
Parenting & Best Interests

Child Custody Considerations

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The Details

Types of Custody

Legal & Physical or Residential Custody

The Progressive® Lawyer

By Curtis J. Romanowski, Esq.

Legal Custody

Legal Custody of the children is commonly viewed as the parent or *parents* – in the case of joint custody – with whom the decision-making authority rests.

It is generally agreed that when both parents are able to jointly communicate and solve problems concerning the children's health, education and welfare, or are likely to develop that ability following the distress of litigation and the passage of a little time – the so-called *Beck Standard* – it is in the children's best interests that both parents remain equally active in decisions that go beyond the "day-to-day." This is called "Joint Legal Custody." If the parents are unlikely to develop the facility for joint decision-making, one parent should be assigned "Sole Legal Custody."

There is no authority favoring Joint Legal Custody over Sole Legal Custody in New Jersey. There have been various movements afoot to create certain presumptions, all of which have failed to date.

Some Judges favor Joint Legal Custody, and some see it as a valuable settlement tool short of trial. Other Judges see the concept as “not what it’s cracked up to be.”

In practical terms, here is the real difference:

Sole Legal Custody

When one parent has Sole Legal Custody, that parent is under no obligation, unless specified elsewhere in the Judgment, Consent Order or Matrimonial Settlement Agreement, to discuss unusual or atypical decisions with the other parent prior to acting on them. If the other parent approaches the Sole Legal Custodial Parent with a request concerning the children, the Sole Custodial Parent is not required to enter into a discussion or to approve the request. Unless provided elsewhere, the other parent has no recourse but to make application to the Court.

Please bear in mind, however, that the rights of a Sole Custodial Parent can be modified. In fact, the status itself can be modified or even reversed over time. Plainly stated, the parent with Sole Legal Custody can jeopardize this status by “being an ass,” pure and simple. The custody status is a privilege that may be revoked.

Parents must never lose track of the guidance provided in **N.J.S.A. 9:2-4**, and must also bear in mind certain “informal” factors that significantly influence custody determinations.

The most impactful of these factors is the Courts’ interest in identifying the parent who is most likely to put personal differences aside to unselfishly do right by the children.

The parent who demonstrates sincere action-based commitment to rise above existing contentions in order to affect amicable resolution of conflicts has an advantage, both within and without the court system.

A second important criterion is which parent is better suited to encourage and foster an appropriate relationship between the child and the other parent.

Joint Legal Custody

When parents share Joint Legal Custody, they must confer prior to making any non-typical decisions affecting the health, education and welfare of the children.

Example: Teenager Bridget is with mom, and asks mom if she can get a tattoo. If mom sees no problem, she must nonetheless confer with dad prior to acting on that request.

Example: Grade-schooler Mikey is with dad and asks if he can have pizza for supper. Provided there are no dietary restrictions, no conference is required.

Now, let’s suppose that mom wants Bridget to have braces put on her teeth and dad thinks it’s too early for orthodontia. Mom has to confer with dad prior to taking any action. If dad agrees following the conference, Bridget gets her braces. If dad still contends that he’s against the idea for now, mom has a few options:

- n She can have the orthodontia started anyway. Dad might let it slide, or he may take mom to court. The Judge may or may not deal harshly with mom. However, mom runs the risk of losing her Joint Legal Custody status by not following the rules.
- n She can ask dad if he's willing to have a talk with the orthodontist she's chosen.
- n She can invite dad to get a second opinion from another orthodontist.
- n She can have a nasty argument with dad in front of Bridget.
- n She can arrange a nice three-way discussion with dad with Bridget present to add her input, if appropriate given her age and maturity.
- n She can invite dad to mediate the issue.
- n She can hold off a taking any action, prior to applying to the Court for permission to go ahead with the orthodontic treatment.

It is amazing, as a general rule, how much trouble, expense and anxiety can be avoided in the context of divorce and family law by avoiding these behaviors:

- 1) Greed
- 2) Wrath
- 3) Envy
- 4) Pride
- 5) Sloth
- 6) Being unreasonable
- 7) Being an ass

Physical or Residential Custody

When parents are separated or about to be separated, one of the first custody issues to arise is that of physical custody. Unfortunately, in some high-conflict cases, threats concerning access to the children are among the first to be made.

Speaking of threats, here is a short yet popular list, which many divorcing adults believe they have invented:

- n You'll never see these kids again!
- n You'll never see a dime from me!
- n If I get ordered to pay child support, I'll just quit my job!
- n I'll leave with the kids and you'll never hear from any of us again!
- n Your kids will grow up knowing what a ***** their father/mother is/was!

- n Your kids already hate you!
- n Your kids already know what a philandering, alcoholic, no-account loser you are!
- n The kids want to stay with me!
- n The kids want to live with me and my girl/boyfriend, who they love more than you!
- n My girl/boyfriend is already a better mother/father than you've ever been!
- n My kids will never see your mother and father again!
- n You are an unfit father/mother! Just wait until the Judge hears what you've done!
- n Your son told me the other day that he wishes you were dead!
- n I'm going to move to California with the kids and my boy/girlfriend, and you won't be able to do a ***** thing to stop us!
- n And by the way... I'm getting the house!

In actuality, the law begins with the presumption that each parent has a non-gender-biased equal right to the physical custody of the children. Except in the occasional rare instance where one parent is simply incapable of parenting and supervising a child, access to both parents will be strongly favored.

The concept of the so-called "Tender Years Doctrine" has still not been overturned in New Jersey – although both the American Psychological Association and the New Jersey Psychological Association have abandoned the concept many years ago. Not only is it politically incorrect, it is woefully unsubstantiated in the clinical and empirical data.

Unfortunately, many Judges still adhere to the belief that the woman's place is in the home with the children. Parties possessing basic parenting skills will typically have co-parenting time with their children on alternating weekends, alternating holidays and large blocks of time during summer vacations from school and other school closings. This pattern or parenting plan is what had previously been termed "Traditional Visitation" in our case law,

The term "visitation" has been replaced with "co-parenting" in New Jersey, presumably because most judges and mental health professionals suggest that time spent with children is not "visitation" but is actual "parenting" time. Naturally, this also assumes that the kids are not being "parked" with baby-sitters or video games the whole time they are visiting with mom or dad. Some have suggested that "visitation" has been traded in for "parenting time" simply because the term sounds less offensive to the visiting parent.

That being said, contested physical/residential custody disputes typically center on those overnights where children are expected to attend school the following morning; *i.e.* Sunday through Thursday evenings.

When one considers the parents' work schedules, the children's extra-curricular activities and the children's own social commitments or preferences, a contested residential custody dispute may only involve a very few hours a few evenings per week. Parents often need reality checks in this regard, as the stakes are often far less than perceived.

Here's some food for thought:

Parents of very young children involved in custody disputes – perhaps because the children are still at the cute and cuddly stage, perhaps because the parents haven't had much experience as parents or as adults for that matter, and in many cases where the grandparents have also taken an active role in telling their sons or daughters what to do – often damage, hurt and alienate their children while running themselves into emotional and financial ruin.

In the context of my own experience in the field, I can't begin to recount for the reader the number of young parents of pre-schoolers who have contributed to behavioral problems for their otherwise healthy and happy children, while mortgaging their futures in so doing.

Ironically, years after the conclusion of the bitter disputes that culminated in custody decisions made by the Court, many parents who were awarded a disproportionate amount of parenting time or given Sole Residential Custody have second thoughts.

- n The child is more work, now that he or she is older.
- n The child is more work, now that mom or dad is older.
- n New coupling relationships come about.
- n New kids from new relationships arrive on the scene.
- n Jobs change.
- n People move.

As a result, fences are often mended, with the visiting parent being offered as much time as he or she could possibly desire with little Arnold or Maria.

Lesson Learned: Look to the future!

Some notes on the Judicial Interview of Children

There is no set age at which a child can testify in Court, as long as the child is mature, can report facts, express feelings and beliefs, and answer questions, The Court – either on its own volition or at the request of a party – may conduct an interview with the child, which is not open to the public.

At the Judicial Interview, the child will be asked various questions and given an opportunity to be heard. Particularly in the case of children under the age of 14, prudent Judges are usually extremely careful not to ask children questions such as, "So who would you rather live with, Mommy or Daddy?" No child should be saddled with even the impression of having that sort of responsibility.

The court, upon request, must interview children seven years of age or older if asked to by either parent. Discretion is advised and exercised by the Court in cases where children are under seven. The Court will either transcribe the interview or record the interview.

Children may tell Mommy that they want to live with her, and may also tell Daddy that they want to live with him. Often, however, the children tell the Judge that they want both parents and wished they were not going through a divorce.

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Curtis J. Romanowski, Esq. Romanowski Law Offices www.divorcenewjersey.com