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BULLETIN

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FOCUS ON FAMILY LAW MARCH 2005

Joint Custody Update 2005 – Passé or Still Possible?

On January 31, 2005, the Ontario Court of Appeal rendered its decisions in two matters dealing with the issue of joint custody: *Kaplanis* v. *Kaplanis* and *Ladisa* v. *Ladisa*.

Joint custody seems reasonable in cases where it is evident that parents can cooperate and communicate effectively to make joint decisions in the best interests of their child, but is more controversial where parents cannot get along or agree. Until recently, the trend in the case law was to award joint custody even over the objections of one parent. Joint custody was frequently ordered even where the parents could not set aside their differences to work co-operatively in making decisions regarding their child nor communicate effectively. Courts made such orders to prevent a sole custodial parent from using custody to minimize the non-custodial parent's influence over and contact with the child. In this way, courts could ensure the preservation of each parent's relationship with the child in high conflict cases where there was the perceived risk that a parent having sole custody would use such award to prejudice or alienate the child from the other parent. The recent Ontario Court of Appeal cases suggest that joint custody will no longer be awarded in high-conflict cases.

In its decisions in *Kaplanis* and *Ladisa*, the Ontario Court of Appeal appears to have returned to its earlier hard-line approach that joint custody should not be awarded in cases where there is no evidence that the parties can act reasonably in setting aside their differences to communicate effectively and cooperate in making decisions together in the best interests of their child. These decisions have practical implications on a litigant's decision regarding whether to make a claim for sole or joint custody, and the strategy that should be employed in advancing custody claims.

A Litigant's Claim for Custody

Litigants should be wary of limiting their claim to only joint custody. The *Kaplanis* decision clearly indicated that in the event a court does not believe it to be in the best interests of the child to award joint custody, a parent who does not claim sole custody cannot be awarded custody. Where there is a history of the parties being able to cooperate and communicate effectively, litigants may instinctively wish to claim joint custody. However, where a court determines that a joint custody arrangement is not in the child's best interest, sole custody will only be awarded in favour of a parent who claims it. This does not mean that litigants should avoid making claims for joint custody where the circumstances warrant such a claim. Rather, litigants who wish to claim joint custody should do so, but should also ensure that they make an alternative claim for sole custody.

Relevant Factors

According to the Court of Appeal, the fact that both parents can agree that the other is a fit parent does not necessarily mean that a joint custody arrangement is in the best interests of the child. On the other hand, it is not enough that one parent asserts the inability of the parents to communicate with one another for the Court to decline to order joint custody. The Court held that joint custody should not be awarded in the hope that communication between the parents, as well as the parties' parenting skills, will improve post-litigation. So what are the factors that the Court will weigh in determining custody issues?

In *Kaplanis* and *Ladisa*, the Court of Appeal considered the following factors:

- The history of co-parenting by the parties while they were married and each child's bond (love, affection and emotional tie) with each parent;

(continued on reverse)

- Each parent's respective ability to parent the child. Both parents should detail the proposed arrangements respecting the care of the child when they are with the parent and, the benefits to the child of such arrangement;
- Each parent's ability to communicate effectively with the other despite their differences and conflict. Where a child is so young as to be incapable of communicating his or her own needs, communication between the parties is an extremely relevant consideration. Sometimes expert evidence may be necessary to enable the court to determine how a custody order will meet the children's needs. The older the child, the more weight the child's wishes will be given and the more the child's cooperation will be required in any proposed custody arrangement;
- The parents' abilities to work together and put the interests of the child ahead of their own; and
- In cases where the Office of the Children's Lawyer is involved, its recommendations on parenting arrangements are to be given considerable weight.

The Appellate Court has sent a clear message that in the absence of evidence that the parties can cooperate and communicate effectively, joint custody should not be awarded. In order to meet the threshold required to establish that joint custody is workable, a party must establish through the evidence that both parties have worked and can work together. Litigants and their counsel must find the right balance in arguing for joint custody in the first instance (evidencing how the parents can communicate effectively and work together), and also arguing sole custody in the alternative (evidencing the litigant's superior parenting plan and skills), should the Court determine that joint custody is not appropriate.

Implications for Mediators and Assessors

These recent Court of Appeal decisions have a significant impact for mental health professionals charged with the responsibility of rendering recommendations regarding custody in the context of the mediations and assessments they have been asked to conduct.

Currently, most mediators and assessors have a tendency to err on the side of optimism by leaning towards recommendations of joint custody, even where it is evident that the parents cannot get along. Most of such professionals would admit to a bias in favour of joint custody, regardless of whether the evidence supports same. In an effort to minimize conflict in cases where parents do not necessarily get along, many of these professionals routinely recommend that parties attend counselling and/or utilize the services of a "parenting coordinator" to resolve ongoing disputes.

It should be noted that the Ontario Court of Appeal has determined that judges exceed their jurisdiction in ordering parents to attend counselling or imposing on them the requirement that, if they are unable to agree on any issue, a "parenting coordinator" is to determine the issue for the parties. Assessors should reconsider requiring parents to attend counselling or to submit unresolved issues to a "parenting co-ordinator," in light of the Court of Appeal's opinion that such procedures cannot be imposed on parents.

The *Kaplanis* and *Ladisa* decisions will force mental health professionals conducting assessments and mediations to reconsider their approach and recommendations in custody matters. Mental health professionals are faced with a new dilemma: to provide recommendations with respect to what they perceive to be in the best interests of the child (i.e. both parents having a meaningful, significant role and influence in a child's life) or to provide recommendations in accordance with the law (i.e. an evidence-driven recommendation based on the parents' ability to cooperate with each other). Mediators and assessors who believe that by recommending joint custody, parents could be forced to cooperate with one another, must now reconsider their approach in light of the most recent appellate law that joint custody should not be awarded where there is no evidence to support the claim that the parties can communicate effectively and cooperate in the best interests of their child.

The Kaplanis and Ladisa cases can be obtained from the Ontario Court of Appeal Web site at www.ontariocourts.on.ca/decisions_index/2005index.html.