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Child custody 101: The conscientious attorney's role

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Whether it is a divorce action or a situation involving unwed parents, the outcome of a child custody dispute should be fair, practical, and comprehensive.

The court's test in determining issues concerning children is the "best interests of the child." Practitioners must recognize that child custody concerns are factually intensive.

Clients should be advised about alternative means to resolve custody disputes. Arguably, the best method is collaborative law. Both parents, with trained attorneys, can address the needs of their children at the collaborative table, formulating an arrangement without the intervention or imposition of a court.

Clients often confuse the meaning of custody. Custody is decision making, not time spent by the child in each parent's home. What is the most appropriate custodial arrangement for the case at hand? Joint or sole custody?

Decision making of major concerns rests equally with both parents as joint custodians, or with one parent as sole custodian. The lawyer and client must review what day-to-day parenting is devoted to the children, including feeding; dressing; bedtime preparation; diaper changing; caring for a sick child; transportation to games, practices and rehearsals; scheduling doctor/dentist visits; attending parent/teacher conferences; arranging daycare; supervising homework; providing discipline; assigning chores; awareness of friends and classmates; and familiarity with favorite books, games, TV shows, foods, rock stars and actors.

Even though a non-custodial parent lacks decision-making ability, he or she may receive report cards, health records, school calendars, activity schedules and other important paperwork. In most cases, a non-custodial parent may attend all meetings, conferences and consultations pertaining to a child's health, education, religious upbringing and activity participation, as well as games, performances, practices, rehearsals and celebrations.

Joint custodial parents are expected to share and discuss

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information relating to significant concerns affecting their child. In those circumstances where it is questionable whether the parents are able to communicate to mutually determine a major issue affecting their child, parties may agree to joint custody with an impasse provision.

The parties attempt to reach consensus by exchanging information and discussing issues at hand. If unsuccessful, one of the parents has the "final say."

Once custody is determined, focus shifts to parenting time. In most situations, one parent will be the home-based parent, or the "primary residential parent." The other would enjoy a schedule of residency with the children. "Visitation" or "visiting parent" refers to sole custody, when the non-custodial parent spends scheduled time with the children.

In most cases, a detailed schedule of parenting time is needed, even in cases where parents seek to assure their attorneys they can "work things out." Children need to know when they will be in the care of mother and the father. An exception to this rule may be when the subject child is a teenager whose time is consumed with school work, a part-time job or activities and sports. A visitation or residency schedule will allow each parent to spend time with the children during the work week, weekends, holidays and school recesses, including winter, spring and summer. Holiday, recess and vacation residency should supersede the week-to-week schedule.

All residency schedules must have a catch-all provision. Parties should agree that changes to the schedule must be accommodated in the event of unforeseen or agreed-upon occurrences such as a parent or child illness, employment responsibilities, unscheduled activity or special occasions such as family reunions, weddings, funerals, graduations and so forth. Rather than engaging in a tug-of-war, parents should allow occasional changes to the schedule.

The cardinal rule of residency is that the scheduled parent must be present to care for the children. When this is not possible, it is helpful to have a provision stating the

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remaining parent has the first option to care for the children.

In certain circumstances, conditions may be imposed upon the non-custodial parent. Psychological or psychiatric evaluation may reveal a need for restrictions. Parenting classes or substance abuse rehabilitation may be necessary. Certain parental unfitness may require visitation supervision by the remaining parent or a third party. The Society for Prevention of Cruelty to Children may be directed to supervise periods of visitation or the exchange of the children between the parents. Child safety seats, suitable sleeping accommodations or a restraint against alcohol or drug use may be demanded.

Parents must be advised that child custody and residency are not etched in stone. Until a child reaches the age of 18, arrangements may be modified when the best interests of the children are not met by the existing agreement or order. The courts must allow children of teenage years great weight in determining residency.

In a contentious situation, the court will appoint a law guardian to represent the children. Interviews of the parents, children and knowledgeable third persons, along with visits to each parent's home and a review of pertinent records, will be conducted by the law guardian.

Regardless of age, children involved in a custody proceeding should not be placed "in the middle." Unfortunately, children may be interrogated by a parent to reveal occurrences at the other parent's home. Presentation to the parties of the Children's Bill of Rights will assist in preventing such inappropriate treatment.

Cases pertaining to children require lawyers to focus on a practical arrangement of custody and residency. A detailed review of each parent's connection with the child since birth will serve to resolve the case.

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