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MATRIMONIAL LAW

# When Custody Is Truly Contested, Who Decides Best Interests?

*In a welcome shift, the First Department holds that it should be the trial court rather than an expert.*

BY HARRIET NEWMAN COHEN

**WHO DETERMINES the best interests of children in that minuscule percentage of cases in which custody is truly contested? The court, as parens patriae, a court-appointed forensic mental health professional, or the parents?**

This article analyzes a recent appellate court decision, *John A. v. Bridget M.*,[1] that is significant for its shift of direction from a too-slavish reliance on the independent expert's opinion regarding best interests,[2] to reliance on the court's own evaluation of all pertinent data in making the ultimate determination of the children's best interests. *Bridget M.* reaffirms that a single, even pertinent, piece of information may not be exalted above all others, but the court must consider the totality of circumstances so as not to disserve the children's best interests.

This article also examines the debate that is raging about the admissibility of, and over-reliance on, the opinions of court-appointed custody evaluators, and on select cases and commentators engaged in that debate.

## In New York, 'Best Interests' Govern

New York has no statute or case that enunciates a prima facie right to custody in either parent.[3] Nor does it have a tender years presumption, or, like West Virginia, a prime caretaker presumption.[4]

ART BY RICK NEASE

On the contrary, New York is a "best interests" state. The court must look at the totality of the circumstances, including such considerations as the age of the child, the quality of the home environment of each parent, the relative fitness of each parent, the ability of each parent to guide and provide for the child's intellectual and emotional development, the financial abilities of each parent, the child's need for stability, the length of time that the child has resided with a parent and the effect an award of custody to one parent might have on the child's relationship with the other, among others.[5]

The court's determination will not be set aside unless it lacks a sound and substantial basis in the record.[6]

In determining best interests, courts have become more and more reliant on court-appointed neutral forensics. Following authorization of the appointment of neutral financial experts, neutral custody experts have been a mainstay in custody cases since 1988.[7] Before that, litigants hired their own experts who prepared reports and testified subject to cross-examination as to their bias and other infirmities.[8]

What was heralded as a reform that

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would reduce cost and educate the court impartially as to best interests has evolved into a costly and controversial enterprise. A series of articles by Timothy Tippins published in the New York Law Journal proposes closing the courtroom door altogether "to unverifiable intuitive emanations, whether uttered by astrologers, necromancers or mental health professionals."[9]

This is countered by the argument that the testimony should remain admissible but subject to "vigorous cross-examination," "careful instruction on the burden of proof" and "not … undue reliance on the recommendation."[10]

The Matrimonial Commission created by Chief Judge Judith S. Kaye recently focused on the role of forensic experts.[11] The Administrative Judge for Matrimonial Matters in the State of New York changed the orders she issues appointing custody experts to eliminate the requirement that the forensic give a recommendation on the child's best interests.

"For one thing," Justice Jacqueline Silbermann told a Law Journal reporter, "I don't know where their scientific basis for a recommendation comes from.… In the final analysis, I've got to be the one who makes the decision based on all the information."[12]

All agree that the court must be the ultimate arbiter of what custody arrangement is in children's best interests.

In a decision that predates *Bridget M.*,[13] a court questioned the scientific underpinnings and reliability of court-appointed forensics and noted its obligation to "hold the mental health witness accountable for the application of empirically supportable principals and methods and to insist that the experts whose opinions can change lives support each and every one of their inferences with specific empirical evidence." The court deemed it its responsibility to keep unscientific opinions out of the process entirely, observing that the best interest standard is a legal and socio-moral construct, not a psychological construct.[14]

A second Suffolk County decision that post-dates *Bridget M.* expressed the same concern and scheduled a pretrial hearing to examine the reliability of, and reliance on, the psychological tests utilized by the neutral forensic psychologist. The mother had moved to exclude testimony based on psychological tests that she argued did not meet the standards for reliability for expert testimony.[15]

## The 'Bridget M.' Decision

Bridget M.[16] signals a corrective by the First Department to the near obeisance previously granted to the recommendations of court-appointed forensics.[17]

Briefly stated, Bridget and John became embroiled in a Family Court paternity proceeding about their non-marital twin girls, Amber and Scarlett, born Sept. 8, 1999. John, a married traveling corporate executive, age 48, with a wife, four grown children and grandchildren, and homes in St. Louis, Malibu and New York, had never lived with the children, who were always in the care of their mother.

Bridget sought supervised visitation, claiming that John had, since the girls' infancy, acted in a sexually inappropriate manner towards them — a claim that John vigorously disputed. The trial court ordered supervised visitation during the pendency of the litigation. Bridget then claimed that the girls reported two incidents of inappropriate touching during supervised visitation. The New York Hospital confirmed vaginitis in both girls.

Bridget moved to suspend John's visitation. John moved to amend his visitation petition to seek custody. The trial court ordered supervised visitation and appointed a neutral mental health professional who was qualified as an expert in psychiatry, forensic child psychiatry and child sexual abuse. The trial court also appointed a law guardian who chose two social workers, one qualified as an expert in child sexual abuse and the other in social work, to assist her.

These experts expressed the opinion with a high degree of certainty that these children were not sexually abused by their father and recommended that they be removed from their mother's custody and that custody be transferred to the father. The court accepted the recommendations of the court-appointed experts — but not the psychiatrist's recommendation that the father could move away with the girls to California. It awarded sole custody to the father, conditioned on his living within 40 miles of Manhattan. The mother was permitted supervised visitation only.

In a change of direction from its prior decisions, the First Department, in three separate but concurring opinions, unanimously rejected the recommendations of these experts and overturned the trial judge's decision that expressly relied on their recommendations. The girls were returned to their mother.

## In the First Department

Justice Joseph Sullivan wrote the first opinion. Based on the totality of the circumstances, he concluded, it was not in the girls' best interests to subject them to the trauma of being separated from their primary caretaker since birth and removed from the only home they had ever known. Even the neutral forensic had found that the mother was a "good enough" mother.[18]

Agreeing with the opinion of the mother's hired forensic expert, Justice Sullivan wrote that the appropriate response to the mother's using the children as pawns in her battle with the father was treatment of the mother's condition,[19] not removal of the children from the mother: "Courts should be ever mindful that, while the

forensic expert may offer guidance and inform, the ultimate determination on any such issue is a judicial function, not one for the expert."[20]

Justice Sullivan remarked on the "ongoing debate in the legal community and the mental health profession as to the implications of expert psychological opinion in custody litigation, especially when the opinion is a conclusion as to the ultimate determination as to where to award custody.…"[21]

Justice David Friedman concurred, in an opinion joined in by Justice Peter Tom. He reiterated the thread that ran through the decision — that while fitness of a parent is at issue when a parent programs an impressionable child to make unfounded accusations of sexual abuse against the other parent, there is no per se rule requiring transfer of custody from the interfering parent to the other parent, or even that such interference, once terminated, gives rise to a rebuttal presumption in favor of a change of custody.

Rather, each case must be decided on its particular facts. This case required avoiding having the girls raised by paid caregivers or a stepmother. As such, at least in the first instance, the better exercise of judicial discretion was to keep them with their mother. The custody issue could be revisited if the mother again sought to interfere with the father's relationship with the children: "It is in the mother's power to maintain custody by refraining from further abuse of her power as the custodial parent."[22]

Justice David Saxe also concurred. His opinion is of especial interest in that he was the trial judge in the 1994 *Rentschler* case, supra, which, on appeal, deferred to the opinion of the forensic.

In its four to one decision in *Rentschler*, the First Department overturned Justice Saxe's award of custody to the mother as "not warranted by the evidence, particularly since there is much support in the record for the opinion of the court-appointed psychiatrist, and the evaluation by an independent expert should not be readily set aside."[23] Justice Asch, the lone dissenter, wrote: "[W]e should affirm, to continue custody of the children in their mother, on the comprehensive analysis by the Supreme Court justice, who is experienced in matrimonial and custody matters."[24]

Justice Saxe was not as certain as his brethren that Bridget M. coached the children to make "false allegations of sexual abuse."[25] The finding that the children were coached failed to take sufficiently into account "the mother's state of mind and the possibility that she could have sincerely, even if irrationally, believed that the father constituted a danger to the children, based on a real, although slim, foundation."[26]

Justice Saxe showed awareness of the body of work that has explored the complex reasons — other than pure malice — why accusations of sexual abuse crop up in custody cases with some frequency.

He listed the distrust that stems from a couple's mistreatment of one another; that suspicions may have been harbored for years based on observations or comments made by one party or the other years earlier; that there was also the possibility that a party would give "free rein" to resentment and bitterness, and attempt to "win" by completely removing the other parent from his or her, and their children's, lives.[27]

A report of suspected sex abuse may not necessarily be the result of spite or malice, but may be the product of other pertinent circumstances.[28]

Justice Saxe agreed with his brethren and concluded stating that "[r]emoval of custody from the parent with whom the children are closely bonded should not result from one discrete fact but requires a weighing of all relevant factors and a determination that the new award will be in the children's best interests."[29] Like Justice Sullivan, he cautioned: "It is always necessary to consider the totality of the circumstances when determining custody."[30]

The case law that holds that interference with the relationship between a child and non-custodial parent

> is an act so inconsistent with the best interests of the children as to per se, raise a strong probability that the offending party is unfit to act as a custodial parent, does not justify applying a per se rule requiring a change of custody, or even a rebuttable presumption that custody should be changed. Rather, such a finding constitutes one fact, albeit an important one, in determining the best interests of the children. *The present case shows how a failure to adequately consider all the pertinent information may result in a change of custody that, despite the custodial parent's misconduct, is not in the best interests of the children*.[31]

## A Later Case

One month after *Bridget M.*, Judge George Jurow decided *Y.W. v. T.T.J.*[32]

Commenting that *Bridget M.* is a significant case that shared elements with the case before him, including interference and allegations regarding parental conduct, Judge Jurow made clear that he

> never viewed the issue of obstruction of or interference with the other parent's access as a per se determinant of custody, as *Bridget M.* so cautions. Instead, in this case, the Court has considered all the circumstances concerning the subject child's best interests and has determined that the father could provide a far superior emotional climate for the child, in addition to supporting access with the noncustodial parent.[33]

Unlike in *Bridget M.*, here there was a hands-on father, a physician, whose practice and offices were in New York City, and who had always spent and

would continue to spend consistent custodial time with the child..

The court acknowledged keen awareness of the debate raging in the legal and mental health communities as to the implications of expert psychological opinions in custody litigation, "especially when the opinion is a conclusion as to the ultimate determination as to where to award custody so as to serve the child's best interests."[34]

Saying that he had no need to resolve this debate in this particular case, Judge Jurow nevertheless observed that unless the courts were prepared to throw out clinical interviewing by experienced forensic psychiatrists — a move that would overturn practice established even before *Kesseler v. Kesseler*[35] was decided in 1962 — on methodological grounds, he would accept the data presented by the mental health professional in the case before him that involved clinical interviewing of the parties and collaterals. The judge observed that the interactions among the parties and the child, and the review of written communications by the parties, was something well within that psychiatrist's expertise.

Clinical interviewing without psychological testing in the context of this case was not relevant. Forensic evaluation was but one variable in the court's assessment of the record. The court was in the position of assessing multiple sources of data in the record and of determining whether the evidentiary record had elements that so strongly corroborated each other that the decision reached by it was based on substantial evidence.

Most importantly, this court was firm that it never had and never would "rubber-stamp" the conclusions of any expert witness.[36] The forensic expert might "offer guidance and inform," as Justice Sullivan had instructed, but the "ultimate determination" would remain a "judicial function," of the court's and the court's alone.[37]

## Conclusion

By whatever route, courts are arriving at the conclusion that they are not to cede their custody determinations to anyone. Such determinations will be made based on the totality of circumstances, not on a single, even pertinent, factor, by the court and the court alone.

Once parents entrust such life altering decisions to the courts, the courts must be vigilant about watching over the best interests of the children and not yielding that sacred trust to any other.

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1. *John A. v. Bridget M.*, 791 N.Y.S.2d 421, 2005 N.Y. App. Div. LEXIS 3374 (1st Dept. 2005), modifying, 4 Misc.3d 1022A, 2004 N.Y. Misc. LEXIS 1533 (Fam. Ct, N.Y. Co, Goldberg, J., 2004) (hereafter *Bridget M.*).

2. *Rentschler v. Rentschler*, 204 A.D.2d 60 (1st Dept. 1994); *In re Custody of Rebecca B.*, 204 A.D.2d 57 (1st Dept. 1994).

3. N.Y. Dom. Rel. Law (DRL) §70(a) (McKinney 2005); DRL §240(1)(a); *Eschbach v. Eschbach*, 56 A.D.2d 167 (1982); *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982). New York has not enacted a "factors" statute as to what constitutes best interests, unlike, e.g., New Jersey (see, N.J. Rev. Stat. §9:2-4[c][2005]) and Michigan (see, Mich. Comp. Laws. §722.23 [3][a-l][2005]).

4. *Garska v. McCoy*, 167 W. Va. 59 (Neely, J., 1981).

5. *Eschbach* and *Friederwitzer*, supra; endnote 3; *Vinciguerra v. Vinciguerra*, 294 A.D.2d 565 (2d Dept. 2002); *Miller v. Pipia*, 297 A.D.2d 362 (2d Dept. 2002); *Entwistle v. Entwistle*, 61 A.D.2d 380 (2d Dept. 1978), appeal dismissed without op., 44 N.Y. 2d 851(1978).

6. *Vinciguerra*, supra, endnote 5 at 566.

7. *Zirinsky v. Zirinsky*, 138 A.D.2d 43 (1st Dept. 1988); McKinney's Uniform Rules – Trial Courts, 22 N.Y.C.R.R. §202.18 (2005 [enacted April 30, 1989]) "Testimony of Court-Appointed Expert Witness in Matrimonial Action or Proceeding. In any action ... to which section 237 of the Domestic Relations Law applies, the court may appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody or visitation .... The cost of such expert witness shall be paid by a party or parties as the court shall direct."

8. See, e.g., *Rosenblitt v. Rosenblitt*, 107 A.D.2d 292 (2d Dept. 1985).

9. Tippins, Timothy M., NYLJ, Custody Evaluations, Parts I through XII, published between July 15, 2003, and May 5, 2005.

10. Dobrish, Robert Z. and Kothari, Ranunak, "Mental Health Professional Testimony in Child Custody Cases," NYLJ, April 13, 2005, p. 4, col. 2).

11. NYLJ, News in Brief: "New Commission to Examine Divorce Process," June 2, 2004, p. 1.

12. Caher, John, "Experts Challenge Family Court's 'Best Interests of Child' Standard," NYLJ, Feb. 22, 2005, p. 1.

13. *Bridget M.*, supra, endnote 1.

14. *Linda W. v. Frank T.*, 5 Misc.3d 1031A, 2004 N.Y. LEXIS Misc. 2798 (Fam. Ct., Suffolk Co., Simeone, J., 2004); see also, *Frye v. United States*, 293 F. 1013 (CADC 1923) (to be admissible, scientific evidence must gain the general acceptance of the relevant expert community); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (*Frye* test superceded by Federal Rules of Evidence (Rule 702), United States Supreme Court holding that expert testimony could be admitted if district court deemed it both relevant and reliable); *Kumho Tire Company Ltd. v. Carmichael*, 526 U.S. 137 (1999) (gatekeeper's function is to exclude expertise that is "fausse" and science that is junky); *People v. Wesley*, 83 N.Y.2d 417 (1994) (to admit expert testimony based on scientific procedure, particular procedure need not be unanimously endorsed by scientific community but must be generally accepted as reliable).

15. *S.M. v. G.M.*, NYLJ, April 5, 2005, p.19, col. 1 (Sup. Ct., Suffolk Co., Pines, J.).

16. *Bridget M.*, supra, endnote 1.

17. *Rentschler v. Rentschler* and *In re Custody of Rebecca B.*, supra, endnote 2.

18. *Bridget M.*, supra, endnote 1, 2005 N.Y. App. Div. LEXIS 3374 at 16.

19. N.Y. Fam. Ct. Act (FCA) §656(f) (McKinney 2005) provides authority for the court to impose an order of probation with mandatory participation in programs of treatment, counseling and rehabilitation; see also *Mongiardo v. Mongiardo*, 232 A.D.2d 741 (3d Dept. 1996); *Lamirande v. Lamirande*, 251 A.D.2d 1071 (4th Dept. 1998), leave denied, 92 N.Y.2d 809 (1998).

20. *Bridget M.*, supra, endnote 1, 2005 N.Y. App. Div. LEXIS 3374 at 18.

21. Id. at 18-19.

22. Id. at 27.

23. *Rentschler*, supra, endnote 2 at 60.

24. Id. at 61.

25. *Bridget M.*, supra, endnote 1, 2005 N.Y. App. Div. LEXIS 3374 at 30.

26. Id.

27. Id.

28. See, e.g., Nicholson, Bruce E. and Bulkley, Josephine, eds., "Sexual Abuse Allegations in Custody and Visitation Cases," American Bar Association National Legal Resource Center for Child Advocacy and Protection (1988). For an excellent paper on the parental alienation syndrome and a reformulation of the phenomenon of the alienated child, together with recent research findings regarding the role played by the conduct of the estranged parent, see Johnston, Janet R., "Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child," 38 ABA Family Law Quarterly Vol. 4, Winter 2005, pp. 757-775.

29. *Bridget M.*, supra, endnote 1, 2005 N.Y. App. Div. LEXIS 3374 at 30-31.

30. Id. at 31.

31. Id. at 27-28, emphasis supplied, quoting *Young v. Young*, 212 A.D.2d 114 (2d Dept. 1995) and *Daghir v. Daghir*, 82 A.D.2d 191 (2d Dept.1982); see also, *Victor L. v. Darlene L.*, 251 A.D.2d 178 (1st Dept. 1998), where the First Department panel, including Justices Sullivan and Saxe, affirmed Judge Schechter's Family Court decision that did not apply a per se unfitness rule, but cautioned the mother that if she deliberately frustrated, denied or interfered with the father's visitation rights, her conduct would raise a strong probability that she was per se unfit by itself. In that case, the law guardian and the psychologist retained by the law guardian emphasized the need for continuity of the home environment where the child had thrived; but see, *Karen B. v. Clyde M.*, 151 Misc.2d 794 (Fam. Ct., Fulton Co., Jung., J., 1991), affirmed sub. nom., *Karen PP. v. Clyde QQ.*, 197 A.D.2d 753 (3d Dept. 1993) (Third Department affirms trial court removal of three non-marital children from custodial mother due not only to fabricated charges of child sexual abuse, but also based on totality of circumstances).

32. *Y.W. v. T.T.J.*, unreported decision (Fam. Ct., N.Y. Co., Jurow, J., May 5, 2005).

33. Id. at 26.

34. Id. at 20, citing *Bridget M.*, supra, endnote 1; Tippins, supra, endnote 9. For a position contrary to Tippins, see Dobrish, supra, endnote 10.

35. *Kesseler v. Kesseler*, 10 N.Y.2d 445 (1962).

36. *Y.W. v. T.T.J.*, supra, endnote 34 at 28; *Bridget M.*, supra, endnote 1 at 18. On the issue of psychological testing, its relevance in contested custody cases is a major subject of debate, as is noted elsewhere in this article.

37. Id.; *Bridget M.*, supra, endnote 1 at 18.