



7th JMTC Legal Assistance Information

Understanding Child Custody

Please note that this Information Paper only provides basic information and is not intended to serve as a substitute for personal consultations with a Legal Assistance Attorney.

When families with minor children separate or divorce, the parents or the courts have to make some very important decisions regarding the children. Who will the kids live with? How much will the other parent see the kids? Between the parents, who is making the decisions about the kids? Can one parent force a decision on the other? Can one parent prevent the other from doing things with the kids that they object to? These types of issues are very common in the divorced or separated family. The rights of the parent depend on the type of custody that a parent enjoys. Unfortunately, the legal idea of “custody” is confusing and requires some explanation.

Just what does “custody” mean anyway? Custody, as it is used in regards to children and parents, is controlled by state law. Naturally, there are many variations in terminology state to state, but the basic rights and responsibilities of the parents are the same. How a parents’ “custody” is defined in his or her court case is all-important. Each parent must know what kind of custody he or she has, and just what means in that state. For example, Kansas calls the parent who has the child in his home the “residential custodian”, but Texas may call that person the “managing conservator.” These are simply labels that different traditions in different states have adopted over time. The label is not as important as the rights behind them. This article will address those rights without regard to the particular wrapper as state court may place them in.

Custody can be divided into basically two types. “Joint Custody” and “Sole Custody.” By far the most common is Joint Custody. Under this theory, mother and father have “joint” parenting authority. Remember, mom and dad divorced or separated, not parent and child. The relationship between the children and the parents will remain unchanged as much as possible. It is true that the children live with only one of the parent most of the time, but that does *not* mean that this parent calls all the shots. It is very important to remember that the address of the children has nothing to do with the

rights of the parents. Under Joint Custody, Junior may live with Dad, but Mom has *exactly* the same parental rights as Dad. Dad may have “residential custody” or “residential placement”, but he enjoys no more authority or power than Mom. Many courts take the approach that the “residential parent” enjoys a privilege by having the child in their home. Because they have been granted this special bonus, they have a special duty to the other parent not to abuse it.

The parents are to work together to make important decisions that are in the best interests of their children. The parent who has the child in their care at the time can decide the little things in life alone (what they eat for lunch, what they wear to school, if they go over to Johnnies after school to play), but the cannot make big decisions without consulting and conferring with the other parent. These are things like where will Junior go to school? Should Junior be held back a year at school? What religion will Junior be raised in? Can Junior get a tattoo? Is Junior old enough to date? Is Junior ready to get a driver’s license? Should Junior go to collage and where? What medical or dental treatment does Junior need? Should Junior be taking birth control pills? These sorts of things come up all the time and require the parents to make joint decisions.

Joint custody is not only important between the parents, it is also important between the parents and third parties. The best example is between the non-residential parent the child’s school. Once the school knows that Mom and Dad have joint custody, they have a duty to treat them both the same, preferring neither. A good school will not care which parent the child lives with. A good school will treat the parent the same and giving them equal feedback, access to grades and grade cards and the like. Unfortunately, there are some poor schools out there. The non-custodial parent often has to fight for their rights. They may not get a copy of the grade card or be told when the parent-teacher conference is or when the Christmas Play will be. Another example is the relationship between the parent and the child’s doctors. Each parent has equal rights to information regarding the children’s health. A parent with joint custody can insist on being treated the same because a court of law has given them that right.

In a nutshell, when the parents have Joint Custody, they each have the same rights, input, authority and responsibilities as the other. One does not have the right to make important decisions without the other. Who the child lives with is irrelevant as to the rights of the parents. One parent acting as if they do have more authority than the other can lead to losing what authority that parent does have. This leads us to the theory of “Sole Custody.”

The idea behind “Sole Custody” is that one parent can make important decision *without* consulting the other parent. Likewise, schools and doctors can ignore the other parent. The other parent has not lost their parenting rights all together and may still have visitation and be paying support, but they do not have the right or authority to make important decisions regarding the child. Sole Custody is uncommon and reserved for cases where it has been demonstrated that the children are better off when one parent is excluded from the decision making process.

Why would a court make this decision? Maybe Dad has a history of poor decision making like allowing Junior to drink alcohol at age 5, or allowing 13 year old Susie to spend the night with her 20-year-old boyfriend whenever she wanted. Maybe Dad has a criminal record, has been violent towards the children or is mentally ill. Sometimes a parent is awarded Sole Custody simply because the other parent has never been around, never built a relationship with the kids and does not even know the children.

Many times, one parent wants Sole Custody simply because they don't want to deal with their former spouse. From a parent's point of view, it is far simpler to call all the shots and never have to talk to their "ex" again. This is especially true when things are not going well with Junior. Let's say Junior lives with Dad and is failing math at school. Dad may not be looking forward to having a conversation with Mom about summer school or a tutor for fear that Mom may use this as an opportunity to attack Dad. He fears that she will claim he has poor parenting skills and the child is better off in her home. (Remember, the parents could not get along as a couple, but courts and society expect them to confer on important decisions regarding their children. This can be a tall order!) Dad may also fear that Mom will use this information against him in court in an attempt to change residential placement of the child to her home. Although the fear may be well founded, it is not a basis for being granted Sole Custody.

Many times mothers will ask for Sole Custody in a paternity case. Let's say Mom and Dad were not married. Let's say they do not really even know each other very well. All the same, Junior is here and Mom wants child support from Dad. But Dad did not even know Mom was pregnant and is not at all sure he is the father. This doubt is put to rest through the magic of DNA testing and, congratulations, Dad is in fact the father. By now Junior is 6 months old and Dad meets his son for the first time. Mom -- who does not have a relationship with Dad, does not know him very well, and certainly does not want this guy taking her wonderful new infant home with him -- asks the Court for Sole Custody. If Dad is just a normal person who wants a relationship with his son, she will probably lose. If, on the other hand, Dad has no intention of raising the child and wants nothing to do with him, she will probably win.

The type of custody a parent has been awarded is the deciding factor in what authority and rights they have in raising their children. Most of the time, mother and fathers have joint responsibility for making these decisions. Courts and society believe that a child is best served when both parents work together in the best interest of their children, regardless of whether the parents like each other or not. Only in limited situations, where a court has found that the best interests of the child are served by placing all the decision making authority with one parent will Sole Custody be granted. Parents owe it to their children to understand their custodial rights and responsibilities. If a parent does not enjoy the custody they believe they are entitled to, then they may petition the court for a change. Likewise, if a parent is not living up to their responsibilities, then it may be appropriate to change custody from Joint to Sole. Either way, understanding the types of custody is essential.