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UNDERSTANDING CHILD CUSTODY'S KEY COMPONENTS

CHILD CUSTODY

Child custody is a legal term used when a couple has children together. Under the law, the parents have joint guardianship and equal parental rights.

These rights can change, however, when the parents separate or divorce. If the parents cannot or will not work out an equitable custody arrangement, then the court will address custody issues.

A parent has the presumed right to visitation with their child, in the absence of certain circumstances, such as proof of physical or emotional abuse by that parent or of mental instability, which would cause a court to either order supervised visitation or none at all.

CHAPTER 1

THE BEST INTERESTS OF THE CHILD

When parents separate, the child or children will typically live primarily with one parent. To determine which home the child lives in the majority of the time, the court will decide which location serves the best interests of the child. In other words, the court looks to provide the best way to ensure stability in the child's life. There are a number of factors that go into this decision:

- A. The child's wishes or preferences provided that he or she is mature enough to make such preferences.
- B. The child's relationship with his/her parents, siblings, and other family members.
- C. The child's ability to adjust to his/her community, home, and school.
- D. The child's needs, such as educational and medical insurance, and the ability of the parents to provide those needs.
- E. The parents' willingness to encourage a continuing relationship between the child and the other parent.
- F. The parents' wishes or preferences as to custody.

- G. The parents' geographic proximity as it affects future availability.
- H. The parents' ability to cooperate and make joint decisions on childrearing.
- I. The mental or physical health of the parties involved in the proceedings.
- J. Any history of domestic violence, child abuse, negligence, or substance abuse.

CHAPTER 2

TYPES OF CUSTODY

Whichever parent is granted primary custody, i.e., the custodial parent, will make decisions regarding the child's school and health care. His or her religious upbringing, if an issue, may also be left to the custodial parent. There are different types of custody which can affect the decisions pertaining to the child.

A. TEMPORARY CUSTODY

One parent is granted temporary custody while the divorce or separation proceeding continues and until a final order is granted. The non-custodial parent may have supervision rights, or he or she may have supervised visitation in which another adult must be present during the visitation. Restricted visitation in any arrangement can be ordered if a parent has possibly abused the child or if the parent suffers from emotional problems the court can also deny any visitation under these circumstances.

B. CUSTODY TO THIRD PARTY

In some cases, a third party such as grandparents or a relative may seek custody if it is in the child's best interests and if both parents have certain mental or legal difficulties that might pose a risk to the child.

C. SPLIT CUSTODY

If more than one child is involved, the court could separate the siblings and award split custody, as per each child's best interests. Generally, though, siblings are not separated.

D. JOINT MANAGING OR JOINT PHYSICAL CUSTODY

The court may decide that a child will live with one parent for the purpose of attending school, in which case the court will impose a visitation schedule for the other parent, who will also have to pay child Maintenance. There is a presumption that the noncustodial parent will have visitation rights, such as three weekends a month or every-other Thursday evening. Alternate possession, or who has custody for holidays and summers on alternating years.

This can also be called "joint physical custody," even though one parent has more parenting time than the other. The parent who has less parenting time may have to pay Maintenance, depending on the parties' circumstances, including the amount of parenting time of each, the parties' income, the child's expenses or other needs, and whether the parents have other children.

E. JOINT LEGAL CUSTODY

Joint legal custody does not mean that the parents have joint physical custody; it only means that both parents share the right to make decisions affecting the child's education, health, and welfare. These decisions cannot affect the physical custody arrangements.

F. SOLE PHYSICAL CUSTODY

In this situation, the noncustodial parent has only limited parenting time and may be subject to supervised time or a certain visitation schedule. The child will spend the majority of his or her time with the custodial parent.

G. MAINTAINANCE PAYMENTS

Generally, the noncustodial parent must pay child Maintenance to the custodial parent if he or she is employed or has the current ability to earn income. The courts determine child Maintenance payments based upon statutory formulas. Some courts, though, will impose whatever amount the court deems appropriate, given the noncustodial parent's income and number of children, the combined income of the parents, and any additional needs, such as for special needs children or recreational activities.

A court can reduce or increase the amount of maintenance ordered if there is a substantial change in circumstances, such as the loss of a job, increased medical expenses or income, or if it is in the child's best interests.

H. WHAT IS JOINT PHYSICAL CUSTODY?

One of the most common inquiries from parents that are going through a divorce involves the different types of custody, namely, what joint physical custody is. Admittedly, custody arrangements can be a confusing topic, particularly when you're navigating through an already challenging and complicated life change. For the purposes of clarifying some of this confusion, let's take a moment to go over the differences between joint legal and joint physical custody, as well as some of the many ways choosing a joint physical custody arrangement can help both you and your children.

I. WHAT DOES JOINT PHYSICAL CUSTODY MEAN?

In simplest of terms, joint physical custody is an arrangement in which both parents share equal rights in terms of time and contact with their children. In other words, the children's physical place of residence is shared between both parents. For instance, the children may reside with their mother for one full week, and their father the next full week, or they may split the week to provide both parents with relatively equal parenting time. It's important to note that this arrangement typically only works when both parents

live close to one another, otherwise it may simply be too stressful for the children.

J. DIFFERENCES

Many couples confuse joint physical custody with joint legal custody. The main difference between the two is that legal custody governs who gets to make decisions for the children, such as healthcare and education, and who is allowed to move the children out of state. Parents who are given joint legal custody share these rights and unless there is a really good reason to state otherwise, joint legal custody is the default position for children and divorce. Joint physical custody is similar in that both parents share equal rights; however, physical custody governs only where the children will stay. It's possible to share joint legal custody but not joint physical custody. In the end, it really depends on the situation and the family dynamics.

K. BENEFITS OF JOINT PHYSICAL CUSTODY

I am in favor of joint physical custody arrangements, but only when both parents are able to work together and have their children's best interest at heart. Unfortunately, sometimes parents battle for control of their child and use joint physical custody as a way to "get their fair share" of the kids or (and I quote) "to make sure they live a normal life at least half the time!" There are a lot of benefits to these types of arrangements, such as:

L. STRONGER RELATIONSHIPS

When children feel equally at home in the residence of both their mother and their father, they are able to develop strong, healthy relationships with both parents.

M. ELIMINATES THE CONFLICT OF LOYALTY

Children who only spend limited time with one parent often feel torn about where their loyalties lie. In joint physical custody

arrangements, this conflict and tension is eliminated because parenting time is equal.

N. EASIER TRANSITION

When one parent moves out of the marital home, it can be a traumatic experience for the children. With a joint physical custody plan, even though both parents no longer reside under the same roof, their children often find the transition easier.

O. SHARED RESPONSIBILITY

Being a single parent is never easy. Joint physical custody arrangements make it easier on both parents because they each share equal responsibility when it comes to caring for and raising their children.

Better Cooperation Parents often benefit from joint physical custody arrangements because they are forced to work together on a regular basis for the sake of their children. This allows for better cooperation and collaborative parenting. It also benefits the children, who get to witness their parents interacting with one another in a mature, conflict-free manner.

CHAPTER 3

HOW MEDIATION CAN HELP

Developing an effective parenting plan through mediation can help both parties determine which type of custody arrangement will work best for them. Whenever possible, an arrangement that allows the children to spend as much time as possible with both parents is always the best scenario. Mediation can help both parties to work together and come up with a plan that works for everyone involved and suits the unique needs of their family. When child custody is determined through mediation, both parties are more comfortable with the outcome, which ultimately benefits the children in the long run.

CHAPTER 4

VISITATION

Seeing and spending time with your children is a major part of a child's life, as well as an important part of child rearing. It is also a right of constitutional dimension. A schedule is created either by agreement of the parties or court order after a trial. That schedule allocates the time the children are to spend with each parent, including allocation of holidays, as well as over-night timesharing during the week and on week-ends. Failure to permit this timesharing could subject you to the contempt powers of the court. It could also form the grounds for modification of visitation in the future. Regularly failing to exercise time with your children could expose you to a claim for a modification of child Maintenance based upon increased expenses due to not exercising your time.

These issues can be quite contentious and emotional. Mental health professionals are sometimes involved. They can be asked to perform an evaluation of one or both of the parents to determine their parental capacity. Sometimes therapy may be ordered. This gives rise to the issue of privilege and whether or not the therapist should be permitted to testify in court becomes necessary. These issues are quite complex and you should ensure that you hire an expert family lawyer to assist you.

COMMON VISITATION SCHEDULES FOR CHILDREN

If you plan to get visitation of your children, you may be wondering how often you will see them. The answer varies depending on the circumstances, and you and the custodial parent should come to an agreement with the help of your lawyers. However, getting an idea of some common visitation arrangements may help you determine a good schedule.

One of the most common arrangements for visitation is every other weekend. This means the custodial parent gets the kids during the weekdays and every other weekend so that you see them on alternating weekends. This is especially good if you work

traditional hours at a job so that you have weekends off to spend with the children. If this is not the case, you should consider other options so you get to make the most of your time during visitation.

Another option is getting the kids for many holidays. Most parents who take this route also see their children at times other than holidays, but this is often ideal for those who get most holidays off from work. If you cannot make a regular schedule during which you see your children, perhaps due to work, you can at least arrange to see them on the days you know you will have off. Then you can also likely see them as your schedule permits.

Some parents decide to share their children throughout the week, especially when weekends do not work well. This means that if you have two days off in the middle of the week, you might opt to get visitation those days. This way, you are not working the entire time you are supposed to be seeing your children, so you can get some quality time with them. You just need to figure out days and times that work well for the custodial parent, too, since he or she will likely have to either drop the children off or pick them up.

For some busy parents, weekdays do not work well since they have work, while the children have school. If this is the case, you should remember to be respectful of both the custodial parents work schedule and the kids' school schedule, which means you, should not keep the kids up late. You may also have to only see them in the day after school since they will likely need to return home at night. Of course, if the custodial parent agrees, you may be able to have them spend the night at your home as long as you drop them off at school each morning.

CHAPTER 5

CHILD CUSTODY BASICS - RIGHTS, RESIDENCY AND RELATIONSHIPS

"Child custody" is a legal term that is often used by family courts to describe the rights and responsibilities of divorced parents and their minor children, the residency or placement of the children

and the relationship and/or amount of contact the children have with each parent. When divorced parents are unable to agree on such issues, the family courts are often left with the difficult task of determining the best custodial arrangement for the children and parenting plan for the parents. The more parents understand what is involved in child custody determinations, the more informed they will be in making decisions regarding their children after a divorce.

A. RIGHTS AND RESPONSIBILITIES OF THE PARENTS

The rights and responsibilities of each parent to his or her minor children include decisions regarding the raising and general welfare of the children on issues such as the children's education, medical care and religion. Such rights and responsibilities are commonly referred to as "legal custody" of the children.

B. RESIDENCY OR PLACEMENT OF THE CHILDREN

The residency or placement of children refers to where the children will live and spend the majority of their time. Oftentimes, a child will live with one parent more than the other parent, and the parent that the child lives with the most will typically be responsible for the day-to-day care of the child. In some cases, the child will live equally with both parents, close to equally with both parents, or live a significant amount of time with each parent and the parents will share in the responsibilities and day-to-day care of the child. Residency and day-to-day care comprise what is commonly known as "physical custody" of the children.

CHAPTER 6

RELATIONSHIP AND/OR AMOUNT OF CONTACT THE CHILDREN HAVE WITH EACH PARENT

In the case where the child resides or lives primarily with one parent, the time spent with the other parent is often referred to as "visitation." The parent that the child lives with more is often

referred to as the "custodial parent" and the parent with visitation is referred to as the "noncustodial parent." In such cases, the noncustodial parent will typically have a visitation schedule that details his or her contact with the children. The visitation schedule is sometimes referred to as a "parenting arrangement."

CHAPTER 7

INTERFERENCE WITH VISITATION WHAT IS INTERFERENCE WITH VISITATION?

After a bitter divorce, visitation disputes can linger for years if not decades. I have seen many people ruin their lives by engaging in mental warfare with their ex-spouse over visitation disputes. In many cases, ex-wives use visitation as a bargaining chip to force their ex-husband to pay his child Maintenance. Moreover, in many cases ex-wives try to frustrate visitation so that she can essentially shut out the ex-husband. In many cases, stepfathers take over the parental responsibilities after a divorce. Unfortunately, many ex-wives frustrate visitation with the biological father if they remarry, and if the stepfather is caring and a good financial provider for the children.

Interference with visitation can take many forms. It can be attempts to prevent visits. It can be "poisoning" the child with negative talk about the other parent. It also includes the prevention of communication between the parent and the non-custodial parent. Letters, phone calls and gifts can be kept from the child. It can also be attempts to make visitation difficult by scheduling appointment or activities during the expected time of the visit.

CHAPTER 8

WHAT CAN I DO IF I EXPERIENCE INTERFERENCE WITH MY VISITATION RIGHTS?

The courts have many remedies to address interference. These can include a make-up visit(s) for those missed, increased visitation

time and fines. Some courts will find the custodial parent in contempt of the court-ordered visitation schedule. In extreme cases, the courts may remove the children from the custodial parent and place them with the other.

In my experience the best strategy to avoid repeated interference with visitation is to require that all of the pickup and drop off of the children occur at the local police station. The parties will be forced to act more civil to each other if they have to conduct their "business" at the police station. Moreover, if one party fails to appear, then a police incident report can be prepared to document any violations of any court orders.

CHAPTER 9

I NEVER GET TO HAVE VISITATION(S) WITH MY CHILDREN. DO I STILL HAVE TO PAY CHILD MAINTAINANCE?

The answer to this question is an unequivocal "Yes." Visitation and child Maintenance are two separate and distinct issues. The custodial parent has a duty to allow a non-custodial parent visitation with the children, and the non-custodial parent has the duty to pay child Maintenance. If there is interference with your visitation, then you must file a motion in the family court to enforce your visitation rights.

A non-custodial parent can file a motion to have the child Maintenances placed in an escrow account until any visitation disputes are resolved. In many cases, the best method to convince an embittered ex-wife to permit visitation is to exert financial pressure on her. It may be advisable to file a motion and request that the court order that the court treasury to hold all of the child Maintenance payments in escrow until any visitation dispute(s) are resolved. If the judge is open minded, then he may carefully consider this request.

CHAPTER 10

CAN INTERFERENCE WITH VISITATION AMOUNT TO A
SUBSTANTIAL CHANGE OF CIRCUMSTANCES TO
WARRANT A CHANGE OF CUSTODY?

Interference by one parent in the relationship of a child and the other parent is almost never in the child's best interests. Most courts and experts agree that except in unusual cases it is most important for a child to have a strong relationship with both parents. Thus, courts will typically conclude that an award of custody to the parent who is most likely to foster as relationship between the child and the other parent is in the child's best interests. For this reason, if a custodial parent has demonstrated in the past a pattern of interference with the relationship between the child and the non-custodial parent, unless other facts dictate a difference holding, a court will frequently conclude that a substantial change in circumstances justifying a change of custody has occurred.

The most common form of interference with parental rights which is remedied by courts occurs when custodial parents consistently refuse to turn children over to the non-custodial parent for a court-ordered visitation. The fact that the courts frequently order changes of custody changes of custody in these circumstances is perfectly understandable, since a court-ordered visitation is often the non-custodial parent's only connections to his or her children. If this visitation is frustrated, the child's best interests are clearly injured because the child will be completely deprived of a relationship with the non-custodial parent.

Courts frequently conclude that where the custodial attempts to show the other parent in a negative light, a substantial change in circumstance has occurred which justifies a change of custody. Experts generally agree that when a custodial parent speaks negatively about the non-custodial parent in presence of the child, a custodial parent causes great damage to the emotional and mental health of the child.

CHAPTER 11

WHAT LEGAL CLAUSES SHOULD I INSERT INTO THE DIVORCE JUDGMENT TO PROTECT MY VISITATION RIGHTS?

In order to prevent a child's relationship with the non-custodial parent from deteriorating, certain provisions should be standard in every divorce judgment. First, every divorce judgment should require each person with a right to custody or visitation to foster the relationship between the child and other persons who have a right to custody or visitation. Second, every divorce judgment should state that persons who have custodial or visitation rights should not speak ill of another person who has custodial or visitation rights. Third, there should be restrictions on a custodial parent's right to relocate without informing the court or the non-custodial parent.

These three provisions will not guarantee that no problems with custody or visitation will occur. If the above provisions are inserted into a divorce judgment, then a violation of a specific provision could lead to a contempt violation. While not a panacea, the above three provisions may give the non-custodial parent the extra edge which he or she may need in any post-judgment custody dispute. Furthermore, since the provisions encourage a strong relationship between both parent the child, such provisions are generally in the child's best interest.

CHAPTER 12

WHAT ARE SOME PRACTICAL TIPS TO ENFORCE MY VISITATION RIGHTS?

I always advise my client to keep a calendar. Have witnesses when trying to pick up a child. Call police as a civil standby and obtain incident reports from them later. Always make sure that all parties are well informed as to the time and place of the pick up or

exchange. If you can do this in writing, so much the better, it will prove a record if needed later. Keep and organize all written correspondence with the other parent. Keep all this together with your journal. If after doing all of the above, the custodial parent still denies your visitation, then file a contempt motion against her.

CHAPTER 13

PRACTICAL TIPS ON PARENTAL CONDUCT DURING AND FOLLOWING DIVORCE

- Put your children's welfare first. Never use your children as a weapon against your spouse.
- Be sure your children have ample time with the other parent. They need it.
- Don't introduce your children to your new romantic partner until the children have adjusted to your separation and your new relationship is stable.
- Don't bring your children to court or to your lawyer's office.
- Keep to the schedule. Give the other parent and the children as much notice as you can when you will not be able to keep to the schedule.
- Be considerate. Be flexible. You may both need to adjust the schedule from time to time.
- Giving of yourself is more important than giving material things. Your children need your consistent love and attention.
- Do not use your children as spies to report to you about the other parent.
- Do not use the children as couriers to deliver messages, money or information.
- Try to agree on decisions about the children, especially matters of discipline, so that one parent is not undermining the other parent's efforts.
- Avoid arguments or confrontations while dropping off or picking up the children and at other times when your children are present.

- Don't listen in on your children's phone calls with the other parent.
- Maintain your composure. Try to keep a sense of humor. Remember that your children's behavior is affected by your attitude and conduct.
- Assure your children they are not to blame for the breakup, and are not being rejected or abandoned by either parent.
- Don't criticize the other parent in front of your children. Your children need to respect both parents.

CHAPTER 14

UNDERSTANDING CHILD CUSTODY'S KEY

COMPONENTS

In any divorce, custody will be one of the most difficult subjects to resolve. Child custody in itself is a complex matter, rife with legal nuances and potentially volatile emotions. Part of a divorce attorney's job in representing a client is to help that client fully understand the different factors that may apply and issues that should be considered. Giving clear definitions of all custody and divorce-related terms and providing an outline of the process and its components can help the client gain such an understanding of the matter to know what to expect and what to do and therefore have the chance to reach a swifter and more advantageous case result.

There are a number of terms that should be understood when approaching a custody dispute. Many parents have heard these in passing or have had friends, family members and "professionals" provide their opinions and "facts" on custody-related matters. Expelling preconceived notions to find the truth can therefore be a somewhat difficult undertaking.

A good way to approach custody is by dividing it into its two key components. The first is physical custody, or where the child will live. The second is decision making, which refers to who will make important decisions about the child's upbringing, medical care and similar issues. This is also sometimes referred to as legal custody.

In the event of a divorce, the traditional arrangement is for primary physical custody to be awarded to one parent. This means that a child who is still in school will spend most days and nights living at the home of the parent with primary custody, usually with weekends spent at the non-custodial parent's house. The specific arrangement may vary, with the child spending alternate weekends with the non-custodial parent or perhaps having weeknight dinners with the non-custodial parent once a week. The child may spend approximately 22 days out of the month with the custodial parent and the remainder with the non-custodial parent. This arrangement, though it may seem archaic to some and unfair to most parents, is preferred by more traditional Judges who see it as a way to keep the child in a stable environment. Consistency is viewed as a benefit to the child, who will attend school during the week and return home on weeknights to the custodial parent's care. Because custody disputes are decided on a case-by-case basis, there is the possibility that a Judge will award allow the non-custodial parent more time with the child or even propose a 50/50 split, which in itself can cause some problems.

Attempting to determine physical custody is a delicate matter, and one that some judges will say is best decided by parents rather than by a stranger, no matter how qualified and experienced he or she may be as a family Judge. Parents have the right and freedom to decide on their own custody schedule based on their unique needs, preferences and concerns. Some variations of the traditional custody arrangement discussed above may include a child spending alternate weeks at each parent's house, splitting weeks or working out other arrangements. These custody agreements would then be ratified by a Judge so they would be legally enforceable.

When the matter of legal custody or decision making is approached, there are two primary courses it may take: sole custody and joint custody. This may seem simple enough at first glance, but there are a number of other factors to consider. But first to define sole and joint custody in terms of decision-making authority. Sole custody may be defined as the right to make any

and all decisions about a child's upbringing, without having to consult the other parent or get the other parent's approval. Joint custody may be defined as an arrangement wherein parents share decision-making authority. These are the two primary arrangements of legal custody, but there is a third arrangement where parents may share decision-making authority with one parent having final say over the other.

A more modern arrangement is to divide legal custody into different areas, such as medical decisions, educational decisions or extra-curricular decisions. When parents have certain areas that they feel more strongly about than others, this arrangement may provide a valuable solution. Parents may have joint legal custody, but one parent may have the final say in a certain area, such as medical decisions, and the other parent may have final say in another area, such as educational decisions.