

FAMILY

A Prescription for Joint Custody

By Michael F. LoFrumento

In the recently decided case *A.T.S. v. M.V.D.*, NYLJ (March 17, 2019), after a 15-day custody trial, Judge Ayesha K. Brantley of Nassau County Family Court awarded joint legal custody to the father and the mother with residential custody to the father solely for the purpose of determining the children's school district and a shared parenting time schedule between the parties. In making this determination, the court relied on the following testimony and evidence presented at trial.

Mother's testimony

The mother testified that she was the part owner of a dance studio where she also worked as an instructor. She asserted that she was the primary caretaker of the parties' children, taking them to all of their doctor's appointments among other traditional tasks, while the father refused. She testified that her mother assisted the parties while she was at work caring for the children.

The mother added that her relationship with the father became volatile and he abdicated his parenting responsibilities to a nanny if she was not home. She believed the father was following her and claimed to have found a tracking device in her car. She ultimately moved out

of the father's home and took the children with her. She testified that she "found it difficult to co-parent with respondent [the Father] as she believes that he communicates with her in an antagonistic and denigrating manner." She further testified that she is careful not to "incite" him. She alleged that she had difficulty communicating with him regarding holidays, school events and extra-curricular activities.

Father's testimony

The Father, a partner at a law firm, admitted to hiring a private investigator to observe the mother, in part to prove that she was not a "full-time stay at home mom" as she alleged. However, he testified he did not know any of the details or outcome of the investigation. The Father testified that the mother worked overnights at a hospital and during this time he cared for the children. He further testified that once the mother opened her dance studio she was working late into the night and averaged 30-40 hours per week. Ultimately, the mother took the children from the home without the Father's knowledge and he did not see the children until they were produced in court as a result of him bringing a writ of



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habeas corpus.

Subsequently, the Father testified that the mother restricted his time with the children while he had attempted to be accommodating. He further asserted that the mother failed to take the children to their extra-curricular activities while his flexible work-schedule allowed him to do so. He stated

that he was concerned that if the mother was awarded residential custody she would continue to impede communication between the children and him and would rely heavily on third-party caretakers.

In addition to the parties' testimony and witnesses, the court also relied on the court-appointed forensic evaluator who submitted a report containing his findings. Specifically, the forensic psychologist testified that both parties would make a suitable custodial parent.

As matrimonial practitioners are well aware, the Court of Appeals, in *Braman v. Braman* 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978), determined that joint custody would only be appropriate in "the rare case" and as something to "be encouraged primarily as a voluntary alternative for relatively stable, amicable parents behav-

ing in mature civilized fashion." *Id.* at 589-590. Subsequently, in *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171 (1982), the Court of Appeals established the "best interests of the child" standard for determining the proper custodial parent.

Despite the foregoing, *A.T.S. v. M.V.D.* is an example of courts trying to navigate the precarious custody waters when two bona fide custodial parents exist. Indeed, Judge Brantley specifically noted in quoting *Eschbach* that "[a]ny court considering questions of child custody must make every effort to determine what is for the best interest of the children, and what will best promote its welfare and happiness." *Eschbach*, 56 N.Y.2d. 167, 169 (1982). Notably, Judge Brantley stated that she was "compelled to disabuse both parties of the fallacy of a "part-time" versus "full-time" parent." Insightfully, the court noted that a "parent that works outside of the home is not per se less of a parent than one that devotes more time to domestic responsibilities." Indeed, Judge Brantley, in awarding joint custody focused her gaze on "the environment that each parent provides and the quality of the time that a child enjoys while with his/her parent."

In doing so, Judge Brantley relied on "the love the children freely vocalize sharing for

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both parents." As a result, despite the parties' failure to agree to joint custody, based upon the best interests of the children, she nonetheless awarded joint custody.

As practitioners, we advise clients of the risks associated with custody litigation. Namely, the significant cost coupled with the great likelihood that one of the parties will attain sole legal custody. Judge Brantley's insightful and optimistic decision challenges *A.T.S.* and *M.V.D.* to grow up and to view themselves through the same prism that their children view each of them through. One cannot help but sense the uneasiness that Judge Brantley had in that her decision would "be a difficult pill for the parties to swallow." Un-

doubtedly, her concern is that these two litigants are destined for future litigation and/or will not be able to co-parent, given their refusal to voluntarily enter into an agreement. Notwithstanding, Judge Brantley's prescription for joint custody is for *A.T.S.* and *M.V.D.* to swallow that pill, set their egos aside, and co-parent their children. Time will tell, but Judge Brantley is giving them a chance.

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