

Child Custody--Is a Custody Battle Best For Your Children?

Beware of letting your children get involved in the case through an extended custody tug-of-war -- it will backfire on you.

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Look at this time as an adventure and opportunity of trying to improve your parenting skills in order to improve the quality of the relationship you have with your children. Your children simply can't lose in an effort such as this.

1. Conservatorship

Conservatorship is the term used in Texas to designate the division of parental rights, privileges, powers and duties. Joint managing conservators may share all rights or may share some rights and retain others exclusively. By law, it is now presumed that the parents should be named joint managing conservators unless good cause is shown. Because of this presumption, this handbook will only address joint managing conservatorship in detail.

In those extreme circumstances which warrant a sole managing/possessory conservatorship arrangement, the sole managing conservator (the "custodial" parent) is the person who is granted all of the rights, privileges, powers and duties of a parent. The possessory conservator (the "noncustodial" parent) has only limited parental rights when he or she has actual possession of the children. There may be some instances when a non-parent may be appointed as a sole managing conservator or possessory conservator, although this rarely occurs in a divorce case. When it does occur, one or more of the grandparents of the children may be appointed as an additional possessory conservator. In addition, there may be more than one possessory conservator with specific rights to possession of the children at certain times.

2. The Court Must Determine the Rights and Duties of Each Parent

In a decree or order appointing them joint managing conservators, the parent rights may be divided however the parties agree or the court determines: they can retain all rights and exercise them jointly, or they can apportion more to one parent than the other. The exception to this is the domicile of the child or children. The order naming joint managing conservators must either fix the county of residence of the children until and unless altered by further court order, or give one of the conservators the right to determine the domicile.

The courts also like to allow the primary caretaker to have the overriding say the selection of schools, physicians and the right to direct the moral and religious training of the child or children, after appropriate notice to and/or discussion with the non-custodial conservator.

3. Things are a-Changin'

Prior to 1974, Texas had followed the "tender years" doctrine, in which children of tender years (up to seven or eight years old) should be with their mother. It was accepted that the mother was a better person to care for, teach and guide children of tender years. In 1974 the law specifically directed that the decision as to which parent should have custody of the children should be made without regard to the sex of the parent seeking custody. Although the "tender years" doctrine lingers to some degree, the family district courts of Tarrant County show that there has been a marked change in the attitude of judges towards the custody of children. Each party can expect to be treated fairly. After all, in over 50% of families in the United States, both the mother and father work. In situations where both parents work, the father should be able to do as good of a job parenting the children as the mother since he would have had to develop the same skills and would have had to make similar arrangements for the children to be taken care of during periods when he was working.

4. The Court Will Establish a Possession Schedule for Each Party

In addition to setting out the parental rights of each party, the order will set out each parent's right to possession of the children at different times. Joint managing conservatorship *does not* mean that the children will divide their time equally between each parent. Many times a joint managing conservatorship can provide that one of the parents has the right to possession of the children most of the time, with the other parent having various weekends and alternating holidays.

5. The Best Interest of Your Children

The law requires that the best interest of the children should be the determining factor in assessing which parent should be named a child's primary conservator. Some of the factors that should be considered are as follows:

- (A) the desires of the child;
- (B) the emotional and physical needs of the child now and in the future;
- (C) the emotional and physical danger to the child now and in the future;
- (D) the parental abilities of the individual seeking custody;
- (E) the programs available to assist these individuals in promoting the best interest of the child;
- (F) the plans for the child by these individuals or by the agency seeking custody;
- (G) the stability of the home or proposed placement;
- (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one;
- (I) any excuse for the acts or omissions of the parent;
- (J) the amount of time a parent has spent and currently spends with the child.

The Texas Family Code provides that the court, upon application, shall confer with any child 12 years of age or older and shall consider their desires. Even so, the child's desires do not affect the

discretionary power of the court. The decision of the court will still be based on the welfare of the children, which is of paramount importance.

6. Assessing Your Motives

The most important question to consider is: Why do you want primary custody of your children? All sorts of reasons may be involved, and often you may not understand exactly why you want custody. If your spouse or ex-spouse has decided that a divorce or change in custody is necessary and assumes he or she will have custody, you might feel hurt and resentful by this. In this particular situation, you may want the children because they represent a means of revenge and an opportunity to punish your spouse or ex-spouse. That is, of course, a poor motive for seeking custody of your children. Alternatively, you may think you really are the better parent and can provide the children with more of what they need than your spouse or ex-spouse.

The key to success in this type of case is simply hard work. You are asking the attorney to become a partner with you in this venture. You are asking for emotional commitment, a physical commitment and a time commitment to a demanding case. If your motives are questionable and your commitment is not complete, we will be reluctant to become a part of the effort to seek the primary conservatorship of your children.

7. Parenting is an Extremely Difficult Full Time Job

If your lawyer finds that you are not a competent, qualified parent, she may not remain as your attorney. If, in that case, there are compelling reasons why the *other* parent is not a good alternative, your lawyer may stay in your case with the understanding that you cooperate and follow our instructions to improve your parenting skills. In this way, we can make a presentation to the court which gives you a chance to be appointed the primary conservator of the children. Your children can only benefit.

Take time to consider that primary conservatorship of one, two, or three children is an enormous responsibility. It is much easier to visit your children every other weekend than to see your children on a day-to-day basis, feed them, clean them, be with them when they're sick, nudge them about their grades, have the economic responsibility of their care, maintain the house, as well as, perhaps, holding down a full time job. It is neither an easy job nor a small one. It's a job you really have to want.

8. Create a Win-Win Situation for Your Children

If you have received temporary primary conservatorship and are living in the house with the children, you must use this precious time prior to trial to show your skills as a loving, concerned parent so that the court will be more inclined to continue this arrangement on a permanent basis. If, after taking over the responsibility of the children for a period of time, you make the determination that primary custody is more difficult than you anticipated, then your spouse may be the appropriate parent for permanent custody.

Keep in mind, there is nothing wrong with discovering you should not be the primary conservator. There is certainly nothing wrong with admitting you were wrong as long as you love your children and want the very best for them. Why spend thousands of dollars in a custody fight that you cannot win or that you should not win, even if you could? That money would be better spent for the benefit of the children. You must be honest with your attorney, and your attorney must be honest with you. If you decide somewhere along the line you do not want to pursue this fight, you must tell us. Correspondingly, if there's a time when we think that you do not have a chance to succeed, we promise to tell you.

Making Your Case for Primary Conservatorship

A contested custody battle should be your last resort.

1. Personal Assessment as a Parent

The assessment of your existing parenting skills is crucial. Make a list of your strong points and your weak points as a parent, as a provider and as a person. Make a similar list of the good points and bad points of your spouse or ex-spouse. Then, list the names of persons who can testify as to the good and bad points of you or your spouse or ex-spouse, who can also describe the interaction between you and your children and can describe the relationship you have with them. Finally, provide your attorney with their names, addresses, and telephone numbers including a description of their relationship to you, so that we will have the ingredients for their testimony.

2. Paint a Picture of Your Children's Relationship with Each Parent

Provide your lawyer with a picture of each of your children so that she may have it in my files for reference and let her know what you think about them. Explain the relationship you have with each child and the activities you and your children share. Provide the same type of description about your spouse or ex-spouse's relationship with your children. If this is a divorce, describe your role during the infancy of your children. If you are the father, where you were when the children were born. What was your participation in the care of the children after they came home from the hospital? Exactly what was the division of duties in your house with each child, from the first child through the youngest? Break this down into time periods, such as infancy, two years, five years, etc. This needs to be in writing and to be as specific as possible.

3. Get Involved with Your Children

There are activities in which you can participate with your children that will be beneficial to a custody case and to your relationship with your children. You cannot think of your children as one group. Each child is unique and, consequently, your relationship with each child will be different. You need to develop activities that fit the interests of each particular child. Remember, each child may want or need activities different from those of your other children.

It is important to determine what activities your children will enjoy with you. If you require them to perform activities that they find unpleasant, they will look upon the time spent with you as unpleasant. That is counter-productive.

The expenditure of funds in entertaining children is often necessary, but not essential. Try not to be subject to the criticism that you're trying to buy the favor of your children. The money you spend should be on things other than material possessions for the children.

Children tend to use parents against each other during a lengthy custody proceeding. Do not allow your children to put you in a position where you are in a spending war with

4. Know Your Child's School and Activities

You should become actively involved in your child's school. You should know the children's teachers and principal by name, so that if you are asked about their schooling, you will be able to reply quickly and easily about their activities, their interests, and their academic progress. Quiz yourself. Do you know the name of each child's homeroom teacher or your child's favorite subject? You should know this information before proceeding to court in a custody contest. If you know that a custody dispute is going to become a reality, have a private conference with your children's teachers to let them know what is going on. Don't ask the teacher to pick sides, just let them know what is going on at home so they can be alert to any problems the children are having. Teachers are potentially among the strongest witnesses in a custody case. Make sure the teachers know that your children's best interests are your primary concern, and not who "wins" the custody battle.

How much do you really know about your children? We intend to find out. For example, what size dress does your daughter wear? What size shirt does your son wear? Who is your daughter's music teacher? Who is your son's assistant principal? What is your daughter's favorite color? What is your son's favorite ice cream? You should know the answers to all of these questions. If you don't, you should work on your knowledge of your child's life. As a part of the process of preparing for this case, you are going to learn about those things, and retain them so that you have the ability to testify in court as to those facts. You should be able to talk about your son's best friend, your daughter's boyfriend, if she has one, and what things your children like about their various friends. The only way you can find out those things is to spend time, individually, with each child, talking to them, but not interrogating them.

5. Be Able to Communicate to the Court about Your Relationship with Your Children

It's important that you be able to communicate to the court the kind of relationship you have with your children. You can be the best parent in the world and have impressive activities with your children, but if you are unable to demonstrate that to the judge, the counselors, the psychologists, or the social worker, you may not succeed in your case. Some people verbalize better than others. Good communication skills are an asset. If you do not have the ability to communicate effectively we will work together to improve that ability.

When asked to describe their children, most people do a terrible job. They have a difficult time doing much more than saying, "He's a great kid". You should make the judge believe your child is "a great kid" by helping the judge understand and visualize him.

You have to remember that the judge who hears your case has heard hundreds of cases. You have to humanize yourself and your children so the judge can see that the names on the paper represent people who are alive, children who are real and people who care about and love those children. You should practice describing your children. Think of their imagination, sense of humor, or sensitivities. Write down those qualities. Then describe those qualities aloud.

6. Keep a Journal of Events

For purposes of this suit, you should keep a log in which you write down the most interesting incident, positive or negative, that has occurred with each of your children. Try to do this at least once a week.

As noted before, you also need to keep a record of the time you spend with your child. Your record should reflect the times you have with your child, or in some cases, the times you did not have. Such a record will be a quick reference for you and your attorney in determining if visitation privileges are being carried out.

7. Look for the Best from Your Spouse as a Parent as Well

Your children will benefit from this case by having a more caring, understanding, attentive and skilled parent than when the case was first filed. If, in fact, your spouse or ex-spouse has made the same kind of effort, the children will then have two parents who are functioning, both physically and emotionally, on a higher plateau. You may discover some of the problems and complaints you had about your spouse or ex-spouse have disappeared during the pendency of the suit. You should expect and hope that your spouse or ex-spouse's new conduct is of a lasting nature rather than a facade or a temporary measure to impress the court. If, in fact, your spouse or ex-spouse's conduct is real and lasting, your children will be the beneficiaries of two parents who love them and have worked hard to achieve better parenting skills.

8. If a Social Study Investigation is Required, Cooperate Fully with the Investigator or Case Worker

Tell the truth and let the case worker know the kind of parent you are. It is the duty of the case worker to make recommendations regarding the custody of the children and you should spare no effort in being cooperative so that your side will be understood and believed. The investigator will ask you for references, the names of people with whom you have worked and people who know you. These people will be contacted. Talk with your references and tell them that they can expect to hear from the case worker. Do not tell them what to say. Above all, don't give names of people who either do not know you well or who might be adverse to you. Do not hurt your case - help it.

CHANGE OF CUSTODY IN A MODIFICATION

Change of Custody on a Temporary Basis in a Modification

In a modification, the court may not render a temporary order if the effect is to change the designation of a sole or primary joint managing conservator appointed in a final order unless it is necessary because:

- the child's present living environment may endanger the child's physical health or significantly impair the child's emotional development;
- the child's managing conservator has voluntarily relinquished the actual care, control, and possession of the child for more than 6 months and the temporary order is in the best interest of the child; or
- the child is 12 years of age or older and has filed with the court in writing the name of the person who is the child's choice for managing conservator and the temporary order naming that person as managing conservator is in the best interest of the child.

Change of Custody on a Final Basis in a Modification

In a final trial, the standard for making an order that has the effect of changing the primary caretaker is somewhat easier than on a temporary basis. However, the Courts do not like to make major changes without cause, so be ready to clearly prove the following:

- circumstances of the child or either parent have "materially and substantially changed" since the last order
- OR**
- the last order has become unworkable or inappropriate under current circumstances
- AND**
- modification would be a positive improvement for and in the best interest of the children.