

Child Custody and the Status Quo Ante

Toby Kleinman and Daniel Pollack | February 10, 2023



While both parents have an equal right to parent their children, married or otherwise partnered parents make decisions that work for their lives and the lives of their children while they are together. Sometimes, one parent becomes a stay-at-home parent. Sometimes, both parents return

to work after the baby is born. And sometimes, a parent delays working at all until a child reaches a certain age. What is always true is that when they are together, couples decide which parent will be a primary parent in terms of taking the children to the doctor, to social or athletic events, to assist with homework, etc. Barring an actual decision, patterns emerge where one parent is the actual primary parent for any number of reasons, including demands of a job, the parents' preferences, and many other reasons. When parents separate, absent contraindications, the roles of the parents should continue as much as possible. Why? For the stability of the children, and because the way the parents have allotted their respective roles—absent domestic violence—indicates that the status quo ante should be presumed to be in their child's best interests.

Children's lives are disrupted when parents separate. This is true regardless of the reason for the separation. Clearly, it is in the children's best interests to give them as much stability as possible during that stressful time over which they have little or no control or input.

However, state statutes vary as to exactly what happens when parents separate and don't agree about their children's lives. It seems practical that what should happen is to maintain the status quo ante. That is, the parents should, to the extent possible, continue in the same parental roles as before the separation.

If a matter comes before a court, discerning the status quo ante seems a first critical step. If it is so obvious, why has the status quo ante been trumped by other best interest considerations such as equal time to the parents rather than the status quo for the children? If it is presumed that what the parents were doing when they were together was what the parents believed was in the children's best interests, why would a court

consider modifying that after separation, absent extraordinary circumstances?

Leaving things as they are, with minor changes to accommodate two homes, would allow the court to figure out a way to address the children's' best interests, recognizing that in most circumstances the status quo ante yields the most stability.

Where parents separate due to a domestic violence incident, the incident itself causes disruption of the children, whether or not they were witnesses. Risk assessments by domestic violence trained assessors should be done regarding contact with perpetrator. It is well known that children are victims where they have lived with or witnessed domestic abuse. It is also well known that children suffer harm as a result, and that avoiding a dangerous person is a natural and important response to their fear. They may resist seeing the violent parent and may refuse to go with the violent parent. Batterers often use a defense to children's reactions of resisting or refusing to go. They may blame the non-violent parent and accuse the victim of being the reason. The violent parent may put a label on the non-violent parent, calling them an "alienator." The court should be wary.

Courts should never set aside the known facts of domestic violence, because domestic violence is about controlling behavior. Where one parent seeks to modify the status quo ante with accusations of alienation and there is no extraordinary reason provided for the change, the court should take great care to adhere to scientific standards for reliability and science—no different than in criminal court.

The assertion of alienation is often used as a defense to the issue of domestic violence. The courts should not lose sight of domestic violence as a critical factor and should refuse to hear attacks absent appropriate science. Indeed, denigration by a parent has a rebound effect onto the parent who denigrates. Courts need to look closely and disregard mere labels. They should focus instead on how to maintain a child's stability, how the child is doing in their current circumstances, and should never be permitted to overlook both the impact of domestic violence and its long-term effects of living in a home where there was domestic violence, even where the child was not a witness.

The disruption and trauma to children caught in the throes of a separation that involve domestic violence is truly troubling. It often involves the appointment of evaluators who make recommendations to the court that will help determine issues of custody and visitation. While parents have a constitutionally protected right to parent, they do not have a right to injure their children. The training of the evaluators regarding the impact of domestic violence is crucial to the proper designation of time sharing between parents, but the emphasis should also recognize the children are citizens entitled to rights. Making assumptions that 50/50-time sharing is best for children may seem natural for parents, but it may be extremely disruptive to children. This is true especially where there is a domestic violence or a particularized status quo before separation. The evaluator and the court should look carefully at the potential impact of making changes to the status quo ante. The focus should always be on the children.

Toby Kleinman is a New Jersey attorney and partner at Adler & Kleinman. **Daniel Pollack**, MSW, JD is a professor at Yeshiva University's School of Social Work in New York. They can be reached at toby@adlerkleinman.com and dpollack@yu.edu, respectively. This column is written for general informational purposes only and should not be construed as New York-specific legal advice.

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