

LEXSEE 2004 NY SLIP OP 51181U

[*1] **C. B., Plaintiff, v. J. U., Defendant.**

302243/2002

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

**2004 NY Slip Op 51181U; 5 Misc. 3d 1004A; 798 N.Y.S.2d 707; 2004 N.Y. Misc.
LEXIS 1742**

September 21, 2004, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

DISPOSITION: The Court entered its orders regarding custody & visitation of the child.

HEADNOTES

[***707] [**1004A] Parent and Child--Custody.

COUNSEL: For Plaintiff: Peter M. Nissman, New York, New York.

For Defendant: Dawn M. Cardi, Dawn M. Cardi & Associates, New York, New York.

JUDGES: Jacqueline W. Silbermann, J.

OPINION BY: Jacqueline W. Silbermann

OPINION

Jacqueline W. Silbermann, J.

This matrimonial action was commenced by Summons with Notice filed by the plaintiff (hereinafter "wife") in or about February, 2002. The defendant (hereinafter "husband") filed an answer and counterclaim. Both parties sought custody of their child, born April, 1999. In September, 2003, this Court commenced a trial on the issues of custody and visitation. The trial extended over 21 days (ending April 21, 2004) with 14 witnesses, including the parties, Dr. K. (as neutral forensic evaluator), a supervised visitation facilitator, the husband's therapist, and three experts.

The wife seeks sole legal and physical custody and an order limiting the husband's parenting time to supervised visitation. The husband seeks joint legal and physical custody or, in the alternative, joint legal custody with spheres of final decision-making and liberal, unsupervised parental access.

The Court has had a full opportunity to consider the evidence presented with respect to the issues in this proceeding, including the testimony offered and the exhibits received. The Court has further had an opportunity to observe the demeanor of the various witnesses called to testify and has made determinations on issues of credibility with respect to these witnesses. The Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The parties were married on May 16, 1996 in a religious ceremony in the Catholic Church in Argentina. A Jewish wedding ceremony was held in the United States in October, 1996. The wife is forty-three (43) years of age, and the husband is forty-four (44) years of age. They have one child, born in April, 1999.

The wife was born and raised in Buenos Aires, Argentina, and is the oldest of three sisters. Her two sisters live in New York and her parents still live in Argentina, although they spend a good deal of time in the United States each year visiting the family. The wife is a devout Catholic and maintains very close ties with her family. At the time of the marriage she was 35 years of age, and a virgin. Until the marriage, the wife lived in Argentina with her parents, where she worked as a part-time kindergarten teacher. After the marriage, the

wife worked from home as an educational [*2] consultant for Scholastic.

The husband was 37 years of age at the time of the marriage. He had been living on his own since college in a variety of states, and was a culturally religious Jew. He had been in other long-term relationships with women, including one serious relationship with E. M., with whom he lived for over a year, and who testified on his behalf at trial.

While the evidence at trial established that the parties had major differences in their cultural upbringing, religions, personalities and temperaments which contributed to the difficulties in their marriage, it is clear that the husband's inappropriate, controlling, and at times abusive behavior toward the wife and the child were the main causes of the ultimate disintegration of the relationship.

The February 3, 2002 Non-Consensual Sex

At the time of commencement of the divorce action, a Temporary Order of Protection was in place in favor of the wife and against the husband as a result of an incident on February 3, 2002, in which the husband engaged in non-consensual, unprotected sex with the wife while she was sleeping. This act of domestic violence, together with other inappropriate acts committed by the husband (discussed *infra*) set the stage for the wife's request for supervised visitation, and solidified her fear that the husband may be a danger to the child.

Although the parties' testimony differed regarding the events of February 3, 2002, the Court finds the wife's testimony to be credible and the husband's testimony to be incredible. The wife testified as follows:

We were in bed and we were about to go to sleep, and [husband's name deleted] started touching my breasts, and I told him to stop, and I told him twice to stop, and he stopped there and I fell asleep. And then I felt - and then I woke up and he was climbing (sic) [climaxing] in me ... He was inside me. And I asked him, "What are you doing?" And he answered to me that we were getting older and that [the child] needed a sibling and that I was not going to control who's having a baby or not, I mean, I was not going to be the only one

to control if we're going to have a baby or not. And I was sitting on the bed, couldn't believe what was going on, and he was asking me "Well, is something wrong? Is something on your mind? And I said "Just this, [name deleted], nothing else than this."

In contrast to the wife's description of the incident, the husband's testimony was incredible in that he contradicted himself and attempted to convince the Court he did not know his wife was asleep when he entered her. In support of this claim, the husband submits he relied on non-verbal "cues" from the wife indicating she was awake and wanted to have unprotected sex.

The husband testified that when he came out of the bathroom on the evening of February 3, 2002, he got clear signals that the wife was awake and wanted to have sexual intercourse. He claimed he stood by the dresser to check if the wife was willing to have sex, and because of the "cues" he got, he decided not to put on his underwear before getting into bed. When this story was tested on cross-examination however, it fell apart. The relevant testimony was as follows:

Q:After the 11 o'clock news ends at 11:30, you went to the bathroom; is that right?

A:Yes.

[*3] Q:The bathroom is through the bedroom?

A:Yes.

Q:The lights were off in the bedroom?

A:Yes.

Q:You had two bodies, one small, one large lying in the bed, in the dark, without moving. Isn't that right?

A:Yes.

Q:For how long, you don't have a clue, do you?

A:I wasn't more than, it wasn't more than the 15 minutes, because usually at the commercial break I'd go to the bathroom, something like that.

Q:Let's talk about specifically that night, February 3rd, 2002. Did you go and brush your teeth in the bathroom after the news was over?

A:Yes.

Q:And, the lights in the bedroom were off; is that correct?

A:Yes.

Q:And the bodies in the bed were not moving; is that correct?

A:Yes.

Q:What clues did wife give you that indicated she was not asleep?

A:When I got into bed?

Q:Before you got into bed, what clues did wife give you that she was not asleep?

A:I didn't check for clues.

It is clear, even from the husband's incredible version of events, that there were no cues to indicate the wife wanted to have sex before the husband got into bed. Moreover, there was no indication the wife was awake; indeed, the husband admitted there was no eye contact between the couple, that they exchanged no words, that the wife did not touch him, and that the wife had been lying quietly in the bed with the lights off for at least fifteen minutes prior to his arrival.

Taken as a whole, the husband's testimony at trial of the events of February 3, 2002 and his relation of the events to Dr. K. overwhelmingly suggest he knew the wife was asleep and intended to have sex with her anyway - in part because of his desire to have another child. Such attitudes and behavior demonstrate the husband's willingness to violate boundaries and his sense of entitlement with women, which may pose risks for the child's safety.

Inappropriate Behavior Regarding The Child

The credible evidence adduced at trial established three specific instances of the husband's inappropriate behavior with the child prior to the parties' separation, to

wit: (1) the husband had an erection while playing with the child; (2) the husband rubbed the child's feet on his genitals; and (3) the husband smelled the child's underwear just after removing it, and sighed with satisfaction.

[*4] Alarminglly, the husband does not contest the occurrence of these events, but merely disputes his reasons for performing the acts, the frequency with which the acts occurred, and/or the timing of the incidents. The Court has resolved the conflicting testimony with respect to these events in favor of the wife, as the husband's versions of the incidents are inconsistent and incredible. Moreover, his attempts to explain the inconsistencies by attributing them to mistakes made by others, [including his own lawyer, Mr. S. (the visitation supervisor), Dr. K. (the neutral forensic evaluator), and his wife] are disingenuous, at best. The wife's testimony, however, was consistent and credible in this regard.

A. The Husband Rubbed The Child's Feet on His Genitals

The wife was consistent in her Affidavits and testimony regarding the incident in January or February of 2002, in which the husband rubbed the child's feet on his genitals. She described the incident as follows:

... we were in bed and I saw [*adjective stricken*] movement under the covers, so I pulled the covers ... and I saw [name deleted] with [the child] - he was rubbing her feet in his genitals and ... I asked him, 'What are you doing?' And he said 'Well, I'm warming [the child's] feet.' I said, 'Why are you - 'you don't warm the feet there.' And he said 'Well, her feet are cold so I'm warming them up, I'm warming them up. What's wrong with that?' And I just grabbed [the child] and took her, you know, to the other side. [The child] was sleeping. And then, you know, I just took her out of him from him ...

Contrary to the wife's testimony, the husband's memory and explanation of this event was vague and ever-changing. In his Affidavit in support of a cross-motion seeking custody, the husband did not indicate he remembered this specific incident, but admitted to warming the child's feet on his thighs and remarking that his wife has taken pleasure in this practice. He stated, "I have warmed her [child's name deleted] cold feet against my thighs or my stomach (in much the same way my wife frequently demands that I warm her own feet), but never against my genitals."

Thereafter, in his interview with Dr. K., the husband again claimed to lack a distinct recollection of the incident stating that he "... may have put them [the child's feet] on his body. I think she was awake. I don't recall explicitly."

At trial, however, the husband's memory of the event improved, and his testimony contradicted his earlier statements. Indeed, he now claimed to remember that the child's feet were placed on his stomach or chest, (and not his thighs or his genitals), and even claimed to know the reason the child's feet were cold on this occasion. He further disingenuously attempted to explain his earlier admissions that he warmed the child's feet on his thighs by blaming his former attorney, J. F., for the contradiction.

Q:Now, [husband's name deleted], did you tell this Court in your March 5, 2002 affidavit that you warmed [the child's] feet on your thighs?

A:No.

Q:Is it your testimony that this sentence means something other than you warmed [the child's] feet on your thighs?

A: It's a poorly constructed sentence. And I did not correct J.F.'s grammar everywhere through the whole thing. I can't reach [the child's] feet with my thighs.

The husband's ever-changing explanations for his behavior, along with his demeanor while testifying, undermine his credibility and result in the Court resolving this factual dispute and others against him.

B. The Husband Had an Erection While Playing With The Child

The wife's statements regarding this incident have been consistent, reasonable and unimpeached. She indicated:

... I was doing the dishes after dinner, and [the child] was playing with [husband's name deleted] in the bedroom, and when I'm done with the dishes I went into the bedroom, [the child] was just leaving the bedroom, crossing the door, and I saw [husband's name deleted] laying in bed, laying in bed with an erection. And I asked him, 'How did you get like that?' And he was like, 'I don't know, I don't know,' and I was like, 'What did you do? or - I couldn't get it. And he said, 'Oh, I don't know, I don't

know, I don't know and he just got into the bathroom without answering.

To the contrary, the husband's description of the incident was not credible. Initially, the husband indicated to his therapist, A. G., that he did not remember the incident, but indicated it "might have happened." The husband further offered A. G. three possible reasons for the erection. First, he said he woke up with it; second he said he needed to go to the bathroom, and third, he offered that "men get erections." In discussing this incident with Dr. K. during the forensic evaluation, the husband claimed he frequently had erections during the day, and asked Dr. K. whether she believed he was a "sick-o". He admitted he had an erection when he and the child were "jumping around."

Despite his prior lack of recollection, the husband's trial testimony demonstrated an amazingly precise memory of the incident. Indeed, at trial he claimed to remember the "whoosh" of the blinds as he looked out the window and saw the flag of the W Hotel, the color and type of pajamas worn by the child, and that it was ten seconds after the child left the room that he had the erection. He indicated the incident "... could not have been in the evening, it was absolutely in the morning," although he testified he did not wake up with an erection. He further testified he did not have an erection when playing with the child, contradicting his earlier statement to Dr. K. Finally, he testified that an urge to urinate was "one of the reasons [he] got an erection" in addition to stretching and contracting his thighs, which gives him an erection within a "second or two" of doing it.

Again, the husband essentially admitted the behavior in question, and then attempted to rationalize or justify it in his own peculiar way. Despite Dr. H.'s [the husband's expert at trial] opinion that men can have non-sexual erections as expressions of love for their children, the Court is troubled by the husband's apparent arousal in response to his young daughter, especially when viewed in the context of the other disturbing incidents described by the wife at trial and detailed herein, along with the husband's varied and bizarre explanation for this occurrence.

C. The Husband Smelled The Child's Underwear

When the child was approximately eighteen months old, her aunt, V. B., witnessed another incident of bizarre behavior by the husband. She testified that after dinner at

the parties' home, the husband was in the bedroom changing the child's clothes, and that she saw the husband "... smelling [the child's] underwear, used underwear and he brought it up and made a sigh like enjoyment or [*5] pleasure." V. B. further testified that the husband was startled when he realized she was observing him.

Again, the husband admitted the incident, but attempted to explain his behavior by passing it off as a joke, indicating "... and I took it, and I went, 'Oh, Oh, Oh,' (phonetic sounds). You know. And that's one time when I sniffed [the child] - one time, when I sniffed [the child's] panties."

Other Abusive Conduct

The experts who testified at trial concurred that domestic violence, whether psychological, emotional, physical or sexual, is a risk factor related to the psychological, emotional, physical or sexual safety of children. Domestic violence, in any form, is a factor that must be considered by the court in making a determination of custody and visitation. DRL § 240(1)(a). In addition to the incidents just described, several other instances of abusive behavior were established at trial, as follows:

Amniocentesis/Abortion: The husband relentlessly attempted to persuade the wife, (a devout Catholic who would not have considered aborting her pregnancy under any circumstances), to undergo an amniocentesis despite her clear and emphatically expressed religious objections.

Indeed, the evidence established the husband's behavior in pursuing the issue of an amniocentesis with his wife during her pregnancy went far beyond what could be considered "routine" marital discussions, and crossed a boundary into that of abusive behavior. The evidence further established that this abusive behavior did not stop until the wife's pregnancy progressed beyond the point where an amniocentesis could be performed. The wife testified that the husband "was insisting every single day" that she have the procedure, and that it became "torture" for her. Her pain concerning this was palpable throughout her testimony. The wife's sister, V.B., testified that the wife looked unhappy and depressed and that when asked what was wrong the wife "started crying and completely broke down and said that [the husband] had convinced her that her baby was going to [have Down's Syndrome]".

The husband's testimony corroborates much of the wife's and V.B.'s testimony and confirms that he failed to change his behavior despite his understanding that his wife was becoming unhappy and depressed, as well as his knowledge that his wife would not have an abortion regardless of the results of the test. Instead of responding to his wife's distress in a caring manner, he persisted in badgering her because he believed she "wasn't really listening" to him, and that she was "irrational" for not discussing the issue. Incredibly, he excused his behavior by claiming the wife didn't give any reasons for her refusal to consider the procedure!

There was credible evidence at trial of other instances of abusive and/or controlling behavior toward the wife and the child, which must be considered in evaluating an appropriate custody and visitation arrangement, to wit:

the husband persistently attempted to photograph the wife naked while pregnant against her wishes; he persistently attempted to photograph the wife's bare breasts while she was breast-feeding the child; he frequently attempted to watch the wife in the bathroom while on the toilet; he grabbed the wife's breasts and buttocks in public against her wishes; [*6] he repeatedly forced the child to perform tricks, holding her from her feet upside down to show her "abs" while she was screaming to be put down; he taunted the child by repeatedly poking the jacket she was wearing, despite her protestations; and he repeatedly forced hugs and kisses on the child despite her protestations. As with the many other incidents which led the wife initially to seek an order of supervised visitation, the husband essentially admits the foregoing behavior, but attempts to place his own favorable "spin" on it.

Forensic Testimony

On February 10, 2003, Dr. K., the Court appointed forensic evaluator, submitted a 55 page report containing her observations, analysis and findings. Dr. K. later submitted an additional 138 pages of interview notes, including a 16 page questionnaire completed by the wife, a 36 page questionnaire completed by the husband, and 22 pages of e-mails sent by the husband to Dr. K. during the course of the evaluation and thereafter.

In her report, Dr. K. recommended that sole physical custody and decision-making responsibility be granted to the wife, and that the husband's visitation be supervised.

She further recommended that the husband enter a treatment program administrated by health providers skilled in the assessment and treatment of sexually abusive individuals designed to address issues of sexual abuse and the husband's tendency to violate physical and psychological boundaries - - particularly those of adult females and children. Dr. K. noted in her report that in conjunction with the aforesaid treatment program, visitation could be expanded and supervised by a babysitter.

Dr. K. noted throughout her testimony that the husband's statements to her, his lengthy responses to her clinical forensic questionnaire and the several e-mails he sent to her, corroborated the disturbing allegations raised by the wife. Dr. K. also noted throughout her forensic report and testimony that her observations of the husband confirmed that he had personality characteristics and behavior consistent with the wife's allegations.

Dr. K. found that the wife was a reliable reporter and that the husband was not, given the "substantial distortion in some of the ways he sees things", and that some of his answers were internally inconsistent. Dr. K.'s observations of the husband during her evaluation were consistent with the court's observation of the husband's conduct and testimony during the trial. While at times the husband's prepared direct examination appeared coherent and logical, through cross-examination it was shown that the husband's testimony was often bizarre, evasive, self serving and incredible.

The experts' opinions relating to custody and visitation were generally consistent to the extent they opined that custody should be granted to the wife. Even the husband's expert, Dr. H., did not recommend that the husband have custody; nor did he indicate that Dr. K.'s recommendations as to custody were wrong - although he clearly believed her recommendations as to the need for supervised visitation did not flow from the investigation she conducted and that her investigation was inadequate to determine whether the husband posed a risk to the child's safety.

Dr. K. and Dr. S. K. (who testified as a rebuttal expert) concurred that all contact between the child and the husband should be supervised in order to ensure the child's safety. Although in her report Dr. K. believed that a "babysitter" could act as the supervisor, she later concluded that visitation must be professionally supervised.

[*7] Dr. S.K. testified that based upon Dr. K.'s report and her review of the relevant trial testimony, strict professional supervision was imperative, in light of the significant risk factors present for sexual, emotional and/or psychological abuse if visitation were unsupervised. A few examples of the risk factors identified are:"... the sexual assault of the mother. The issue of possibility sexual perversion on the part of the father being present, ... then I would be very concerned about sexual assault risk for a child and sexual behavior. ... there are many personality characteristics here that are associated with risk of adult partner abuse, but also risk of abuse towards the child. ... I don't see any record of the treatment that's taking place, that's addressing these allegations..."

"... what's being described, if, in fact, it is felt to be true, is a lack of awareness of the needs of another individual, particularly a child. The need to be - the need for not wanting to be touched, wanting some physical satisfaction. And that's part of what happens, either when there's either sexual abuse or an emotional maltreatment situation that's occurred, where the parent misinterprets the cues of the child, not knowing that the child doesn't want something, and, in fact, feels the child does want it. So, therefor, continues to restrict the child's behavior or even to harm the child because they think it is acceptable. They don't recognize it as being something that either the child is objecting to, which is restricting the child or it may be inappropriate, in terms of a boundary, such as a sexual boundary is not appropriate for a child. So, either way, violating somebody's physical space could be restricting psychologically, could hurt them physically, and could, in fact, be part of a sexual overture towards a child."

"Again, your Honor, it is a risk factor. It is a risk factor for sexual abuse of children. One of the things that happens when - and when someone molests a child - is there's going to be cognitive distortions where often the child is perceived of like an adult, and able to consent, by the perpetrator."

It is significant that the husband's own expert, Dr. H., ultimately reached the same opinion as the court's expert and Dr. S.K. He agreed that supervised visitation was highly recommended in cases where domestic violence

has occurred and even more so when there is evidence of sexual perversions accompanying domestic violence. In response to the inquiry by counsel, Dr. H. testified that if the wife's allegations are found to be true by the Court, supervised visitation would be necessary.

Q. Now, if the court finds that the father is a domestic violence perpetrator and the court finds that he has these sexual perversions, and that he rubbed his daughter's foot on his genitals, is it your testimony that, that is not sufficient to put the child in danger?

MS. C.: Objection.

THE COURT: I'll allow it.

A. It is different. And I would answer differently. That, that could put the child at risk, the way [*8] you phrased that question, yes.

Dr. K. stated that the husband's personality and behavioral patterns were "possessive", "controlling", "obsessive", that his personal qualities are "associated with strongly held sexual stereotypes that featured his presumed self proclaimed male prerogatives", and that as a result he often violated "ordinary psychological and physical boundaries...". Furthermore, Dr. K. stated that "in terms of personality, [the husband had] a tendency to be disrespectful and controlling of the other individual, and that - and to lack insight into how that negatively impacts upon the other person. And this is - and there are aspects, I believe, in his personality that are consistent with what individuals have described as abusive personalities." Dr. K. testified that these terms are characteristic of domestic violence perpetrators. She further concluded that the incident of February 3, 2002 was in and of itself an act of domestic violence.

Dr. H. concurred with Dr. K.'s descriptors of a domestic violence perpetrator, and agreed that, "if the court finds that the allegations of [the wife] relating to the conduct of [the husband] ... was accurate...", the wife was a victim of domestic violence. Dr. H. also acknowledged (as had Dr. K.) that the incident of non-consensual sex alone would be sufficient to find that the wife is a victim of domestic violence.

The experts also acknowledged that the conduct described by the wife and V. B., and admitted in some form by the husband, was some evidence of the existence of sexual perversions. Dr. H. acknowledged that the

husband's alleged desire to watch his wife on the toilet against her wishes on a regular basis could be a sexual perversion, and further admitted that the husband's rubbing of his daughter's feet on his genitals, if true, was "inappropriate", "bizarre", and would make him "concerned about the safety of the child".

In sum, while the Court agrees with Dr. H.'s learned opinion that Dr. K.'s investigation may have been insufficient to determine whether the child was a victim of sexual abuse and to recommend supervised visitation, it is clear to the Court that the husband's behavior poses risks for the child's safety which cannot be ignored.

CONCLUSIONS OF LAW

It is well settled that in making custody determinations, the Court is to give paramount concern to the best interests of the child, although other factors are relevant in making that determination. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982); *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171, 436 N.E.2d 1260, 451 N.Y.S.2d 658 (1982). Some factors which have been held to be of particular importance include the quality of the home environment and the parental guidance the custodial parent provides for the child; the financial status and the ability of each parent to provide for the child; the ability of each parent to provide for the child's emotional and intellectual development; the individual needs of each child and his or her wishes, although the child's wishes are not determinative; and a presumption it is in the children's best interest to keep siblings together. *Eschbach*, at 172-173.

Additionally, pursuant to DRL § 240(1)(a), the Court is required to consider the effect of domestic violence, whether direct or indirect, in determining custody and visitation. *See Finkbeiner v. Finkbeiner*, 270 A.D.2d 417, 705 N.Y.S.2d 268 (2d Dept. 2000). In considering the existence of domestic violence the Court is not limited to acts of physical abuse but must also consider psychological and emotional abuse. *See J.D. v. N.D.*, 170 Misc. 2d 877, 652 N.Y.S.2d 468, (Fam. Ct. Westchester Co. 1996) (evidence of psychological and other forms of abuse inflicted by the father upon the mother [*9] showed that it would not be in the child's best interests to place him in the father's care and custody).

The Court of Appeals held in the seminal case of *Braiman v. Braiman*, 44 N.Y.2d 584, 378 N.E.2d 1019,

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407 N.Y.S.2d 449 (1978), that absent an agreement between the parties and the showing of an ability to make joint decisions on matters relative to the care and welfare of the children, joint custody will not be imposed by the courts. The state's foremost concern is the best interests of the child, not the emotional needs of a parent, or any other concern that may run counter to a child's welfare. *See Beyond the Best Interests of the Child* (The Free Press 1973); *Before the Best Interests of the Child* (The Free Press 1979); and *In the Best Interests of the Child* (The Free Press 1986), by Alber J. Solnit, Anna Freud and Joseph Goldstein.

The existence of domestic violence is a factor that must be considered by the court with respect of decision making determinations, and mitigates against an award of either joint custody, "zones of responsibility" or any other form of shared custody. *Samala v. Samala*, 309 A.D.2d 798, 765 N.Y.S.2d 523 (2d Dept. 2003).

In the case at bar, it is overwhelmingly clear that the wife must have sole custody of the child. The husband has demonstrated a lack of insight and alarmingly poor judgment in his relationships with the wife and the child and has violated their physical and psychological boundaries on numerous occasions. Moreover, the husband's controlling personality and reluctance to address through treatment the problems which led to the need for supervised visitation, lead this Court to the inescapable conclusion that the child's best interests are served by granting sole custody to the wife, who has demonstrated a consistent ability to lovingly care and provide for the child and make decisions with the child's best interests of paramount concern.

The best interests of the child standard is also dispositive of visitation issues. *See, supra, Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982).

While the development of a safe and healthy relationship with both parents is in the best interests of the child, the Court must exercise caution where the exposure of the child to one of his/her parents presents a risk of physical, psychological, emotional, sexual or developmental abuse or harm. When those risks are present, visitation must be restricted, supervised, or even denied when it is necessary to protect the best interests of the child. *See Hotze v. Hotze*, 57 A.D.2d 85, 394 N.Y.S.2d 753 (4th Dept. 1977); *Karen K. v. Kenneth Z.*, 239 A.D.2d 159, 657 N.Y.S.2d 40 (1st Dept. 1977).

The court may subject a parent to reasonable conditions on his/her visitation that protect the child. While supervised visitation is a restriction on a parent, it is not considered a "drastic remedy" as is the denial of visitation; nor is it considered a deprivation of meaningful access. *See Matter of Laura A.K. v. Timothy M.*, 204 A.D.2d 325, 611 N.Y.S.2d 284, (2d Dept. 1994); *Lightbourne v. Lightbourne*, 179 A.D.2d 562, 578 N.Y.S.2d 578 (1st Dept. 1992).

As with custody, DRL § 240(1)(a), requires that the court consider evidence of domestic violence when determining what visitation will be in the best interests of the child. *See A.U.G. v. J.G.*, 300 A.D.2d 205, 750 N.Y.S.2d 857 (1st Dept. 2002) (supervised visitation and a stay away order was appropriate where the husband had raped the wife in their home near where the children slept).

While it is not permissible to compel therapy as a condition to visitation, it is appropriate to compel therapy as a prerequisite to the expansion of visitation when mental health treatment would be beneficial or necessary to protect the safety of the child. *See Nacson v. Nacson*, 166 A.D.2d 510, 560 N.Y.S.2d 792 (2d Dept. 1990); *Schneider v. Schneider*, 127 A.D.2d 491, 511 N.Y.S.2d 847 (1st Dept. 1987); *Landau v. Landau*, 214 A.D.2d 541, [*10] 625 N.Y.S.2d 239 (2nd Dept. 1995).

Upon consideration of the foregoing, it is abundantly clear that the supervised visitation currently in place must continue. It further is clear that the supervision should be performed by a professional able to recognize risks to the child and assist the husband in obtaining insight to his behavior and modifying his behavior so that supervision may one day not be necessary. For this reason therapeutic supervision, rather than just a babysitter, is preferable.

Accordingly, it is hereby

ORDERED that the wife shall have sole legal and physical custody of the child. The husband shall be entitled to such visitation with the child as hereinafter set forth. As part of her role as custodial parent, the wife is directed to keep the husband apprized of all major decisions regarding the child's health, education, and welfare, and to consult him regarding such decisions as she deems appropriate; and it is further

ORDERED that the husband shall be entitled to access to the child's doctors, teachers, medical records,

school notices and report cards. If such information is not provided directly to the husband by the school or physician, the wife shall provide such information to the husband in a timely fashion; and it is further

ORDERED that the husband's parenting time with the child shall be supervised pending further order of this Court. At the husband's election, he may continue supervision with Comprehensive Family Services, or he may elect another supervisor, *so long as the replacement supervisor is a mandated reporter of child abuse* (e.g., a social worker, a teacher, or a babysitter who has come to court and accepted an order of this court mandating a cessation of the visit on certain impermissible conduct and thereafter reporting same); and it is further

ORDERED that the cost of such supervised visitation shall be borne by the husband; and it is further

ORDERED that the husband may have supervised parenting time on alternating weekends as follows: Saturdays from 10:00 a.m. to 7:00 p.m. and Sundays from 10:00 a.m. to 5:00 p.m. commencing Saturday, September 25, 2004. The husband also shall be entitled to a mid-week dinner with the child each week from 5:00 p.m. to 7:30 p.m. Additionally, the husband may have daily telephone contact with the child, so long as the calls are placed at reasonable times and are of a reasonable duration; and it is further

ORDERED that the parties may agree to expand the supervised parenting time awarded herein at their option, including an overnight provided it is appropriately supervised; and it is further

ORDERED that the child shall spend each Mother's Day with the wife and each Father's Day with the husband, regardless of which parent is scheduled to have parenting time that weekend; and it is further

ORDERED that the parents shall elect either to share the child's non-school birthday time equally, or alternate the child's birthday each year. In such case, the wife shall have the child for her birthday in even numbered years and the husband shall have the child for her birthday in odd numbered years; and it is further

ORDERED that the child shall spend the wife's birthday with the wife and the husband's birthday with him, unless the wife is traveling with the child outside the tri-state area; and it is further

[*11] **ORDERED** that the child shall spend each Easter Sunday, Christmas Eve and Christmas Day with the wife; and it is further

ORDERED that the child shall spend the Jewish holidays with the husband, as follows:

Passover: The child shall spend the first two nights with the husband;

Rosh Hashanah: The child shall spend the first two nights with the husband, unless one night is the wife's birthday which shall take precedence over one night of Rosh Hashanah;

Chanukah: The child shall spend two nights with the husband, including but not limited to the first weekend night and an additional night to the husband; if during the week it shall be from after school until 10:00 p.m.;

Purim: The child shall be with the husband from after school until 8:00 p.m.

Succoth: The child shall be with the husband from after school until 8:00 p.m.;

Yom Kippur: The child shall be with the husband from 10:00 a.m. until 8:00 p.m., unless it falls on a day when there is no school the next day and then it can be until 9:00 p.m.; and it is further

ORDERED that the wife shall spend Thanksgiving day with the child in even numbered years and the husband shall spend Thanksgiving day with the child in odd numbered years; and it is further

ORDERED that the court shall entertain an application to modify this supervised visitation order on or after February 1, 2005. While the Court is not ordering the husband to enter a treatment program of the kind recommended by Dr. K., it is the recommendation of the Court that the husband seek additional treatment to address the issues raised herein so that the parenting time with the child can be safely changed.