

How Is Child Custody Determined?



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May 3, 2013

Custody rule number one: The best interest of the child is the polar star in every custody case. Custody is really about the child. It is only secondarily about the parent.

Determining “Best Interest of the Child”

How do you define and determine “best interest of the child”? Custody is different from other areas of domestic relations law. The principles are not so arcane. Generally, the court will consider what makes sense. The same kind of criteria you might use when you think, “He’s a great dad,” or “She’s a great mom,” or perhaps “he’s not a great parent,” are probably the very same considerations that will be significant to a court.

If a parent is involved, interacts with his or her children, attends their events, reads to them, does homework with them and plays with them, those will be positives.

If, on the other hand, a parent doesn’t do these things very often, uses harsh or obscene language in their presence, stays in a separate room when he or she is home with them, lets them see R-rated movies, lets them eat Twinkies instead of dinner, and never changes their clothes, what would be your opinion of them as a parent? It’s likely the court’s assessment will be similar.

It goes without saying that abuse, neglect and parental unfitness are the nuclear bombs in custody cases. “Unfitness” is a term of art, with a meaning fairly close to the dictionary definition of the word. If a parent drinks in excess, takes drugs or has mental problems that impact parenting competency, odds are a court will find “unfitness.”

A parent who is having an affair may or may not be “unfit.” It primarily depends on what you expose the children to. No one has sex in front of children. But judges usually do not like it if children are home while you and a stranger are in the bedroom either. Public displays of affection in front of the children, particularly where you are still technically married to the other parent, are frowned upon. You may very well desperately want your children to love and feel comfortable with the person you intend to marry, but in my experience, the more you try to force that situation, the more resistance you get from the kids. And you can pretty much count on your spurned soon-to-be-ex-spouse to be pumping the kids full of sunshine about how evil your new best friend is.

You have more latitude with your behavior when you are not with the children because then you are not exposing them to untoward influences. There is a limit, of course. Even if your spouse has the children for the weekend, you cannot expect that a court will ignore it if you are snorting the family fortune up your nose or having an affair with your next door neighbor. What is more, if you do remarry, doesn’t it make sense that the character and circumstances of your new spouse come into play? Is he or she an alcoholic or a drug abuser? Does he or she have children living with him or her? Do

said children run with scissors?

Changes in Child Custody Agreements

Any determination regarding minor children, whether by agreement between the parties or court order, is never absolutely set in stone. This includes not only custody, but also visitation and child support. If the circumstances that affect the children change substantially, the court will review the evidence and, where appropriate, alter the previous court order or agreement. Again, this only makes sense. If there is a visitation schedule that has the children with your spouse on Wednesday evenings and every other weekend, and your spouse moves to Kuala Lumpur, that previously ordered (or agreed) visitation just won't work anymore. Or if you become an ax murderer or a game show host, it makes sense that the court would consider the changed circumstances and make revisions.

By way of contrast, if your income goes up by \$100 per month, that is probably not a material enough change to warrant a review by the court. However, if either party's income goes up or down by \$10,000, someone loses their job through no fault of their own, you or your ex-spouse wins the Powerball Lottery, or one of the children, God forbid, becomes seriously ill a court will look into it.

The laws of physics sometimes seem to apply to the custody rubric. There can be a judicial tendency not to disturb objects at rest. If the parents have been separated, and the children have been doing well, the judge may very well think, "why should I change this?" The parent who wants a change had better be prepared to offer evidence on that point or he/she is less likely to prevail.

Conclusion

It's advised that clients not to spend \$10,000 in attorney's fees fighting over an \$11,000 asset. It doesn't make sense. Even if you win, you lose. But many people feel that there is no limit to what they will spend to get custody. That is a decision that each parent has to make. But listen to your attorney. If you've hired a good one, he or she may well have an idea about whether or not you will get your way in court. And listen to the mental health professional who has seen the children and has an idea of what would be in their best interests.