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Court Gives **Renewed Force to Policy** Requiring Full Custody Hearings

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This article analyzes an important custody decision handed down by the Court of Appeals on June 9, 2016. While the court declined to adopt what it called a "one size fits all" rule, it cautioned the lower courts that there are only limited circumstances under which a court may make determinations regarding child custody without first conducting full and plenary hearings. And in such limited circumstances, if any, articulate, articulate, articulate.

In *S.L. v. J.R.*,[1] the Court of Appeals gave renewed force to its longstanding policy that, as it had stated in *Obey v. Degling*,[2] "[g]enerally a determination of [custody] should be made only after a full and plenary hearing and inquiry."[3] That policy, the court explained in *S.L v. J.R.*, "furthers the substantial interest shared by the state, the children and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interests of a child."[4] The court gave no indication that it intended to alter the longstanding policy of the courts that a party who seeks modification of an existing custody order is not entitled to a hearing *unless* he or she has made an "evidentiary showing" that there has been a change in circumstances since the time of the previous custody order that would warrant modification of the existing order.[5]

In reversing the Second Department's affirmance[6] (Dillon, J.P., Leventhal, Sgroi and Hinds-Radix, JJ) of an *initial* custody determination made by Supreme Court, Westchester County, Susan M. Capeci, J., and remitting the case to Justice Capeci, for further proceedings, the Court of Appeals, *rejected* long-standing Second Department case law holding that custody may be decided *without a hearing* so long as the court doing so "possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interest."[7] The Court of Appeals held that the "adequate relevant information" standard

> tolerates an unacceptably-high risk of yielding custody determinations that do not conform to the best interest of a child—the first and paramount concern of the court. *Nor does this standard adequately protect a parent whose fundamental right—the "right to control the upbringing of a child"* (*Matter of Adoption of Maxwell*, 4 N.Y.2d 429, 439 [1958] hangs in the balance.[8]

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Second Department) on what the Court of Appeals described as "*mere 'information*'"[9] in lieu of admissible evidence:

> [I]n rendering a final custody award without a hearing, Supreme Court appeared to rely on, among other things, *hearsay statements and the conclusion of a court-appointed forensic evaluator whose opinions and credibility were untested by either party. A decision regarding child custody should be based on admissible evidence, and there is no indication that a "best interest" determination was ever made based on anything more reliable than mere "information."*[10]

The report of the forensic evaluator, who, in the absence of a hearing, had obviously not given sworn testimony under circumstances such that the court was able to assess the evaluator's credibility, and had obviously not been tested by cross-examination, was clearly hearsay. *Matter of Chloe W*[11]("[T]he court erred in admitting into evidence at the fact-finding hearing a 2012 evaluation of the mother by a forensic evaluator who did not testify at the hearing. The report constitutes hearsay"); *Matter of Berrouet v. Greaves*[12] ("[p]rofessional reports constitute hearsay, and therefore are not admissible without the consent of the parties").[13] The Court of Appeals explained in *S.L. v. J.R.* that

> Custody determinations … require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child. The value of a plenary hearing is particularly pronounced in custody cases in light of the subjective factors—such as the credibility and sincerity of the witnesses, and the character and temperament of the parents—that are often critical to the court's determination.[14]

The factors previously identified by the Court of Appeals, in *Eschbach v. Eschbach*[15] as being significant in determining custody—some of them highly subjective—include:

- "the quality of the home environment and the parental guidance the custodial parent provides for the child";[16]
- "the financial status and the ability of each parent to provide for the child;"[17]
- "the ability of each parent to provide for the child's emotional and intellectual development;[18]
- "the desires of each child";[19] and
- "the stability and companionship to be gained from keeping the children together."[20]

The Court of Appeals did not take issue with the Second Department's premise that (as courts have previously held) the existence of undisputed allegations (in this case, of the mother's "emotionally destructive and sometimes violent behavior toward [the father] and the parties' two children") may obviate the need for a hearing.[21] But the Court of Appeals rejected the Second Department's conclusion that the facts of *S.L. v. J.R.* presented such a case, finding that "while Supreme Court purported to rely on allegations that were 'not controverted,' the affidavit filed by Mother plainly called into question or sought to explain the circumstances surrounding many of the alleged incidents of 'disturbing behavior.'"[22] The Court of Appeals also concluded that "these circumstances do not fit within the narrow exception to the general right to a hearing."[23] The court eschewed the adoption of what it called a "'one size fits all' rule mandating a hearing in every custody case statewide,"[24] but, nonetheless, set forth a rule of general application obviously designed to limit the number of cases in which custody is determined *without a hearing* and, at the same time, facilitate appellate review in those cases in which a hearing was dispensed with. In the words of the Court of Appeals:

> [W]here, as here, facts material to the best interests analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required. *Accordingly, a court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination and the evidence supporting its decision.*[25]

One legal commentator, discussing *S.L. v. J.R.* on the eve of the release of the decision of the Court of Appeals, observed that "it appears that historically the vast bulk of cases [applying] the 'adequate relevant information' [standard] as an exception to the 'general rule' derive from cases involving pendente lite relief and modification/enforcement of previously existing custodial arrangements."[26] Our review of the Second Department cases that have invoked the "adequate relevant information" standard supports that observation. But that line of Second Department case law began with *Porter v. Burgey*[27] in 1999, in which the Second Department also affirmed *an initial custody determination* made without a hearing, so it cannot be said that the "adequate relevant information" standard was not originally intended by the Second Department to apply to *initial custody determinations* as well. It is worth noting, however, that, of the four cases cited in *Porter* as supporting affirmance despite the absence of a hearing below, three involved

awards of temporary custody,[28] and the fourth involved a modification of custody.[29] In *Porter*, the court declared that the court below had "possessed adequate relevant information to make an informed and provident custody determination"[30] and that "[t]he uncontroverted evidence before the court was sufficient to enable it to reach a sound conclusion" as to custody.[31] But it provided no description of the evidence or other "information" that had obviated the need for a hearing, or how the court below had obtained it and could judge it reliable.

We have found 17 other decisions in the 16-plus years between *Porter* and the Court of Appeals decision in *S.L. v. J.R.* in which the Second Department applied the "adequate relevant information" standard in reviewing a determination of *custody* (including *both initial determinations and decisions on modification requests*, as well as temporary and final orders), as opposed to applications concerning only a proposed modification of visitation. In the seven such decisions that were rendered prior to 2013, the "adequate relevant information" standard was cited as justifying affirmance of the custody determinations made below *without a hearing*—or at least without a hearing specifically on the issue of custody.[32] By contrast, of the 10 such decisions from 2013 through March of 2016, *five affirmed* the custody decisions made below *without* a custody hearing (or at least without a *full* hearing),[33] while *five reversed*, finding that the court below had lacked "adequate relevant information" to make a custody determination without a hearing.[34] The other Departments have also affirmed custody determinations made without a hearing on custody,[35] but apparently not so frequently as the Second Department.

In some of the cases in which Appellate Division courts have affirmed custody determinations in the absence of a hearing on custody, they have cited the fact that the lower court (or another court) had recently or contemporaneously completed hearings on other matters involving the same parties, e.g., neglect proceedings, family offense proceedings and violation proceedings. See notes 31, 32 and 34, supra. The facts adduced at a such previously held hearings may, indeed, be sufficient in some circumstances to inform a custody determination. In other circumstances, however, conducting a hearing on such issues, but not a broader custody hearing, may tend to focus the attention of a court too narrowly, so that it does not consider the full range of factors on which a custody determination should be made.

> The court eschewed the adoption of what it called a "'one size fits all' rule mandating a hearing in every custody case statewide," but, nonetheless, set forth a rule of general application obviously designed to limit the number of cases in which custody is determined without a hearing.

S.L. v. J.R. does not establish a blanket prohibition against making custody determinations without hearings. But it does emphasize that exceptions to the "general" rule that a hearing is required should be rare, must be based on *admissible evidence* (like any summary judgment[36]), and must take into account the full panoply of factors on which custody determinations are to be based, *discussed above*. In addition, it requires that, where a court determines custody without a hearing, *its decision must set forth with specificity the findings upon which the determination was made and the evidence on which those findings were based*—facilitating appellate review and assuring that a court determining custody without a hearing gives thoughtful attention to the question of whether it actually has before it sufficient proofs for a determination of the best interests of the child or children whose future it is deciding.

1. 2016 N.Y. Slip Op. 04442 (N.Y. Ct. App. 2016).
2. 37 N.Y.2d 768 (1975).
3. Id. at 770.
4. 2016 N.Y. Slip Op. 04442 at 2.
5. See, e.g., *Franco v. Franco*, 127 A.D.3d 810 (2d Dep't 2015) ("[A] parent moving to modify an order regarding custody is not entitled to a hearing on the motion unless he or she first makes an evidentiary showing that circumstances have changed to such an extent that modification is necessary"); *Warrior v. Beatman*, 70 A.D.3d 1358, 1359 (4th Dep't 2010); *Bjork v. Bjork*, 23 A.D.3d 784, 785 (3d Dep't 2005); *David W. v. Julia W.*, 158 A.D.2d 1, 6-7 (1st Dep't 1990) ("To automatically grant the non-custodial parent a hearing would simply facilitate a disgruntled party in harassing his or her former spouse, compelling the latter to expend considerable time, money and emotional anguish in resisting the loss of custody. Certainly, a person who seeks such a change must make some evidentiary showing to warrant a hearing.").
6. *S.L. v. J.R.*, 123 A.D.3d 682 (2d Dep't 2015).
7. See, e.g., id. at 682 (citing *Lazo v. Cherrez*, 121 A.D.3d 1002 [2d Dep't 2014]; *Matter of Zaratizian v. Abadir*, 105 A.D.3d 1054, 1055 [2d Dep't 2013]; *Matter of Schyberg v. Peterson*, 105 A.D.3d 857 [2d Dep't 2013]; and *Matter of Hom v. Zullo*, 6 A.D.3d 536 [2d Dep't 2004]).
8. 2016 N.Y. Slip Op. 04442 at 2. (emphasis added.) The Legislature recognized the "fundamental" nature of parental rights and the attendant Constitutional implications in 1976, when it established a right to counsel in several types of proceedings affecting parental rights. Family Court Act §261 states, in pertinent part:

> Persons involved in certain family court proceedings may face the infringements of fundamental interests and rights,

> including the loss of a child's society … and therefore have a constitutional right to counsel in such proceedings. Counsel is often indispensable to a practical realization of due process of law[.]

Family Court Act §262(a) establishes a right to counsel of one's own choosing for parties to various types of family law proceedings, including"the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine custody"—and the right to assigned counsel for any such party who is "financially unable to obtain" counsel—and requires the court to advise such parties of those rights at the outset of a proceeding. The Legislature's action followed the decision of the Court of Appeals in *Matter of Ella B.*, 30 N.Y.2d 352 (1972), which recognized a right to counsel in proceedings for termination of parental rights.

9. Id. at 3.

10. Id. (emphasis added).

11. 137 A.D.3d 1684, 1685 (4th Dep't 2016).

12. 35 A.D.3d 460, 461(2d Dep't 2006).

13. Practitioners in downstate courts typically complete an affirmation form before being permitted to read the confidential forensic mental health professional's report. The form typically has a check off box for whether the person signing the form consents to the judge reading the confidential report prior to its being introduced into evidence in an evidentiary hearing. One of the choices is "I do not consent," a choice that is provided in the furtherance of due process.

14. 2016 N.Y. Slip Op. 04442 at 2.

15. 56 N.Y.2d 167 (1982).

16. Id. at 172 (citing *Ebert v. Ebert*, 38 N.Y.2d 700, 702 [1976]; *Bistany v. Bistany*, 66 A.D.2d 1026 [4th Dep't 1978]; *Sandman v. Sandman*, 64 A.D.2d 698 [2d Dep't 1978]; and *Matter of Saunders v. Saunders*, 60 A.D.2d 701 [3d Dep't 1977]).

17. Id. at 172.

18. Id. (citing *Sandman*, 64 A.D.2d 698; *Porges v. Porges*, 63 A.D.2d 712 [2d Dep't 1978]; and *Saunders*, 60 A.D.2d 701).

19. Id. at 173.

20. Id. (citing *Ebert*, 38 N.Y.2d 700).

21. 123 A.D.3d at 682.

22. 2016 N.Y. Slip Op. 04442 at 3.

23. Id.

24. Id.

25. Id. (emphasis added).

26. L. Rosenberg, "The Right to Be Heard on an Initial Custody Determination: The Court of Appeals Considers *S.L. v. J.R.*," NYSBA Family Law Review., Vol. 48, No. 1 (Spring/Summer 2016), at 3.

27. 286 A.D.2d 552 (2d Dep't 1999).

28. *Astenza v. Astenza*, 173 A.D.2d 515 (2d Dep't 1991); *Webster v. Webster*, 163 A.D.2d 178 (1st Dep't 1990); *Meltzer v. Meltzer*, 38 A.D.2d 522 (1st Dep't 1971).

29. *Hermann v. Chakurmanian*, 243 A.D.2d 1003 (3d Dep't 1997).

30. 286 A.D.2d at 553.

31. Id.

32. *Matter of Luis O. v. Jessica S.*, 89 A.D.3d 735 (2d Dep't 2011); *Matter of Horan v. Framolaro*, 46 A.D.3d 891 (2d Dep't 2007); *McAvoy v. Hannigan*, 41 A.D.3d 791 (2d Dep't 2007); *Matter of Melikishvili v. Grigolava*, 20 A.D.3d 569 (2d Dep't 2005); *Assini v. Assini*, 11 A.D.3d 417 (2d Dep't 2004); *Matter of Levande v. Levande*, 10 A.D.3d 723 (2d Dep't 2004); *Matter of Malfitano v. Parker*, 7 A.D.3d 715 (2d Dep't 2004). In *Luis O.*, the "adequate relevant information" cited by the Second Department as informing the lower court's decision included the recent neglect finding against the mother made by another court *after a hearing*. Id. at 736. In *Malfitano*, the Second Department noted that the custody determination by the lower court was made soon after the same court had, after a hearing, granted an order of protection against the mother in favor of two of the children at issue. Id. at 715.

33. Matter of *Goldfarb v. Szabo*, 130 A.D.3d 728 (2d Dep't 2015); *Matter of Bell v. Mays*, 127 A.D.3d 179 (2d Dep't 2015); *Matter of Navarette v. Navarette*, 126 A.D.3d 801 (2d Dep't 2015); *S.L. v. J.R.*, 123 A.D.3d 682 (2d Dep't 2015); *Matter of Zabatzian v. Abadir*, 105 A.D.3d 1054 (2d Dep't 2013). In *Goldfarb*, the Second Department held that "although there was not a full hearing … considering the testimony elicited from, among others, the father, the mother, the maternal grandmother, a visitation supervisor, and the neutral forensic psychologist, as well as the reports received from various professionals and agencies, the Family Court possessed adequate relevant information to enable it, without additional testimony, to make an informed and provident determination as to the best interests of the child." Id. at 729. In *Navarette*, the Second Department noted that the custody determination by the lower court was made "immediately following the conclusion of a family offense proceeding in which the mother's inappropriate conduct toward the subject child and others, and the father's positive parental relationship with the child, were amply demonstrated at a hearing[.]" Id. at 802.

34. *Matter of Fielder v. Fielder*, 137 A.D.3d 1129 (2d Dep't 2016); *Matter of Kavorios v. Kirton*, 130 A.D.3d 732 (2d Dep't 2015); *Matter of Velez v. Alvarez*, 129 A.D.3d 1096 (2d Dep't 2015); *Matter of Ruiz v. Scallo*, 127 A.D.3d 1205 (2d Dep't 2015); *Matter of Schyberg v. Peterson*, 105 A.D.3d 857 (2d Dep't 2013).

35. See, e.g., *Fayona C. v. Christopher T.*, 103 A.D.3d 424, 424-25 (1st Dep't 2013) (the court below "possessed sufficient information to render an informed decision based on its extensive history with the parties," which included a contemporaneous hearing in a family offense proceeding in which the court found that the father had "committed acts of domestic violence and/or verbal abuse that were directed at the mother in front of the child"); *Matter of Cerra L.B. v. Richard L.R.*, 48 A.D.3d 1416-17 (4th Dep't 2007) (the court below possessed "'sufficient information to make a comprehensive assessment of the best interests of the child'" as to custody [citation omitted] where "father was incarcerated when the mother commenced the proceeding and thus was incapable of fulfilling the obligations of a custodial parent," but the court below should have held a hearing on the issue of visitation); *Matter of Glenn v. Glenn*, 262 A.D.2d 885, 885-87 (3d Dep't 1999) (the court below "possessed sufficient information upon which to independently evaluate and accommodate the best interests of the children" on motion to modify custody, based on "the detailed findings of fact in the prior custody order" and the court's just-completed hearing on the mother's violation petition, after which it found the father in "offensive violation" of the mother's visitation rights and sentenced the father to six months in jail therefor, and also in light of "the practical considerations attendant to Family Court's direction that [the father] begin serving his sentence immediately"). See also *Webster*, 163 A.D.2d 178; *Meltzer*, 38 A.D.2d 522; *Hermann*, 243 A.D.2d 1003.

36. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).