

How New York State Courts Make Child Custody Decisions

By Justine Borer and Rosalind Ting

“The right of a parent to the custody and control of a minor child is one of our fundamental rights as United States citizens.” *Mark N. v. Runaway Homeless Youth Shelter*, 189 Misc. 2d 245, 733 N.Y.S. 2d 566, 569 (N.Y. Fam. 2001). However, there is a tension between the parent’s right to custody and the tremendous discretion afforded to New York State trial courts in making custody awards. The trial court “is in the best position to weigh the various factors in its assessment of the testimony, character, and sincerity of all parties involved in this type of dispute, and, in making a determination of best interests, the court must consider the totality of the circumstances.” *Murray v. McLean*, 304 A.D.2d 899, 757 N.Y.S.2d 612, 615 (3rd Dept. 2003).

In the not-so-distant past, this tension was often less painful. Even in the late 1970s and early 1980s, courts often adhered to the so-called “tender years” doctrine in making custody awards. As anyone who has seen the 1979 film *Kramer v. Kramer* knows, under the “tender years” doctrine, mothers were given priority.

Today, however, neither the mother nor the father has a prima facie right to custody. See N.Y.S. Domestic Relations Law §70(a) and §240(1)(a); *Mohen v. Mohen*, 53 A.D.3d 471, 862 N.Y.S.2d 75 (2nd Dept. 2008); *In re Luis*, 847 N.Y.S.2d 835 (N.Y. Fam. 2007). The trial court is given the task of making each custody determination on the basis of the “best interests of the child,” by examining the “totality of the circumstances.” See N.Y.S. Family Court Act §611 and N.Y.S. Domestic Relations Law § 70a; *Eschbach v. Eschbach*, 451 N.Y.S.2d 658, 56 N.Y.2d 167, 436 N.E.2d 1260 (1983); *Louis*

M. v. Administration for Children's Services, 69 A.D.3d 633, 892 N.Y.S.2d 488 (2nd Dept. 2010).

When a court makes an inquiry into the totality of the circumstances to determine the best interests of the child, the court must consider the following factors:

- the presence or absence of “parental alienation” (efforts by one parent to undermine the relationship between the other parent and the child)
- what custody arrangement will best promote the child’s stability
- the child’s wishes
- the home environment of each parent
- the guidance each parent is able to provide the child
- the relative fitness of the parents, including a consideration of past performance
- the ability of each parent to provide for the child’s well-being
- the bond between the child and each parent
- the original placement of the child, including the length of that placement
- the financial status of each parent, including each parent’s ability to provide for the child
- informal custody arrangements followed by both parents
- the presence or absence of an Order of Protection.

The court may decide how much weight to give each factor. But the court must consider each factor, and make a custody determination based on the totality of the circumstances. The weighing process is case-specific, but the gender of each parent is not one of the factors the court should consider.

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