

PERSPECTIVE

The Exclusive Occupancy Paradox

BY PETER J. GALASSO

After being inundated with the nuances of the Child Support Standards Act and the complexities of the "merger" issue, revisiting the near forgotten question of "exclusive occupancy" will likely be a relief to the less pedantic.

Exclusive occupancy of the marital residence is generally awarded to a custodial parent and routinely lasts until the youngest child either reaches majority or is sooner emancipated. Courts and psychologists reason that the emotional displacement which occurs when one parent vacates that marital residence would be compounded by compelling its sale upon divorce. Seldom does a litigant even attack the psychological underpinnings of such an automatic determination, not withstanding that it may lock up the equity interest in the marital residence for nearly a generation. However, given the evolution of the law in "removal" cases, as well as the disintegration of that sense of community which formerly was denominated as one's neighborhood, the staple order awarding exclusive occupancy of the marital residence is not only outmoded, but is a veritable paradox.

Although most judges would disagree, a "long term" award of exclusive occupancy is rarely the product of deep thought. Judges habitually announce that their sole consideration is "the best interests of the child" and thereafter entertain argument on any front which might impact on a child's emotional and social development. This amorphous, de facto approach to custody battles typifies the court's inability to erect discernible guidelines for deciding such far reaching issues. Consequently, it is no surprise that most judges simply press the "till majority" button when deciding the term of exclusive occupancy.

Despite good intentions, a court's order granting exclusive occupancy is far more fleeting than it is final. Significantly, as long as the parties agree in writing, they are free to alter the terms of the judgement of divorce with virtual impunity. Before the ink on the divorce papers dries, the custodial spouse may decide to move two blocks down the road. If the non-custodial spouse comments, which would be expected given the immediate distribution of the parties' equity in the marital residence, the court's prior reasoned balancing of the parties' competing interests will be but a memory.

Conversely, when the parties cannot agree on a fundamental change in the judgement of divorce, which is most prevalent in cases where the custodial parent seeks to remove a minor child to another state, the courts are pulled back into the parties "struggle" to make a decision in the best interests of the children. When parties litigate over a removal issue, they seem to forget that the court just a short time before decided to award a lengthy period of exclusive occupancy of the marital residence to the custodial spouse. Inexplicably, the court disregards the reasons for its prior determination in favor of exclusive occupancy when addressing the issue of removal. Most removal cases focus on the extent that the non-custodial parent's visitation will be frustrated and the "exceptional circumstances" which support the custodial parent's move.

The ideological incompatibility of awarding exclusive occupancy and thereafter granting removal becomes far more pronounced in

"commuter removal" cases. In such situations, a party is free to move within a specified radius of the marital residence, so long as the move is not a malicious attempt to reduce the non-custodial parents visitation. Given such flexibility, it is anomalous for courts to insist on denying a non-custodial parent's right to their interest in the marital residence for possibly two decades, when the custodial parent is given such free rein and mobility subsequent to the entry of a judgment of divorce.

This myopia extends beyond the trial courts. The Appellate Division has exercised the same reflex when it has been called upon to consider the issue of exclusive occupancy. In cases such as *Richter and LuVera v. LuVera*, where the parties stipulation of settlement or judgment of divorce was silent with respect to the time period of exclusive occupancy, the Second Department has barely hesitated in holding that exclusive occupancy should continue until the youngest child reaches majority.

An award of exclusive occupancy for a lengthy period is tantamount to a finding that children are not emotionally resilient, which is a fact continually disproven. Were the courts to award exclusive occupancy for a maximum period of but two years, a psychologist would be hard-pressed to develop anything but a contrived theory why such a decision would be detrimental to the children, especially in view of the judicial permissiveness in "commuter removal" cases. One must remember that in two year's time, the custodial parent may remarry, have another child, change jobs, send the child away to military school or decide to move to another neighborhood. In view of the myriad real-life possibilities, it is blind allegiance to the past that prevents the courts from necessary change.

As most practitioners will admit, custody battles are many times litigated to exact financial compromise. Since most marriages produce but one single asset, that being the equity in their marital residence, if the courts abandoned their predisposition toward awarding long-term exclusive occupancy, many custody battles would be avoided. Moreover, if a child can overcome his parents' divorce and endure the frequently vitriolic and even violent arguments between them, it is certainly incongruent to argue that children cannot sustain themselves after a move two years hence to another residence.

Significantly, the economic benefits to granting exclusive occupancy for a minimal period are enormous. The parties will free up funds necessary to extinguish joint or oppressive debt. The non-custodial parent may be able to reinvest his or her funds in a new residence, which will hopefully represent both a new beginning for that parent and a more desirable environment for the child to visit. More importantly, the children may be spared a costly and lengthy fight in court. Accordingly, to more properly mete out justice in matrimonial actions, the various myths supporting exclusive occupancy must be dispelled.

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