

## Child Custody

No aspect of any family action is more important or emotionally-charged than a custody dispute. The custody process can be prolonged and expensive, and often includes reports and testimony from mental health experts, the parties and other witnesses. A custody issue might involve anything from modifying a parenting time/visitation schedule to compelling the return of a child from out-of-state. Unfortunately, it may also involve abuse, neglect, violence or sexual assault. The Court must determine what custodial arrangement and decision making are in the best interest of a child or children.

There are two main aspects of custody: legal custody and physical/residential custody. Parties typically have joint legal custody, unless one parent is unfit due to extreme circumstances. Physical/residential custody can also be joint, whereby the child spends an equal amount of time with each parent. More routinely, physical/residential custody will be shared so that the child lives primarily with one parent and spends time with the other parent according to a fixed schedule. It is critical for parents to set aside their personal differences in order to effectively co-parent children and advance their best interests. Of course, this is easier said than done.

As experienced family law attorneys, we are well-versed in the emotional turmoil that clients suffer during a custody dispute. We understand that these types of issues involve much more than zealous advocacy and good lawyering. Our clients rely on us to sympathetically explore every avenue available to protect their custody rights and their children's best interests. Our work may include retaining a psychological expert to conduct a best interests evaluation, retaining a parenting coordinator to help clients co-parent with the child's other parent, or litigating in Court.

### Definition of Legal Custody

Legal custody refers to decision-making for the child(ren) as to major issues related to health, education and welfare. For example, major decisions include the school a child attends, medical procedures, religious upbringing of a child, or change of a child's name. In New Jersey, a Court's decision whether to award joint legal custody "centers on the ability of parents to put aside their differences, agree, communicate and cooperate in matters relating to the health, safety, education and welfare of the child notwithstanding animosity or acrimony the parties may harbor towards each other." *Nufrio v. Nufrio* 341 N.J. Super. 548 (App. Div. 2001). Although joint legal custody is normally granted, sole legal custody is appropriate in some cases.

### Definition of Physical Custody

Physical custody means the parents share parenting time and are responsible during that time for "routine" day-to-day decisions for the children. The arrangement may vary in accordance with the needs of the parties and the children. If both parties have equal or substantially equal time with a child, they would share joint physical custody. The Parent of Primary Residence (PPR) has physical custody of a child for more than 51% of the time, whereas the other parent is deemed the Parent of Alternate Residence (PAR).

### The Process for Determining Custody

Prior to a final hearing, a party can apply to the Court for more or less parenting time. Often the Court directs the parties to Court-ordered mediation or private mediation. Prior to trial, the Court will allow discovery to include the exchange of written questions, such as interrogatories, document production, and testimony of parties and witnesses prior to the trial (depositions). Either party may appeal a final decision of a Court. If a child custody dispute cannot be amicably resolved, the matter will be decided by a judge or, if the parties

agree, an arbitrator, normally an experienced child custody lawyer or retired judge who serves in the capacity of a judge and is paid by the parties.

## **How Courts Determine Child Custody**

The paramount consideration in child custody cases is to determine which party will foster the best interests of the child. This standard has been described as one that protects the “safety, happiness, physical, mental and moral welfare of the child.” *Fantony v. Fantony*, 21 N.J. 525, 536 (1956). Pursuant to New Jersey Statute, N.J.S.A. 9:2-4, the Court will consider the following factors when making a custody award:

- The parents’ ability to agree, communicate and cooperate in matters relating to the child.
- The parents’ willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse.
- The interaction and relationship of the child with its parents and siblings.
- The history of domestic violence, if any.
- The safety of the child and the safety of either parent from physical abuse by the other parent.
- The preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision.
- The needs of the child.
- The stability of the home environment offered.
- The quality and continuity of the child’s education.
- The fitness of the parents.
- The geographical proximity of the parents’ homes.
- The extent and quality of the time spent with the child prior to or subsequent to the separation.
- The parents’ employment responsibilities.
- The age and number of the children.

## **Typical Protocol of Forensic Experts**

The forensic custody expert will typically meet first separately with each parent and each child and then both parents together and children together with each parent. The expert will also interview collateral sources such as school teachers, family, friends, witnesses to significant episodes and previous treating therapists of a party, provided that a consent is given to waive the doctor/patient privilege. If consent is not given by a party to waive the privilege, the Court will decide whether the privilege shall be nevertheless waived.

If a psychologist is doing the evaluation, psychological testing will also be administered to the parties. A typical test is an MMPI (Minnesota Multiphasic Personality Inventory). The MMPI has several scales that measure different psychological conditions, including depression, hysteria, and paranoia. Psychologists must follow certain professional guidelines and procedures mandated by their profession. Very often each party has retained his or her own mental health expert to render an opinion. However, the Court may require its own expert or the parties may agree on a joint expert with the right of either party to retain their own expert. If a joint or Court expert renders an adverse report about a litigant, the Court may not allow that party to retain his or her own expert if it will delay the trial.

## **A Typical Parenting Time Schedule**

Each parenting time schedule will be tailored to the needs of the parents and child(ren). Typically, the starting point for a parenting plan for a Parent of Alternate Residence is alternating weekends as well as one or two nights during the week for dinner and alternate holidays. In recent years, it is more common for the Parent of Alternate Residence to have Sunday overnights on the alternate weekend or one overnight during the week. When determining a parenting plan that is best for you and your child(ren), it is also important to consider the unique needs of each child and how each parent meets those needs. If a child has special needs, or is very

young or a parent is irresponsible or incapable of handling a child, a typical arrangement may not be in the best interest of a child.

### **Tax Consequences**

The Parent of Primary Residence may claim the child as a dependent on his or her Federal and State tax returns except if the parties have agreed to another arrangement. A parent may file a Head of Household tax return if he or she has physical custody for more than 50% of the overnights.

### **Modification of Custody**

After child custody is determined by a judge or by agreement between the parties, it may be modified by filing a motion with the Court based on changed circumstances to increase or decrease parenting time or change the primary custodian. Examples of a substantial change in circumstances include: a child is being exposed to an unhealthy environment (drugs, alcohol, or abuse); the child is doing poorly in school academically or acting out by violent or destructive behavior; or the child has expressed a desire to live with the other parent. If you are the primary custodial parent and want to move with your child to another state or country, you need permission of the child's non-custodial parent or a Court order before you move.

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