S T A T E O F N E W Y O R K

3181

2009-2010 Regular Sessions

I N A S S E M B L Y

January 23, 2009

Introduced by M. of A. BENJAMIN, FINCH, GALEF, McDONOUGH, KOLB, SCOZZAFAVA, ALESSI, BOYLE -- Multi-Sponsored by -- M. of A. BURLING, CALHOUN, ENGLEBRIGHT, FITZPATRICK, GIANARIS, KOON, MAGEE, McENENY, ORTIZ, PERRY, QUINN, REILLY, THIELE, TOWNS, TOWNSEND, WEISENBERG -- read once and referred to the Committee on Judiciary

AN ACT to amend the domestic relations law, in relation to establishing a presumption of shared parenting of minor children in matrimonial proceedings

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative findings. The legislature hereby finds and declares that it is the public policy of the state to assure minor children have 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 effectuate this policy. At the outset and thereafter, in any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of minor children as may seem necessary or proper. The provisions of this act establish a presumption, affecting the burden of proof, that shared parenting is in the best interests of minor children.

S 2. Subdivision (a) of section 70 of the domestic relations law, as amended by chapter 457 of the laws of 1988, is amended to read as follows:

(a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, [may] SHALL award the natural guardianship, charge and custody of such child to [either parent] BOTH PARENTS, IN THE ABSENCE OF AN ALLEGATION THAT SUCH SHARED PARENTING WOULD BE DETRIMENTAL

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD05762-01-9

TO SUCH CHILD, for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. [In all cases there shall be no prima facie right to the custody of the child in either parent, but the] THE BURDEN OF PROOF THAT SUCH SHARED PARENTING WOULD BE DETRIMENTAL TO SUCH CHILD SHALL BE UPON THE PARENT REQUESTING SOLE CUSTODY. THE court shall determine solely what is for the best interest of the child, and what will best promote [its] THE CHILD'S welfare and happiness, and make award accordingly.

S 3. Paragraph (a) of subdivision 1 of section 240 of the domestic relations law, as amended by chapter 538 of the laws of 2008, is amended to read as follows:

(a) (I) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child and subject to the provisions of subdivision one-c of this section. Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, 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 in making a direction pursuant to this section. If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child. An order directing the payment of child support shall contain the social security numbers of the named parties. [In all cases there shall be no prima facie right to the custody of the child in either parent. Such]

(II) CUSTODY SHALL BE AWARDED IN THE FOLLOWING ORDER OF PREFERENCE, ACCORDING TO THE BEST INTERESTS OF THE CHILD:

(1) TO BOTH PARENTS JOINTLY PURSUANT TO SECTION TWO HUNDRED FORTY-D OF THIS ARTICLE. IN SUCH CASES THE COURT MUST REQUIRE THE PARENTS TO SUBMIT A PARENTING PLAN AS DEFINED IN SUBDIVISION TWO OF SECTION TWO HUNDRED FORTY-D OF THIS ARTICLE FOR IMPLEMENTATION OF THE CUSTODY ORDER OR THE PARENTS ACTING INDIVIDUALLY OR IN CONCERT MAY SUBMIT A CUSTODY

IMPLEMENTATION PLAN TO THE COURT PRIOR TO ISSUANCE OF A CUSTODY DECREE. THERE SHALL BE A PRESUMPTION, AFFECTING THE BURDEN OF PROOF, THAT SHARED PARENTING IS IN THE BEST INTERESTS OF A MINOR CHILD UNLESS THE PARENTS HAVE AGREED TO AN AWARD OF CUSTODY TO ONE PARENT OR SO AGREE IN OPEN COURT AT A HEARING FOR THE PURPOSE OF DETERMINING CUSTODY OF A MINOR CHILD OF THE MARRIAGE OR THE COURT FINDS THAT SHARED PARENTING WOULD BE DETRIMENTAL TO A PARTICULAR CHILD OF A SPECIFIC MARRIAGE. FOR THE PURPOSE OF ASSISTING THE COURT IN MAKING A DETERMINATION WHETHER AN AWARD OF SHARED PARENTING IS APPROPRIATE, THE COURT MAY DIRECT THAT AN INVESTIGATION BE CONDUCTED. IF THE COURT DECLINES TO ENTER AN ORDER AWARDING SHARED PARENTING PURSUANT TO THIS PARAGRAPH, THE COURT SHALL STATE IN ITS DECISION THE REASONS FOR DENIAL OF AN AWARD OF SHARED PARENTING. IN JURISDICTIONS HAVING A PRIVATE OR PUBLICLY-SUPPORTED CONCILIATION SERVICE, THE COURT OR THE PARTIES MAY, AT ANY TIME, PURSUANT TO LOCAL RULES OF COURT, CONSULT WITH THE CONCILIATION SERVICE FOR THE PURPOSE OF ASSISTING THE PARTIES TO FORMULATE A PLAN FOR IMPLEMENTATION OF THE CUSTODY ORDER OR TO RESOLVE ANY CONTROVERSY WHICH HAS ARISEN IN THE IMPLEMENTATION OF A PLAN FOR CUSTODY. ANY ORDER FOR SHARED PARENTING MAY BE MODIFIED OR TERMINATED UPON THE PETITION OF ONE OR BOTH PARENTS OR ON THE COURT'S OWN MOTION IF IT IS SHOWN THAT THE BEST INTERESTS OF THE CHILD REQUIRE MODIFICATION OR TERMINATION OF THE SHARED PARENTING ORDER. ANY ORDER FOR THE CUSTODY OF A MINOR CHILD OF A MARRIAGE ENTERED BY A COURT IN THIS STATE OR IN ANY OTHER STATE, SUBJECT TO JURISDICTIONAL REQUIREMENTS, MAY BE MODIFIED AT ANY TIME TO AN ORDER OF SHARED PARENTING IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION.

(2) TO EITHER PARENT, IN WHICH CASE, THE COURT, IN MAKING AN ORDER FOR CUSTODY TO EITHER PARENT SHALL CONSIDER, AMONG OTHER FACTORS, WHICH PARENT IS MORE LIKELY TO ALLOW THE CHILD OR CHILDREN FREQUENT AND CONTINUING CONTACT WITH THE NONCUSTODIAL PARENT, AND SHALL NOT PREFER A PARENT AS CUSTODIAN BECAUSE OF THAT PARENT'S GENDER. THE BURDEN OF PROOF THAT SHARED PARENTING WOULD NOT BE IN THE CHILD'S BEST INTEREST SHALL BE UPON THE PARENT REQUESTING SOLE CUSTODY. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, ACCESS TO RECORDS AND INFORMATION PERTAINING TO A MINOR CHILD, INCLUDING BUT NOT LIMITED TO MEDICAL, DENTAL AND SCHOOL RECORDS, SHALL NOT BE DENIED TO A PARENT BECAUSE THE PARENT IS NOT THE CHILD'S CUSTODIAL PARENT.

(3) IF TO NEITHER PARENT, TO THE PERSON OR PERSONS IN WHOSE HOME THE CHILD HAS BEEN LIVING IN A NURTURING AND STABLE ENVIRONMENT.

(4) TO ANY OTHER PERSON OR PERSONS DEEMED BY THE COURT TO BE SUITABLE AND ABLE TO PROVIDE A NURTURING AND STABLE ENVIRONMENT.

BEFORE THE COURT MAKES ANY ORDER AWARDING CUSTODY TO A PERSON OR PERSONS OTHER THAN A PARENT WITHOUT THE CONSENT OF THE PARENTS, IT SHALL MAKE A FINDING THAT AN AWARD OF CUSTODY TO A PARENT WOULD BE DETRIMENTAL TO THE CHILD AND THE AWARD TO A NON-PARENT IS REQUIRED TO SERVE THE BEST INTERESTS OF THE CHILD. ALLEGATIONS THAT PARENTAL CUSTODY WOULD BE DETRIMENTAL TO THE CHILD, OTHER THAN A STATEMENT OF THAT ULTIMATE FACT, SHALL NOT APPEAR IN THE PLEADINGS. THE COURT MAY, IN ITS DISCRETION, EXCLUDE THE PUBLIC FROM THE HEARING ON THIS ISSUE. THE COURT SHALL STATE IN WRITING THE REASON FOR ITS DECISION AND WHY THE AWARD MADE WAS FOUND TO BE IN THE BEST INTERESTS OF THE CHILD. ANY direction MADE PURSUANT TO THIS SUBDIVISION shall make provision for child support out of the property of [either or] both parents. The court shall make its award for child support pursuant to subdivision one-b of this section. Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties. Such direction as it applies to rights of visitation with a child remanded or placed in the

care of a person, official, agency or institution pursuant to article ten of the family court act, or pursuant to an instrument approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to part eight of article ten of the family court act and sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable provisions of law against any person having care and custody, or temporary care and custody, of the child. Notwithstanding any other provision of law, any written application or motion to the court for the establishment, modification or enforcement of a child support obligation for persons not in receipt of public assistance and care must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section fifty-two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought or from the party ordered to pay child support to the other party. Such direction may require the payment of a sum or sums of money either directly to the custodial parent or to third persons for goods or services furnished for such child, or for both payments to the custodial parent and to such third persons; provided, however, that unless the party seeking or receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law. Every order directing the payment of support shall require that if either parent currently, or at any time in the future, has health insurance benefits available that may be extended or obtained to cover the child, such parent is required to exercise the option of additional coverage in favor of such child and execute and deliver to such person any forms, notices, documents or instruments necessary to assure timely payment of any health insurance claims for such child.

S 4. The domestic relations law is amended by adding a new section 240-d to read as follows:

S 240-D. CUSTODY OF CHILDREN. 1. WHERE THE COURT CONSIDERS AWARDING SHARED PARENTING PURSUANT TO THE PROVISIONS OF PARAGRAPH (A) OF SUBDIVISION ONE OF SECTION TWO HUNDRED FORTY OF THIS ARTICLE, "SHARED PARENTING", SHALL MEAN AN ORDER AWARDING CUSTODY OF THE CHILD TO BOTH PARTIES SO THAT BOTH PARTIES SHARE EQUALLY THE LEGAL RESPONSIBILITY AND CONTROL OF SUCH CHILD AND SHARE EQUALLY THE LIVING EXPERIENCE IN TIME AND PHYS-

ICAL CARE TO ASSURE FREQUENT AND CONTINUING CONTACT WITH BOTH PARTIES, AS THE COURT DEEMS TO BE IN THE BEST INTERESTS OF THE CHILD, TAKING INTO CONSIDERATION THE LOCATION AND CIRCUMSTANCES OF EACH PARTY. THE TERM "SHARED PARENTING", SHALL BE CONSIDERED INTERCHANGEABLE WITH "NEARLY EQUAL SHARED PARENTING". AN AWARD OF JOINT PHYSICAL AND LEGAL CUSTODY OBLIGATES THE PARTIES TO EXCHANGE INFORMATION CONCERNING THE HEALTH, EDUCATION AND WELFARE OF THE MINOR CHILD, AND UNLESS ALLOCATED, APPORTIONED OR DECREED, THE PARENTS OR PARTIES SHALL CONFER WITH ONE ANOTHER IN THE EXERCISE OF DECISION-MAKING RIGHTS, RESPONSIBILITIES AND AUTHORITY.

2. FOR THE PURPOSES OF THIS ARTICLE A "PARENTING PLAN", REQUIRED TO BE SUBMITTED TO THE COURT PURSUANT TO CLAUSE ONE OF SUBPARAGRAPH (II) OF PARAGRAPH (A) OF SUBDIVISION ONE OF SECTION TWO HUNDRED FORTY OF THIS ARTICLE, SHALL INCLUDE BUT NOT BE LIMITED TO:

(A) THE LEGAL RESPONSIBILITIES OF EACH PARENT;

(B) A WEEKLY PARENTING SCHEDULE;

(C) A HOLIDAY AND VACATION PARENTING SCHEDULE;

(D) A SCHEDULE FOR SPECIAL OCCASIONS, INCLUDING BIRTHDAYS;

(E) A DESCRIPTION OF ANY SPECIFIC DECISION MAKING AREAS FOR EACH PARENT PROVIDED, HOWEVER, THAT BOTH PARENTS SHALL CONFER AND JOINTLY DETERMINE MAJOR ISSUES AFFECTING THE WELFARE OF THE CHILD INCLUDING HEALTH, EDUCATION, DISCIPLINE AND RELIGION;

(F) IF APPLICABLE, THE NEED FOR ANY AND ALL OF THE PARTIES TO PARTICIPATE IN COUNSELING;

(G) ANY RESTRICTIONS ON EITHER PARENT WHEN IN PHYSICAL CONTROL OF THE CHILD OR CHILDREN; AND

(H) PROVISIONS FOR MEDIATION OF DISPUTES.

3. ONE PARENT MAY BE DESIGNATED AS A PUBLIC WELFARE RECIPIENT IN SITUATIONS WHERE PUBLIC WELFARE AID IS DEEMED NECESSARY AND APPROPRIATE. IN MAKING AN ORDER OF SHARED PARENTING, THE COURT SHALL SPECIFY THE RIGHT OF EACH PARENT TO THE PHYSICAL CONTROL OF THE CHILD IN SUFFICIENT DETAIL TO ENABLE A PARENT DEPRIVED OF THAT CONTROL TO ENFORCE THE COURT ORDER AND TO ENABLE LAW ENFORCEMENT AUTHORITIES TO IMPLEMENT LAWS FOR RELIEF OF PARENTAL KIDNAPPING AND CUSTODIAL INTERFERENCE.

S 5. This act shall take effect on the first of November next succeeding the date on which it shall have become a law and shall apply to actions and proceedings commenced on and after such date.