Conditioning Parental Custody or Visitation Decrees to Exclude Certain Third Parties

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I. **Introduction**

In custody cases, a court may be presented with evidence that contact with, or exposure to, certain third parties would be harmful to the child. In these cases, the court generally prefers to grant custody of the child to the other parent, rather than to condition an existing custody decree to exclude contact between the child and a third party. The assumption is that, if a parent knowingly allows their child to be exposed to a harmful third party, then that parent is unfit because the parent is putting his or her own interests before those of the child. Alternatively, if a change in custody would result in greater detriment to the child and the parent is appropriately caring for the child in every other respect, the court is likely to condition custody upon the exclusion of the third party.

In visitation cases where harm to a child may occur from contact with third parties, a court will condition or restrict visitation to exclude such third parties. Courts are much more willing to condition visitation than they are to condition custody. The welfare of the child remains paramount, and thus parents risk losing visitation rights altogether if they fail to follow a court imposed visitation condition.

In custody and visitation cases, a parent may ask the State of New York, through its Supreme Court or Family Court, to restrict the parent-child relationship of the other parent, through the issuance of a court order. In this paper, we will explore the authority of these courts to condition such custody and visitation decrees to exclude certain third parties from having contact with the child when there is a concern that exposure to the third party will be harmful to the child.

New York Domestic Relations Law §240(1)(a) states that, “in any action or proceeding brought…the court…shall enter orders for custody and [visitation] as, in the court’s discretion,
justice requires, [considering] . . . the circumstances of the case . . . the respective parties and . . . the best interests of the child."¹ This statute is not clear as to what specific factors a court should consider in making a custody-visitation determination. The “best interests of the child” standard requires a court to consider any factor that affects a child’s welfare.² The court evaluates each individual case based on the facts presented, and then narrowly tailors its decree to fit the particular circumstances of each case.³ “[T]here are no absolutes in making these determinations; rather [a policy of weighing all the factors in a case is] designed not to bind the courts, but to guide them in determining what is in the best interests of the child.”⁴

In making a custody or visitation determination, the court must balance the “best interests of the child” with fundamental parental rights. Whenever a parent-child relationship is restricted by a court order, such restrictions must be done in the least restrictive manner. Evidence must be presented that the presence or conduct of the third party is harmful to the physical or emotional welfare of the child. The court will only condition a parent’s custody or visitation if a third party’s presence or conduct may be contrary to the best interests of the child.

This paper discusses judicial decisions, both precedent and persuasive, exploring the initial entry and modification of custody and visitation decrees. In these decisions, the courts balance the right of the parents to have frequent and continuing contact with their child against the impact on the child from contact with a potentially harmful third party.

II. Custody and Visitation Decrees Conditioned Upon the Exclusion of a Third Party

The court is authorized to act as “parens patriae” and determine what is best for a child.⁵ Historically, courts have invoked the parens patriae doctrine in cases in which a child’s well-being is at question, such as those involving allegations of abuse or neglect, or when custody issues arise as a result of parental separation. As stated in Finlay v. Finlay, the court has placed
itself in the position of a “wise, affectionate, and careful” parent, and thus it should make appropriate provisions to ensure the best interest of the child. In an action for custody or visitation as part of a matrimonial or family proceeding, the court must make a determination based on what is in the best interests of the child. While the court recognizes that a parent has a fundamental right to raise a child as he or she sees fit, a parent’s liberty interest is outweighed if it is contrary to the best interests of the child. Domestic Relations Law § 240 (1)(a) allows the court to invoke its broad power of equity when rendering a custodial or visitation order after considering all relevant aspects to the parent-child relationship, and if necessary, infringe upon this right to ensure the safety of the child.

Evaluating the parent-child relationship is the starting point for all custody and visitation proceedings. According to Domestic Relations Law § 70(a), there “shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make an award accordingly.” Courts have recognized that it is beneficial for a child to develop a meaningful relationship with both parents, and thus contact with both parents is assumed to be in the best interests of the child. In applying the best interests standard to a custody or visitation determination, the court has discretion as to which factors should be given consideration, and the weight that is allotted to each factor. Some factors that have been considered by New York State courts as part of a custody proceeding include the child’s age, emotional well-being, educational performance, and gender, as well as the parent’s life-styles, morality, and financial status. The court’s decision, however, cannot be based on any one factor alone, such as a parent’s sexual conduct. The court must consider the totality of the circumstances in reaching its determination. Furthermore, a court should not make a custody or visitation decree based on the events that
caused the parental separation; rather the court should maintain its focus on the welfare of the child.\textsuperscript{10}

The presumption that a custody or visitation decree is in the best interests of the child may be overcome if there is evidence that such an arrangement would in fact be harmful to the child. Where the exposure of the child to one of the parents presents a substantial risk of physical, emotional, or mental harm, it is proper for the court to restrict, supervise, or deny custody or visitation. The court may also modify an existing custody or visitation agreement if it finds that the agreement is not in the best interests of the child.\textsuperscript{11} Harm to a child that results from contact with a third party during a parent’s custodial or visitation period can cause the court to restrict or prohibit that party from having contact with the child in the future. Since conditioning a parent’s custody or visitation decree is regarded as a drastic remedy, such order should only be rendered for compelling reasons supported by substantial evidence that such contact would be detrimental to the child’s welfare.\textsuperscript{12} The court does not have the authority to saddle a parent’s custody or visitation with restrictions simply because one parent desires to have them imposed. The parent who brings the motion must prove the risks to the child created by the other parent’s permitted exposure to the third party. Absent a showing of actual harm to the child, the evidence may be deemed insufficient to warrant conditioning a custody or visitation decree.\textsuperscript{13} Any parent, however, may risk losing custody or visitation rights if their lifestyle or conduct does not coincide with the best interests of the child.

A. Justifications For Conditioning Custody or Visitation Decrees to Exclude Third Parties

1. Non-Marital Sexual Conduct

Several New York State Courts have given consideration to the question of whether a custody or visitation decree can be conditioned as a result of a parent’s sexual relations or
cohabitation with a third party outside of marriage. In examining the impact of a parent’s non-marital relationship on the child, the court must provide great care in balancing the state’s interest in protecting the child against the custodial or noncustodial parent’s right to conduct his or her affairs free from state intervention.

Where the child has not been harmed by a parent’s sexual conduct or witnessed any inappropriate behavior by the parent’s significant other, courts will not condition custody or visitation. A lack of evidence to the detrimental impact of a relationship upon the child would render restrictions on a custodial or noncustodial parent’s living arrangements and associations improper. Courts do not assume that a parent’s sexual practices are an indication of overall parental fitness. In Seldin v. Seldin, the Supreme Court of New York rejected a mother’s request to limit the father’s visitation with their fourteen-year-old son to exclude the presence of a woman with whom the Father lived.14 No evidence was introduced to indicate that the Father and the woman with whom he was residing were unfit to care for the son, nor had the Father engaged in any inappropriate behavior in the son’s presence.15 The Court concluded that conditioning visitation would create an adverse consequence, because it would force visitation outside of the Father’s home where the son felt comfortable.16 The Court held that the Father’s residence with this woman was not in and of itself a sufficient basis for such a condition in light of the son’s age and his present awareness of the relationship.17

Although in the State of New York, homosexual conduct is to be treated with neutrality, the presiding judge’s background and beliefs could potentially influence his or her determination regarding the best interests of the child. Courts have indicated that in contested custody cases, either parent’s sexual lifestyle or relationships can be a proper consideration because “sexual conduct between a partner and a stranger to the marriage, whether homosexual or heterosexual,
which takes place in the presence of the children . . . can . . . have adverse affects on the children.”\textsuperscript{18} Such consideration is to be limited, however, to the present or reasonably predictable impact upon the child’s well being.\textsuperscript{19}

In the past, courts have been inconsistent in their decisions as to whether custody or visitation should be conditioned upon the exclusion of a third party when the child is aware of, or has been exposed to, non-marital sexual relationships. Trial court decisions are often upheld in matters of custody and visitation, so long as the evidence reasonably substantiates the decision in awarding custody or visitation. In \textit{Rosenberg v. Rosenberg}, the Second Department held that a parent should be allotted the right to develop his or her own interests as long as it does not interfere with what is in the best interests of the child.\textsuperscript{20} Nevertheless, the decision to exclude must be based on a showing of actual or a strong likelihood of potential harm to the child. The trial court’s decision in \textit{Rosenberg} to condition custody granted to the Mother by not allowing the children to be in contact with her paramour was reversed.\textsuperscript{21} According to the Court, the conditioned order inappropriately interfered with the rights of Mother because it required not only the exclusion of the Mother’s paramour, but also for the prohibition against the Mother remarrying.\textsuperscript{22}

On the other hand, in \textit{Distefano v. Distefano}, the Fourth Department reviewed information regarding the impact of the Mother’s homosexual relationship upon her three children.\textsuperscript{23} In \textit{Distefano}, the Respondent-Mother appealed a Family Court order, which had granted custody of the parties’ three children to the Petitioner-Father.\textsuperscript{24} She was granted restricted visitation that prohibited the presence of a third party with whom the Respondent-Mother had an ongoing relationship.\textsuperscript{25} In its review of the trial court’s decision, the Court found that extensive testimony was presented by experts as well as lay witnesses that the Respondent-
Mother’s inability to separate her relationship with the third party from her role as the children’s Mother had a detrimental impact upon the children. Therefore, the Fourth Department found that the Family Court’s order awarding custody to the Petitioner-Father and visitation to the Respondent-Mother conditioned upon the exclusion of the Mother’s girlfriend was not “opposed to everything presented to the court” and upheld the decision.

The child’s awareness or exposure to a parent’s non-marital relationship is not the only consideration in the court’s decision to condition a custody or visitation order. In Gottlieb v. Gottlieb, the First Department considered whether the Father’s visitation order should be conditioned upon the child being protected from any homosexual activities during periods of visitation. The Court stated that a “[c]hild’s sexual maturation and sense of sexual security must be safeguarded so that the child will have proper identification as to what the parents’ role model should be… [and] [t]his applies equally to heterosexual or homosexual activity.” In Gottlieb, the Court held that the restriction on visitation was not unreasonable, and that the Father should act with discretion so as not to expose the child to any homosexual conduct. However, the Court rejected complete exclusion of the Father’s lover, indicating that it would serve no real purpose except to punish the Father. The child’s age, maturity, and awareness of the non-marital conduct is considered heavily in the court’s custody or visitation determination.

It is important to note that, while these cases are still valid law, they are somewhat outdated. More recent decisions indicate that a child’s exposure to non-marital sexual conduct in regards to same sex couples has not been given substantial weight in determining the best interest of the child, especially in light of the Marriage Equality Act. In the 1992 decision, In re Evan, the Court stated that the child's best interest is not controlled by parental sexual orientation. Furthermore, in the 1994 decision In re Adoption of Caitlin, the Court approved an
adoption of two children by a homosexual female couple, stating that, “[t]he family environment presented in [this case is] warm, loving and supportive, [and] well suited for the nurturance of children,” and that “[t]he court is less concerned for the welfare of these adoptive children than for many of the children of heterosexual parents who find themselves before the court.”

2. Parental Alienation

It is not always obvious when a parent’s partner and the child are unable to interact amicably, or when the parent’s partner attempts to interfere with the parent-child relationship of the other parent. Exclusion of a third party is warranted in situations where the third party has exerted repeated efforts to alienate the child from one of the parents. In DiStefano v. Distefano, the Court determined that the Mother’s partner repeatedly attempted to foster a gap between the custodial Father and his children. The Court found that it was not in the best interests of the children to allow visitation in cases where there is significant animosity and dysfunction; therefore, conditioning the visitation on the exclusion of the Mother’s partner was a proper exercise of its discretionary power. In other cases, however, courts have stipulated custody or visitation upon the third party refraining from interfering with the child’s relationship with the other parent, rather than requiring complete exclusion of the third party. Whether or not to exclude a third party depends on the circumstances of each case.

3. Frequent Absences During Visitation

The issue of leaving the child in the care of a third party during visitation has been recognized as potential grounds for conditioning visitation orders. Courts have stated evidence must be presented that the parent has frequently been absent during such visitations, and that it is detrimental to the child to be left in the care of the third party. Courts are more likely to support
the conditioning of visitation if the child is of a particularly young age. The conditioning of visitation under these circumstances has infrequently been argued before the courts.

4. Domestic Violence

A final consideration in determining whether or not to condition a parent’s custodial or visitation rights is the presence of domestic violence within the home. If domestic violence has been properly pled, then “the [c]ourt 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.” Domestic violence can become a determinative factor in a custody or visitation determination. In *Vasile v. Vasile*, the Fourth Department reversed a decision denying a Mother visitation with her child based upon a report of one incident in which the Mother’s boyfriend physically assaulted her and made threatening remarks, despite that the Mother violated a court order prohibiting the boyfriend from returning the child to the Father following visitation. While the Appellate Court found the order excluding the Mother’s boyfriend from having any contact with the child proper, it found insufficient evidence to support denial of visitation to the Mother. The Court indicated, however, evidence that the third party directed any assaultive behavior toward the child would be sufficient grounds to deny the Mother visitation. In the case *In the Matter of Griffen v. Evans*, the Third Department held that, because one of the children was struck by Respondent-Mother’s abusive boyfriend, the Petitioner-Father was awarded sole custody of the parties’ two children. Respondent-Mother was permitted visitation with her two children on the condition that visitation would not occur with her boyfriend present.

Whether or not a court should condition custody or visitation based on the presence of domestic violence is an area of controversy amongst the courts. Courts have provided greater consideration to the adverse impact of exposure of domestic violence on children in recent years.
Courts have assumed several different positions in regards to domestic violence. Some courts do not want to disrupt the parent-child relationship but recognize the need to protect the child from harm, and therefore they condition custody and visitation orders to exclude the abusive third parties. Alternatively, other courts have supported a change in the custodial parent, but have permitted restricted or supervised visitation with the other parent without the abusive party present. Finally, some parents who have allowed their child to be exposed to incidents of domestic violence have been adjudicated as neglectful by the courts, which may severely jeopardize their future parental rights to custody or visitation.44

5. Involvement of Child Protective Services

It has long been established that parents have a fundamental liberty interest in the care and upbringing of their children, and therefore they should not be denied this right absent a compelling state interest.45 Upon a substantiated report of child abuse, maltreatment, or neglect, the state is permitted to “take a child into protective custody to protect him from further abuse or maltreatment when appropriate…”46 While the state must make reasonable efforts “(A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . .” the Court’s considerations of the child’s emotional and physical needs are of paramount concern and will be given substantial weight.47

Courts are in the best position to receive evidence and to make an informed decision regarding the best interests of the child. Thus, the court has the authority to place any necessary conditions upon a parent’s custody or visitation rights to ensure the safety of the child.48 Neglect proceedings brought against a custodial parent who has not shielded the child from incidents of domestic violence have received growing attention from the courts in New York State. While in
some cases courts may opt for conditioning the custody or visitation upon the exclusion of the abusive third parties, in other cases courts have chosen to involve the state. The abused parent risks the temporary or permanent removal of the child if the parent fails to protect the child from emotional or physical harm.49

In New York State, the debate regarding the removal of children who witness domestic violence has received significant attention as a result of the case Nicholson v. Williams.50 The Nicholson case was a class action suit challenging New York City’s Administration for Children’s Services (ACS) policy of removing children from mothers who have been subjected to domestic violence by their partners.51 In December of 2001, the Federal Court Judge issued a preliminary injunction against ACS requiring the implementation of various reforms.52 Later in March of 2002, the injunction was ordered to remain in effect.53 The decision of the Federal Court Judge indicates that a parent’s status solely as a victim of domestic violence is insufficient for a finding of neglect.54 In 2004, the New York Court of Appeals reviewed this decision.55 The Court held that “exposing a child to domestic violence is not presumptively neglectful” and that “[n]ot every child exposed to domestic violence is at risk of impairment.”56 The Court stated that a victim of domestic violence may be charged with neglect “not because she is a victim of domestic violence or because her children witnessed the abuse, but rather because a preponderance of the evidence establishes that the children were actually or imminently harmed by reason of her failure to exercise even minimal care in providing them with proper oversight.”57 The Court suggests this inquiry will differ on a case-by-case basis, and that in determining whether a parent failed to exercise a minimum degree of care, a court should consider “whether she has met the standard of the reasonable and prudent person in similar
circumstances. Although this case provides some guidance, this decision remains controversial, and how this case is interpreted in practice varies amongst courts.

III. Conditioning Modification of Custody or Visitation Order to Exclude Third Parties

A. Custody Modification

“The only absolute in the law governing custody of children is that there are no absolutes.” However, case law indicates that, if a parent petitions to modify a custody order, “priority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded to the first custody awarded in litigation or by voluntary agreement.” Because changes in custody are disruptive to a child, “absent extraordinary circumstances” showing that a child is being adversely affected or harmed, a change in custody will not be granted. The Family Court Act states that “applications to modify judgments and orders of custody may be granted by the family court under this section only upon the showing to the family court that there has been a subsequent change of circumstances and that modification is required.” “Absence of extraordinary circumstances” has been interpreted by courts to mean “absence of countervailing circumstances on consideration of the totality of circumstances,” not that some particular, sudden, or unusual event has occurred since the prior award. The standard ultimately to be applied in modifying remains the best interests of the child when all of the applicable factors are considered, not whether there exists one or more circumstances that can be deemed extraordinary.

In the case McDonald v. McDonald, the non-custodial Father petitioned the court to prohibit the custodial Mother’s boyfriend from staying in her home after the children went to bed. The Third Department held that to meet the “countervailing circumstances” needed to justify modification of custody, evidence must be shown that the children were upset in some
respect by their exposure to their Mother’s boyfriend. The Court stated, “[a] mere relationship between a parent and a third party does not, by itself, warrant such a modification.” Thus, the Court declined to condition the Mother’s custody decree.

In the case DeArakie v. DeArakie, the First Department denied a motion for change in custody, holding that a modification in custody “should not be made except upon a showing that [a parent] is ‘unfit or perhaps less fit’ to continue as custodian, making a change necessary in order to insure the welfare of the children.” The Court further held that for circumstances to warrant a modification of custody, evidence must show the children were adversely affected and suffer emotional or physical harm.

B. Visitation Modification

New York Court’s have repeatedly held that “[a] noncustodial parent should have reasonable rights of visitation, and the denial of those rights to a natural parent is a drastic remedy which should only be invoked when there is substantial evidence that visitation would be detrimental to the child.” Further, the Fourth Department has held that “…a non-custodial parent has a right to visit his child under reasonable conditions which may not be taken from him except under extraordinary circumstances presenting an undue risk of emotional or physical injury to the child.” Thus, courts grant parents supervised visitation whenever possible, and only deny visitation when the harm to the child cannot be prevented in light of the circumstances at that time.

IV. Applicable Custody and Visitation Modification Cases Regarding the Condition to Exclude Third Parties

1. Non-marital Sexual Conduct

In the case Hess v. Pedersen, the Third Department held that “[i]n custody and visitation disputes, the sexual behavior and living arrangements of a parent are relevant if, and to the
extent, it can be shown that such factors may adversely affect the welfare of the children.” In this case the Father was appealing a Family Court order that conditioned visitation with his children upon “there being no unrelated adult males or females in the company of the children during visitation…” The Court, however, could not find any proof in the record of whether the restriction was necessary for the best interests of the children; there was no showing “there was ever any inappropriate behavior in the presence of the children.” The Court, therefore, modified the order and eliminated the condition.

Another Third Department case, Gerow v. Gerow, further demonstrates when a modification of visitation should be granted regarding a parent’s sexual conduct. In Gerow, the Court reviewed an order entered by the Family Court of Chemung County restricting the Mother’s boyfriend from being present during any visitations with the children. The Third Department affirmed the trial court’s decision, stating that “the party seeking modification…was required “to make a sufficient evidentiary showing of a change in circumstances to warrant…[an evidentiary] hearing.” Because the Mother told the Court that she was “capable of unsupervised visitation…in the presence of her boyfriend,” but offered no evidence to support her claims, the Court held that she only provided a “conclusory and unsubstantiated assertion” that she was capable, and therefore the restriction on visitation inter alia was upheld. Evidence must be presented that shows a modification is warranted: in the absence of such evidence showing it is in the best interest of the child, a court will not grant a parent’s request.

2. Domestic Violence

The presence of domestic violence is enough to warrant a modification in custody or visitation, and to exclude a third party from having contact with a child if it is determined to be harmful to the child’s welfare. The presence of domestic violence in the home can also be a
factor in determining neglect if a parent fails to protect the child from harm. “[A] child will be deemed to be neglected if the child’s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care, by failing to, among other things, provide proper supervision or guardianship to ensure that the child is not harmed or at substantial risk of being harmed.”

In the case Van Hoesen v. Van Hoesen, the Third Department chose not to condition the Mother’s custody, but rather to change custody to the Father as a result of domestic violence in the Mother’s home. The Court stated that, “…alteration of an established custody arrangement will be ordered only upon a showing of sufficient change in circumstances reflecting a real need for change in order to insure the continued best interest of the child…” and that, “[s]uch determinations, obviously, are sui generis and involve inquiry into, among other things, each parent’s past performance, stability, fitness, home environment and ability to guide the child’s intellectual and emotional development.” Here, the Court found that the Mother and child “were [both] physically abused over a seven-month period by [the Mother’s] former live-in paramour…” and that, “[the Mother] failed to take any action whatsoever to remove herself and [her child] from this environment or otherwise to protect [him] from harm despite her knowledge of the physical abuse and the resultant emotional side effects he was experiencing.” It was established that the six-year-old child had developed severe emotional and behavioral problems, which were negatively impacting his progress in school. The Court sympathized with the Mother and acknowledged that she cared deeply for her child, but ordered a change in custody to the Father because it would “substantially enhance [the] child’s welfare.”
It is important to note that not any change in circumstances will be sufficient to modify a custody order: the change in circumstances must be in the best interests of the child. In the case Neftleberg v. Neftleberg, a Mother’s petition asking for a modification of the custody agreement was denied despite a change in circumstances, because she failed to demonstrate how the change enhanced the best interests of the child. In this case, the existing custody and visitation order excluded the Mother’s boyfriend from having contact with the child. The Mother married her boyfriend, and then petitioned to allow him to be present during her visitation with the child. The Court held that the Mother choosing to marry her boyfriend, a man who had felony convictions and whose contact with the child was previously determined by the Court to be harmful to the child, did not warrant a change in the visitation order because she failed to show how contact with her new husband would be in the child’s best interests. If the change in circumstances does not promote the child’s welfare, it does not warrant a modification in custody or visitation.

IV. Conclusion

In this paper, we have explored the authority of the courts in the State of New York to condition a custody or visitation decree upon the exclusion of third parties. With the growth of non-traditional and blended families, this has become a significant consideration for many legal professionals. The court assumes a parens patriae role in these proceedings guided by what is in the best interests of the child; however, the court is not empowered to restrict a parent’s custody or visitation absent sufficient evidence indicating it is in the best interest of the child. Sufficient evidence after reviewing the totality of the circumstances requires a showing of actual harm or a substantial likelihood of actual harm to the child. If the parent alleging the harm has supported his or her claims of detriment to the child’s welfare from exposure to the other parent’s practices
or conduct allowing the presence of the third party, then the court is justified in conditioning the decree. Conditioning a parent’s custody or visitation rights to exclude a third party is permissible despite a parent’s right to be free from state interference when it is found to be in the best interests of the child.

Compelling reasons found by the courts for conditioning a custody or visitation order to exclude a third party include: inappropriate exposure to non-marital sexual conduct, inappropriate interference with the parent-child relationship, and the occurrence of domestic violence within the home. Each of these factors in and of themselves are not dispositive as to whether conditions should be imposed upon a parent’s custody and visitation rights. Additional factors such as the child’s age and the home environment often contribute to the judge’s decision in this regard. While judges are to assume a position of neutrality in regard to a parent’s sexual orientation during such a decision-making process, the judges conceivably can be influenced by their own values and backgrounds; however, this is less likely now that same sex couples can adopt children together and same sex couples are permitted to marry in New York due to the Marriage Equality Act.

Issues of domestic violence are becoming more prevalent within custody disputes. In fact, there are millions of children who witness acts of domestic violence perpetrated against a parent. The question faced by the courts is whether this warrants limiting a parent’s custody or visitation. Courts have been conflicted in these particular determinations. Courts have consistently indicated that excluding an abusive third party is a proper use of its discretionary power, yet some courts have also chosen either to shift primary custody from one parent to the other, or to adjudicate the abused parent as neglectful. These positions assumed by the courts often create significant controversy.
In conclusion, courts rely upon the best interests of the child to determine custody and visitation disputes. If allegations are raised concerning the welfare of the child that would warrant conditioning a parent’s custody or visitation, the court is empowered to do so once sufficient evidence has been presented. Courts must review all relevant facts prior to reaching a determination, including whether a parent’s association with a third party imposes a substantial risk of actual harm to the child. If the court determines there is a substantial risk of actual harm, the court is warranted in conditioning the custody or visitation order to exclude the third party.
See New York Domestic Relations Law §240(1)(a) (McKinney’s 2014).


See New York Domestic Relations Law §70(a) (McKinney’s 2014).


See Finlay v. Finlay, 240 N.Y.429 (1925).


See Domestic Relations Law § 70(a) (McKinney’s 2014).


See Agur at 776.


See id.

See id.

See id.

See Guinan at 832.

See id.


See id.

See id.


See id.

See id.

See id.

See DiStefano at 638.


See Gottlieb at 182.

See id.

See id.
See In re Adoption of Caitlin, 163 Misc. 2d 999 (N.Y. Fam. Ct. 1994).
See Distefano at 638.
See id.
See Rosenberg at 663.
See New York Domestic Relations Law § 240 (McKinney’s 2014).
See id.
See id.
See id.
See N.Y. Soc. Serv. Law § 424(9) (McKinney’s 2014).
See id.
See id.
See id.
See Id.
See id.
See id. at 372.
See id. at 371.
See id.
See Family Court Act §652 (McKinney’s 2014).
See id.
See McDonald v. McDonald, 463 N.Y.S.2d 598 (3rd Dep’t. 1983).
See id.
See id. at 599.
See id.
See id.
See id.
See id.
See id.
See id.
See id. at 482.
See id.
See Family Court Act § 1012(f)(i)(B) (McKinney’s 2014).
See id. at 140.
See id.
See id. at 141.
See id. at 140, 141.
See id.
See id.
See id.
See id.