

Should Willful Nonpayment of Child Support Impact Custody?

Deepti Shenoy, senior counsel at Aronson Mayefsky & Sloan offers her thoughts on how courts should consider taking a parent's willful failure to contribute to the child's expenses into account in determining custody and access.

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To what extent should a parent's willful refusal to contribute financially to the support of her/his child, *despite having the means*, bear upon a child custody determination?

Firmly embedded within the canon of family law practice (at least for New York practitioners) is the following general principle: child custody determinations and financial considerations operate on different tracks.

Thus, for instance, a mother who has washed her hands of the responsibility of contributing to the cost of her child's medical expenses, or a father who has dumped the responsibility of paying his child's school tuition on the child's mother, in both cases despite *having the means to pay*, ostensibly stands on an equal footing with the other parent in a child custody determination.

In making a child custody determination, a court is required to consider the "best interests" of the child. While the parties' respective "financial status" is a factor to be considered in this determination, this refers more particularly to the parties' respective financial stability and ability to maintain a roof over the child's head and to provide for the child's day-to-day needs. *See, e.g., Rosenstock v. Rosenstock*, 2016 N.Y. Misc. LEXIS 4427, (Sup. Ct. Kings Cty. 2016) (noting that while financial considerations should not determine custody, in the matter at hand, the father's relative financial stability and ability to provide for the children without contribution from the mother was a factor in favor of an award of custody to him, particularly where evidence of the mother's income and/or assets, if any, were lacking from the record); *Matter of Menhennett v. Bixby*, 132 A.D.3d 1177 (3d Dept. 2015) (finding sufficient support for the Family Court's grant of an award of custody in favor of the father where, among other factors, the father was employed and relatively financially stable, and was in the process of saving money to purchase a home, while the mother was unemployed and reliant on public assistance, child support and financial support from her family); *Farnham v. Farnham*, 252 A.D.2d 675 (3d Dept. 1998) (affirming an award of custody to the father where, *inter alia*, he had a stable job and was prudent in his financial affairs, while the mother impulsively quit her job, depleted her retirement to spend frivolously on herself and her paramour, and was financially unstable).

Absent a finding that a parent is egregiously financially unstable, a factor that generally goes hand in hand with mental health issues, emotional instability and/or lack of involvement in the child's life, rarely does a court take into consideration a parent's *willful* failure to pay child support or to contribute to a child's expenses in awarding custody. *See, e.g., Berrouet v. Greaves*, 35 A.D.3d 460 (2d Dept. 2006) (taking into consideration the father's relative financial stability, as evidenced by his payment of the mother's rent for her, in awarding him custody, alongside factors that included her apparently raging delusions that the father was poisoning the child via an invisible powder associated with Santeria and Voodoo).

More often, courts find non-payment of support to be an insufficient basis to determine a parent's right to custody and access. *See, e.g., Engrassia v. Di Lullo*, 89 A.D.2d 957 (2d Dept. 1982) (father's

persistent refusal to contribute to child support was an insufficient basis to deny him visitation with the children).

There are a few notable exceptions to this line of cases. One is *Matter of Alonso v. Perdue*, 163 A.D.3d 658 (2d Dept. 2018), wherein the court upheld the Family Court's decision to award the mother sole custody based upon the Family Court's finding, among other things, that:

[T]he mother provided stability for the child and had been the parent who attended to the child's educational and medical needs, while the father had failed to make consistent child support payments and appeared unaware of the full financial commitment and resources needed to care for the child on a daily basis.

Another approach is that taken by Justice Jeffrey Sunshine, who, in awarding the mother sole legal custody in *Faina P. v. Alexander S.*, rejected the father's contention that the parties' financial conflict was irrelevant to the custody issues in the trial and instead found as follows:

*[T]his court must consider the defendant's behavior in using his greater financial resources as a tool of coercion against plaintiff in this litigation and what that choice reflects about his ability and/or willingness to share joint custody with the plaintiff. The court must consider whether a parent who chooses to wield financial coercion to get their way is focused more on winning a dispute with the other parent or in the best interest of the child, especially where that parent does so while also refusing to comply with the terms of the parenting agreement. See *Faina P. v. Alexander S.*, 2024 NYLJ LEXIS 3519 (Sup. Ct. Kings Cty., 2024).*

In other states, financial considerations play a much more direct and significant role in custody determinations—in some cases, a parent's history of contributing to the child's expenses is an express factor to be considered in making decisions as to custody and access.

Consider, for instance, the court's custody decision in *In Re. Marriage of Day*, in which the Supreme Court of Iowa noted as follows regarding a father's application for physical custody of the children:

[The father's] home and farm were listed for sale up to two weeks before the hearing. Although the evidence and his own testimony reflect this farm was very valuable and that

he was pursuing his profession, he was thousands of dollars delinquent in his child support and apparently paid toward it only intermittently. He was cited into court four times for nonpayment. He never applied for a modification to reduce his support payments. We have characterized the requirement to pay child support as a "basic obligation" of a parent. Larry's neglect of his basic obligation to these children does not persuade us to trust him with more responsibility. In Re. Marriage of Day, 314 N.W.2d 416 (Sup. Ct. of Iowa, 1982) (emphasis added).

Likewise, consider *Dubicki v. Dubicki*, in which the Connecticut Supreme Court found as follows:

The trial court expressly found that the plaintiff was not entitled to custody because he had failed to support [the child] for at least four years and because he was unfit due to his irresponsibility, drinking and physical abuse of the defendant. These findings are reasonable and support an award of custody to the defendant based upon the best interests of the child... Dubicki v. Dubicki, 186 Conn. 709 (Sup. Ct. of Connecticut, 1982) (emphasis added).

Going further still in its evaluation of financial considerations alongside the other factors relevant to a custody dispute, the North Dakota Supreme Court noted in *Hogue v. Hogue*:

The trial court found both parties to be fit parents, and viewed them as equal under most factors [relating to the best interests of the child], or found factors to be inapplicable to these parties, with the exception of factors c and f. The trial court found factor c favored Kelly. Section 14-09-06.2(1)(c), N.D.C.C., states: "The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care . . ." In its findings, the trial court considered Robert's failure to have contact with and pay support for his son by a previous marriage as a negative factor against him.... Robert's relationship and child support obligation to Blake is relevant to his disposition to provide for Robbi. Hogue v. Hogue, 1998 ND 26 (N.D. 1998) (emphasis added).

In fact, in *Hogue*, the court found that the father's failure to support his child *from a previous relationship* bore upon his *moral fitness* to be a custodial parent. *Id.*

It bears considering whether, and to what extent, a parent's *willful* failure to support the child should be considered in connection with the child's best interests in New York custody

determinations. Children are expensive, and, particularly in New York, where the cost of living is astronomical and climbing every year, parents should be incentivized to contribute to their children's expenses.

Furthermore, a parent's decision, *despite having the means*, to withhold support for her/his child surely bears some relevance to the parent's level of commitment to the child. More troublingly, as thoughtfully noted by Justice Sunshine in *Faina P.*, the failure to provide support can sometimes be a tool of financial coercion used to keep coparents trapped in a cycle of control. *Faina P., supra.* When utilized in this manner, the withholding of support can perpetuate cycles of financial abuse.

In the 1982 matter of *Labow v. Labow*, the First Department denied a petition for a change of custody brought by the father, astutely noting not only the effect of the father's baseless failure to pay child support to the mother on the mother's ability to pay her expenses and support the child but the impact of the father's withholding of support on the child's own wishes and thought processes. The court observed as follows:

We are also aware of the apparent wish of the young son Steven that custody be awarded to his father, and that the child's view is entitled to serious consideration, although it is not determinative... Just as we have noted that no consideration was given by the Trial Judge or the two psychiatrists or the guardian to defendant's apparently successful technique of bringing about a change in custody by failing to comply with court orders, they also failed to consider the effect of this technique on the child's thinking. It hardly seems to be in the best interests of a child for him to learn the efficacy of such a technique and to observe it practiced by his father and approved by the court. The manipulation of the child by such techniques is manifest. In essence, what is involved here is a prosperous father living in his own apartment with a woman whom he says he intends to marry, and a mother left with three young children who, in addition to raising them alone for several years, has had to resort continuously, in and out of the courts and by all means available, to obtain alimony and child support... It is obviously easier for the father to be more relaxed and flexible in his dealings with his son than the mother can be. Labow v. Labow, 86 A.D.2d 336 (1st Dept. 1982).

There is already precedent in New York for evaluating financial considerations alongside custodial determinations in certain types of cases. In cases where a parent is seeking to relocate with the children, the other parent's failure to support the children can be a meaningful and potentially determinative factor in whether to grant the petition to relocate. "When the relocating custodial parent has provided consistent care for the child, and has received little financial assistance from

the noncustodial parent, that factor may persuade a court that relocation is in the child's best interests when all other factors are also positive." 3 New York Civil Practice: Matrimonial Actions §40.04.

Similarly, in matters in which a third party seeks custody of a child, one factor to be considered is the parent(s)' failure to financially support the child. *See, e.g., Matter of Jerrina P. (June H.—Shondell N.P.)*, 126 A.D.3d 980 (2d Dept. 2015) ("Here, the Family Court properly determined that the nonparent petitioners sustained their burden of demonstrating extraordinary circumstances based upon, *inter alia*...the mother's failure to contribute to the child's financial support...").

In circumstances that are largely the flip side of the scenario presented herein, when a child willfully and baselessly refuses to visit a parent, the child can be deemed constructively emancipated, and the parent's child support obligation can be terminated. *See., e.g., Jurgielewicz v. Johnston*, 114 A.D.3d 945 (2d Dept. 2014) (finding the child to be constructively emancipated based upon the child's failure to maintain a relationship with the father despite the father's efforts). Is it time to take financial factors more expressly into consideration in the reverse scenario, where the parent's baseless refusal to contribute financially bears upon a custody determination?

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