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CHILD CUSTODY AND VISITATION

1. Do mothers automatically get custody of their children when a separation occurs?

No. The law gave fathers the right of custody to their children in the nineteenth century, gradually giving way in the twentieth century to a legal presumption in favor of mothers who, until the 1980s or so, were assumed to be the natural guardians of children. However, a huge leap forward for custody law occurred with the introduction of the Uniform Marriage and Divorce Act, which abandoned sex-based presumptions and preferences in favor of the “best-interests” of the child test. Today, this test remains the most widely applied custody standard. Hence, the courts of most states do not establish an automatic preference for either mother or father, but rather look very closely at which parent will best promote the welfare and interests of the children of the couple.

2. What kinds of factors do the courts consider in granting custody?

That is a very tough question to answer in a handout. Courts usually look at who has primarily taken care of the child during the marriage (washing, feeding and clothing the child, for example, or helping the child with homework), who has the best approach to discipline, who has cared for the child since separation (if the couple has already separated), what work schedules either or both parents have, and how each parent can provide for the physical, emotional, educational, religious and social needs of the child. Simply stated, the test that most states utilize is the “best interests” of the child.

3. Can a legal assistance attorney help me get a court decree for custody?

No. You will need to retain a civilian attorney for the presentation of the papers and the appearance in court.

4. Can the court award attorney's fees to me in a custody case?

Under the law of most states, if the person asking for attorney's fees is acting in good faith and is unable to afford the legal expenses of the lawsuit, it is possible (but not mandatory) for the court to award reasonable attorney's fees as part of the custody order. But remember, unlike a standard civil suit, there is no winner and loser in custody disputes in the traditional sense, and thus, no mandatory award of fees. Also, payment of attorney fees may also be negotiated into a settlement of custody.

5. Can a custody order be changed?

Yes. No custody order is ever *permanent*. However, once a parent is awarded custody in a court order, the judge can change the custody order only if there is a substantial change of circumstances affecting the best interest and welfare of the child or children.

6. Will my separation agreement protect me from the other parent snatching my child?

No. A separation agreement which hasn't been incorporated into a court order or divorce decree is *only a contract* between you and the other parent, not a court order. A court order is enforceable by contempt of court. Court orders of one state can be filed and registered in another state and thus be treated as if they were issued by the second state for purposes of enforcement. None of this applies to separation agreements, which are not incorporated into a divorce decree.

7. If my spouse is granted custody, will I get visitation rights?

It depends. Ordinarily the noncustodial parent is entitled to reasonable visitation rights with a minor child except in extraordinary situations, such as when the noncustodial parent has a history of abusing the child. Visitation can be flexible and unstructured, assuming the parties can get along and agree on the times and terms of visitation, or it can be highly structured and rigid, with certain days and times set out with great specificity.

8. If the other parent does not like the present custody order, can he or she file for custody in another state?

Under the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, the court in a custody case must always inquire into whether the child or children have been the subject of custody litigation in any other state. When a judge finds that another court has made an award of custody, the judge should refuse to rule on the case. Only if the first court has released

or transferred jurisdiction to the new state court may that court assume jurisdiction to hear the custody case (unless there is an immediate and clear emergency affecting the child's welfare).

9. Won't custody be settled when I obtain a divorce?

Divorce decrees do not necessarily settle custody matters, and a custody order can be entered before or after a final decree of divorce. A divorce decree and a child custody decree are, and should be, two separate documents.

10. Does the child's grandparents, or some other third party have visitation rights?

All 50 states now have some type of statute allowing courts to grant visitation to a non-parent based on the best interest of the child. Many states have restrictive statutes, limiting who can petition a court for visitation and under what circumstances.

11. If I have other questions, what should I do?

See a legal assistance attorney or private attorney as soon as possible. Your lawyer can answer many questions and help you to make a fair and intelligent decision about your choices, options and alternatives. Our legal assistance office stands ready, willing and able to help you in these matters.