Family Law: Child Support and Child Custody

If you are in the process of divorcing or separating from your child’s other parent or are a single parent, you may be wondering about your legal rights. This handout provides general information to anyone who would like to learn more about their rights to child custody, child support, or visitation.

What are the different types of child custody?
There are two main types of custody: physical and legal custody. Physical custody means that a parent has the right to have the child physically present, under his or her supervision. This differs from legal custody because a parent with legal custody of a child has the right to make decisions that affect a child’s welfare, such as healthcare decisions or decisions about where the child will attend school. Both types of custody can be either joint custody or sole custody, meaning that either one or both parents will hold physical and/or legal custody of their child. For example, a judge can award joint physical custody to both parents, but may award legal custody to only one parent. A judge can order any type of custody agreement based on the best interest of the child.

With a joint physical custody arrangement, both parents will share time with the child, and if there are disputes, the court may assign visitation rights. If a judge awards joint legal custody, both parents will have the authority to make decisions about the welfare of their child. With a sole physical custody arrangement, one parent will hold physical custody of their child. If a judge awards sole legal custody, only one parent will hold the authority to make decisions about their child’s welfare. In an effort to reduce future administrative costs, courts award sole legal custody more often. Although courts favor joint custody, physical or legal, these arrangements can be difficult if the parents involved have trouble cooperating with each other.

Sharing physical custody of children may help reduce stress on each parent, but there are disadvantages of shared custody. It could be difficult taking children back and forth between homes, and children may be negatively affected if there is non-cooperation between the parents. There is no easy outcome in a divorce or custody arrangement, but the court will consider the best interest of the child.

Can someone other than the child’s parents get custody?
Typically, courts favor children staying with their biological parents in custody disputes. If the court believes that granting custody of children to their biological parents is not in the child’s best interests because a parent is no longer fit to assume that responsibility (or if the biological parents do not want custody), then the courts will look to third party custody.

Third party custody is typically granted to those who can show that they have “legal standing.” This means that the courts will usually not grant third party custody to someone who does not have a strong enough connection to the children or family. For example: a distant cousin who has not spoken to the family in years who applies to take third party custody of the children will likely...
not be able to show that they have a strong enough connection to be awarded custody. However, a grandparent or family friend who has been taking care of the children for a number of years may be able to show that they have sufficient legal standing to be considered for third party custody.

**What does a judge consider when deciding child custody arrangements?**
Generally, a judge will consider what is in the “best interest” of the child. This best interest of the child is determined by a number of factors, including state law, the child's individual circumstances, the parent’s ability to effectively parent, and the child’s safety. Some other factors that the judge will consider include federal or state protections, the child’s ability to maintain bonds with siblings and close family members, and the child’s own wishes.

**Can a cancer diagnosis affect how a court decides a child custody arrangement?**
The court will consider what is in the best interests of a child when determining child custody. Unfortunately, if the judge believes that a parent’s cancer diagnosis or ongoing treatments will not allow that parent to properly care for his or her children, then a parent’s cancer diagnosis and treatments may be taken into consideration when determining child custody. However, cancer or health status is only one factor in a larger list of factors the judge will consider.

**What is a guardian?**
A guardian is a person appointed legal authority to make decisions that can affect a child, the same way a parent with legal and physical custody would. A guardian’s legal authority may include the ability to decide where the child will live, how to spend child support or government benefits, as well as other things that affect the child’s welfare.

If a parent has not arranged for a legal guardian for his or her child, and the child’s parent becomes unable to take responsibility for the child, a judge may set up a guardianship if believe that a child needs someone other than the parent(s) to take the responsibility for their care.

**What does it mean to appoint a joint-guardian?**
If a parent is dealing with a terminal illness and wants to make sure their child has security in the future, the ill parent might want to appoint a joint-guardian. A joint-guardian can be appointed by a parent to share custody with the parent while they are still alive, so that the joint-guardian will have an easier time getting custody after the parent passes away. Appointing a joint-guardian does not mean that the parent gives away custody rights. Instead, it means that the parent is able to have someone help care for his or her child, and make it easier to take over custody after the parent passes away. Appointing a joint-guardian also gives a child a sense of security that they will be cared for if anything happens to his or her parent.

To appoint a joint-guardian, a petition and relevant documents must be filed with the probate court in your area. During a guardianship hearing, the court will decide whether joint-guardianship is appropriate. If you do not have the time to follow through on the process of appointing a joint-guardian, you can appoint one in your will and the court will try to best accommodate your wishes, if they are able to do so.

**How does a judge determine visitation rights?**
If the judge feels that the parents are able to cooperate, the judge will sometimes grant "reasonable visitation." This means that the parents will be accountable to determine their own plan for visitation. If one parent has physical custody ("the custodial parent"), then that parent will typically have more of an influence over what is considered "reasonable."

If a judge chooses to grant "fixed visitation," this means that a court has ordered specific times where the non-custodial parent will have the right to visit his or her children (for example, on weekends). Courts will generally try to do this if they believe that the parents involved are not willing to cooperate with each other enough to determine their own visitation schedule, or if there is some other conflict.

**Will child support be required if parents separate from each other or never married?**

Courts will require the non-custodial parent to pay child support to the custodial parent in a divorce or legal separation that involves minor children, even if the parents were never married. A minor is a child below the age of 18. The amount of child support will generally depend on state laws, each parent’s income, and the amount of time each parent will be spending with the children.

**Can child support be increased or decreased?**

Child support can be agreed upon by the parents themselves, resolved by out-of-court dispute resolution, or can be determined by a court of law. Child support orders can be changed or modified at any time if special circumstances arise, such as an income change. For example, if you are paying child support and become unable to work due to a cancer diagnosis, you could request a change to your child support order. The judge has the authority to change any child support decision as he or she sees fit.

If you worked with a local child support agency to help you with an original child support order, you may want to contact the agency again to ask for help filling out the correct documents for a modification. If you worked with an attorney, you should contact that attorney to assist you with the modification process. If you did not have an attorney help you, you can still try to have an attorney help you with a child support modification.

**Can I receive retroactive child support from a parent who has not been paying?**

Retroactive child support is granted by the court if the court finds that the non-custodial parent should have been making child support payments at a time before there was an official child support order in place, which is different from unpaid child support. Unpaid child support is when there are missed payments after a child support order was issued by the court. Retroactive child support is typically granted if the court determines the non-custodial parent hid assets or finances to avoid paying child support, or in any other circumstance where the court believes it is needed.

**What if one parent chooses not to pay child support ordered by the court?**

The district attorney¹ can impose certain consequences if a parent fails to pay child support. Consequences may include: withholding tax refunds to pay child support, garnishing wages, or

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¹ The Child Support Enforcement Act of 1984 states that District Attorneys or State Attorneys must help a parent collect child support. The District Attorney will assist in enforcing child support orders.
seizing wages. If a parent continues to fail to pay child support, the court may find that parent in contempt of court and could impose jail time. This will typically be a last resort for the court. Trying to enforce a child support order by yourself can be tedious and time-consuming, so it is best to consult with a family law attorney who is familiar with state law to help you in this process.

Resources

The procedures relating to child custody and child support will vary from state to state, so if you would like more information about your state’s laws, you may wish to consult the following agencies and organizations:

National Court Database:
http://www.uscourts.gov/

American Bar Association – Child Custody and Support Information:
https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/child.html

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