department of Social Services, Division of Child Protective Services) will, through its own process, make a determination that a child is at risk or in danger in his or her current custodial arrangement, usually by alleging abuse or neglect. Article 10 of the Family Court Act governs such proceedings.

In these cases, an emergency petition can be filed by the Department of Social Services to remove the child from the parent's custody. If the court finds in favor of the agency, a child will be removed and placed in foster care or another temporary living arrangement.

The standard applied throughout these proceedings is the traditional best interest of the child standard. At the same time, a parent has a superior right to custody, and a court may not deprive a parent of that right absent a limited set of extraordinary circumstances. Thus, the court will do everything it its power to reach the ultimate goal of reunification of the child and parent. This will include ordering the Department of Social Services to provide services to both the child and the parent

as the court finds would be helpful. These services could include mental health counseling, drug or alcohol abuse counseling, job training, parenting classes, and many more.

C. Motion for a Change of Custody or Visitation

In order to seek a change of an existing order of custody and/or visitation, the party seeking the change bears the burden of proving a "sufficient change in circumstances indicating a real need to modify an order to further the best interests of the child." *Grant v. Grant*, 47 A.D.3d 1027. This is a stringent standard and the court will not freely entertain petitions for modification. Thus, as compared to an initial custody determination, a petitioner in this case faces an initial burden of showing the requisite change in circumstances, before the best interest of the child issue is even reached. A petitioner would use General Form 40 to petition the court for a modification of an order of custody or visitation.

Factors the court will consider in determining whether there was a sufficient change in circumstances include situations such as:

- As discussed above, a custodial parent's deliberate interference with or frustration of the noncustodial parents rights (i.e. a failure to abide by the terms of the existing order) would warrant a modification
- Similarly, an attempt by one parent to criticize or alienate the child from the other parent in any way would warrant a modification
- Any new findings of abuse or neglect by the custodial parent which may not have been brought to the courts attention originally
- Exposure of child to inappropriate people, such as a new boyfriend/girlfriend of the custodial parent, this would include any domestic violence, drug or alcohol abuse, or any other inappropriate behavior in the presence of the child
- Custodial parent's failure to properly address the educational, emotional, psychological, physical needs of a child
- A change in the custodial parent's physical or mental health
- Breakdown of the parent/child relationship
- If a child is not of school age at the time of the issuance of the custody/visitation order, a child attaining school age may warrant a change in circumstances which requires a modification
- Remarriage of either parent
- Employment status or work schedule of either parent
- In a case where the custodial parent leaves the child in the custody of a third person, the noncustodial parent would have standing to petition for a change in the current order

D. Questions of Paternity

Issues of paternity are generally governed by Article 5 of the Family Court Act. Where a child is born of married parents, paternity is presumed. Contrastingly, where a child is born out of wedlock, paternity must be established. Paternity is necessary to determine support obligations and parenting rights. Pursuant to §513 of the Family Court Act, each parent of a child born out of wedlock is responsible for the support of that child. There are two main types of proceedings that occur in the area of paternity. The first is a petition for paternity, in which the petitioner is alleging that someone is the father of the child, and is asking the court to issue an order of filiation stating the same. The second is a petition to vacate paternity, in which the petitioner is challenging paternity which has previously been established.

Ways to Establish Paternity

A. Presumption of Legitimacy

A child who is born of married parents is presumed to be the biological child of both parents. (see §417 of the Family Court Act). This is, however, a rebuttable presumption. A court will consider all relevant factors and make an overall best interest determination as to whether or not to overcome the presumption.

B. Acknowledgement

Paternity can also be established by acknowledgement. A father of a child born out of wedlock acknowledges paternity by:

- (1) Executing a written statement, witnessed by two people not related to the signator, stating both that the mother consents to the acknowledgement of paternity by the putative father, and he is the only possible father and that the father is the biological father (pursuant to §111-k of the Social Services Law and §4135-b of the Public Health Law). This is most commonly done at the hospital at the same time that the birth certificate is executed; or
- (2) Furnishing support. Where an individual has paid child support to the mother of a child born out of wedlock, that individual has acknowledged paternity. However, to serve as an acknowledgment, the payments must be clearly and definitely provided for the purpose of sustenance of the child. *Wong v. Beckford*, 28 A.D.2d 137.

C. Order of Filiation

If court proceedings are initiated, and the court makes a finding that a male party is the father of the child, it shall make an order of filiation, declaring paternity (see §542 of the Family Court Act). The court can make a finding based on the results of a DNA test, a best interest of

the child determination, or based on the presumption of legitimacy of a child born to married parents.

Petition for Paternity

A petition for paternity is commenced by filing a verified petition in family court. In this type of proceeding, the petitioner is alleging that the respondent is the child's father; or, in the case where the petitioner is the person alleging to be the father, the respondent would be the mother or guardian of the child.

A. Who May File

Pursuant to the statute (Family Court Act §522), this type of petition may be filed by the following people:

- The mother;
- A person alleging to be the father;
- A guardian or other person standing in a parental relation or being the next of kin of the child;
- Any authorized representative of an incorporated society doing charitable or philanthropic work; or
- A public welfare official of the county, city or town where the mother resides or the child is found (this is usually done where the mother or the child is going to require public assistance)

B. Procedure

After a legally sufficient petition has been received, the court will then issue a summons requiring the respondent to show cause why the court should not enter a declaration of paternity. A respondent's failure to appear can result in a default order of filiation in favor of the petitioner, and could also result in the suspension of respondent's driver's license or other business or recreational licenses or permits. A hearing would then be had before a family court judge to hear both sides.

C. Hearings

The burden of proof in these proceedings rests upon the petitioner, and he or she must establish paternity by clear and convincing evidence. Paternity proceedings are civil in nature and are governed by the CPLR. The court will hear testimony and consider factors such as the specific nature of the sexual relationship between the parties.

In a paternity proceeding (as opposed to a support proceeding) a court must order a DNA test upon petition of either of the parties, except where the court finds that this would not be in the best interest of the child. The court may also order the test in its discretion, even without a request by the parties. Both parties pay for the cost of the test, or, where he or she cannot afford to pay, the court can order that the test be funded by an authorized agency. Where a test is admitted into evidence, it creates a rebuttable presumption of paternity. (see §532 of the Family Court Act).

Vacating an Acknowledgment of Paternity

A party may only petition to vacate an acknowledgment of paternity by a showing of fraud, duress, or material mistake of fact. When a petition to vacate acknowledgement comes before the court, the court will order a DNA test to determine paternity, unless the court finds it would not be in the child's best interest to do so. If, based on the results of the DNA test, the court finds that the person who signed the acknowledgement is the child's father, the court will issue an order of filiation. Alternatively, if there is a finding that this person is not the father, the court will vacate the acknowledgement. (see §516-a of the Family Court Act).

Best Interest of the Child

As is consistent with this area of the law, the best interest of the child standard is also applicable in paternity proceedings. No DNA test will be ordered in any case where there is a finding by the court that it is not in the best interests of the child based on res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman. Usually this means that where a putative father has established a significant relationship with a child, it would not be in that child's best interest to vacate paternity. This line of reasoning is also behind the requirement that a petition to vacate an acknowledgement of paternity must be filed within 60 days of acknowledgement. An attorney will be appointed to represent the best interests of a child in these proceedings. Below are two cases which illustrate this concept:

- In *Glenda G. v. Mariano M. the* Family Court concluded that the father was estopped from denying paternity based on best interests of the child where the man assumed the role of a parent and led child to believe he was his father; and, his reason for demanding the DNA test, which was to remove doubts as to whether he was father, was not a sufficient basis for ordering DNA test almost thirteen years after child's birth. 62 A.D.3d 536.
- In *Bruce W.L. v. Carol A.P.*, a man who, according to the court, "treated child as his own," was, based upon the best interests of the child, estopped from denying paternity, even though the DNA test results indicated he was not the child's

biological father, where the child had resided with him for her entire life, the man represented that he was the father of the child, and child justifiably relied on that representation. 46 A.D.3d 1471.

D. Termination of Parental Rights

Article 6 of the Family Court Act, Article VII of the Domestic Relations Law and Article 6 of the Social Services Law contain many statutes which govern the area of terminating parental rights. An order terminating parental rights may be granted only based on one of the following grounds:

- Death of both parents
- Permanent Neglect of Child
- Abandonment of Child
- Mental Illness or Mental Retardation of Parent
- Severe or Repeated Abuse of Child
- Voluntary Surrender

As previously discussed, a parent's rights can be temporarily suspended by placing a child in foster care or in the care of someone other than the parent. However, in the most egregious cases, parental rights can also be permanently terminated. This is a separate issue from custody. In other words, the fact that a parent does not have custody of his or her child does not mean that the parental rights have been terminated. Terminating parental rights is a drastic and final act which permanently ends the parent-child relationship.

Unlike other areas of family law, a parent's rights may not be terminated solely based on the best interest of the child. The statute makes it very clear that the preferred result of the state is for a child to grow up with his or her biological parents. Accordingly, the state's obligation is to take any possible steps and to provide any services to the family which may serve to prevent the separation of parent and child, or, if they have already been separated, to create an environment which will allow for reunification. Only when this effort has been made to the best extent possible, and it is clear that the biological parent cannot or will not provide a safe home for the child, will that parent's rights be terminated. (see §384-b of the Social Services Law).

Grounds: §384-b(4) of the Social Services Law

i. *Death of Both Parents*

ii. *Permanent Neglect of Child*

Article 6 of the Family Court Act sets forth the substantive and procedural law of terminating the parental rights of a permanently neglected child. For this purpose, a permanently neglected child

means a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of either at least one year or fifteen out of the most recent twenty-two months following the date such child came into the care of an authorized agency substantially continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact.

To plan for the future of the child" shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

One fact which is important to note is that where a child is born out of wedlock, and the father has failed to maintain any kind of substantial and continuous contact with the child, his rights can be terminated without his consent (see §111 of the Domestic Relations Law)

iii. Abandonment of Child

An abandoned child is one whose parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed. A child must have been abandoned for at least six months after the filing of the petition for termination of parental rights.

iv. Mental Illness or Mental Retardation of Parent

The statute defines mental illness as an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

The statute defines mental retardation as subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an

extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

v. Severe or Repeated Abuse of Child

Section 384-b(8) of the Social Services Law sets forth four (4) different circumstances that constitute "severe abuse" and three (3) different circumstances that constitute "repeated abuse." Included in this are situations where parents have been convicted of serious crimes under the Penal Law, such as murder, where parents have been convicted of committing sexual offenses against the child, where a parent has caused injury to the child in a manner that exemplifies "depraved indifference to life" as defined in the penal law, and many more.

vi. Voluntary Surrender

A parent may also voluntarily surrender the rights to their child. A parent can surrender their child into the care of an authorized agency for the purpose of adoption pursuant to §§384 and 383-c of the social services law. In addition, a parent may consent to the adoption of the child by someone else pursuant to Article VII of the Domestic Relations Law.

Procedure

A proceeding to terminate parental rights is initiated by filing a petition in family court; this can be done by any of the following people:

- An authorized agency;
- A foster parent (pursuant to §1089 of the Family Court Act); or
- A relative with the care and custody of the child (pursuant to §384-b(3)(b)

Once a proceeding has been originated, an attorney will be appointed to represent the interests of the subject child. Section 614 of the Family Court Act sets forth the allegations which must be stated in a petition for termination of parental rights based on permanent neglect. The hearing is bifurcated, and the court will first conduct a "fact-finding hearing" to determine whether the validity of the allegations set forth in the petition. The burden is on the petitioner to support the allegations with clear and convincing evidence.

Only if the court finds that the allegations are supported by clear and convincing evidence may it hold the second hearing, known as the "dispositional hearing" in which the best interest of the child will be considered in determining where the child will go. A child could be placed in foster care or with a relative or another approved individual.

E. The Rights of Grandparents and Other Relatives

Visitation

Where a child is in the custody of a fit parent or guardian, there is a presumption that he/she/they has/have the right to make decisions regarding the upbringing of that child, including who the child associates with. "In visitation proceedings, courts should not lightly intrude on the family relationship against a fit parent's wishes...the presumption that a fit parent's decisions are in the child's best interests is a strong one." *Keenan R. v. Julie L.*, 72 A.D.3d 542. However, as discussed above, grandparents and siblings of whole or half-blood have standing under the DRL to seek visitation in certain circumstances.

i. Siblings

Domestic Relations Law §71 allows for a brother or sister, or if he or she is a minor then someone on behalf of a brother or sister, to petition the court for visitation. Using the same Petition for Visitation that a noncustodial parent would use (General Form 17), a sibling can file a petition with the family court and the court would make a determination based on the best interest of the child.

ii. Grandparents

Domestic Relations Law §72 permits a grandparent to seek visitation with a minor grandchild in two instances: (1) where one or both of the parents of the child are deceased; or (2) "where circumstances show that conditions exist which equity would see fit to intervene". While the death of a parent provides automatic standing, the burden of establishing standing in the second situation lies with the petitioning grandparent.

The court can confer standing in its discretion after a consideration of all of the relevant factors; these factors include generally the fact and nature and basis of the parents' objection to visitation and the nature and extent of the grandparent-grandchild relationship. Grandparents must establish a sufficient existing relationship with their grandchild, or in cases where that has been frustrated by parents, sufficient effort to establish one (*Emanuel S. v. Joseph E.*, 78 N.Y.2d 178)

Once the court has found that a grandparent has standing to seek visitation, then the court must determine whether that visitation is in the child's best interest, based on any relevant factors, many of which are the same that are used to confer standing.

iii. Other Nonparents

Although the DRL only allows parents, grandparents and siblings to seek visitation, there are certain cases in which others have attempted to obtain visitation with a child over parental objections. Among the most common groups include former foster parents and stepparents. As mentioned above, the award of custody to a third person over parental objections is extremely rare, but these cases are nonetheless worth noting.

In *Trapp v. Trapp* the court held that a stepfather had standing to seek visitation rights with his stepchild where stepfather had lived with children's mother for a period of almost nine years. 126 Misc.2d 30. In *Webster v. Ryan* the Albany County Family Court held that a former foster mother has no right to seek visitation with her former foster child who had been returned to the biological father. 187 Misc.2d 127.

Custody

Although neither parent has a prima facie right to custody, as between a parent and a nonparent, a parent inherently has a superior right to custody of which they cannot be deprived absent a showing of surrender, abandonment, persisting neglect, unfitness or other such extraordinary circumstances. *Bennett v. Jeffreys*, 40 NY2d 543.

For a court to find such extraordinary circumstances as to warrant custody to a nonparent is extremely rare. A parent has a fundamental right to raise their child and the State cannot not deprive a biological parent of custody merely because a court or social agency "believes it can decide more wisely than the parent or believes it has found someone to better raise the child." *Matter of Adoption of L.*, 61 NY2d 420. The nonparent party petitioning to terminate the biological parent's superior right to custody bears the burden of proof. *Matter of Michael G.B. v. Angela L.B.*, 219 A.D.2d 289. Only if the nonparent proves, to the satisfaction of the court, the existence of extraordinary circumstances, does it then become appropriate for the court to hold a best interest hearing to determine the custodial placement of the child. Thus, unless the court finds surrender, abandonment, persisting neglect, unfitness or extraordinary circumstances, the issue of the best interest of the child is never even considered. *Matter of Adoption of L.*, 61 NY2d 420.

The Domestic Relations Law §72 defines "extraordinary circumstances" as "an extended disruption of custody," which includes, but it not limited to, "a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner." Courts have held that a finding of neglect under Article 10 of the FCA does not even constitute the requisite level of "persisting neglect." *A.B. v D.W.*, 16 Misc 3d 1101(A); nor does a parent's voluntary

surrender of their rights through their consent to an order of custody with a nonparent constitute a finding of extraordinary circumstances. *McDevitt v Stimpson*, 281 AD2d 860.

Where this rare determination has been made, courts have awarded custody to aunts, uncles, stepparents, grandparents, siblings, etc.

F. Checklist of Necessary Documents and Sample Forms

A complete list of the forms and petitions that can be filed in Family Court can be found at: http://www.nycourts.gov/forms/familycourt/index.shtml