

**CHILD CUSTODY**

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**A. Chapter Competencies**

*After studying chapter 9 the student should be able to:*

1. state the main standard courts use in awarding custody.
2. state the tender years presumption.
3. distinguish physical custody, legal custody, and split custody.
4. distinguish joint physical custody from joint legal custody.
5. identify the major factors that the parties must consider in negotiating the custody terms of the separation agreement.
6. identify the major factors that will determine the feasibility of a joint custody arrangement.
7. identify the major factors that the parties must consider in negotiating the visitation terms of the separation agreement.
8. state the major guidelines that will help minimize the trauma that children face in a custody dispute.
9. state the role of the following factors in a court's decision of which biological parent should be awarded custody: discretion of the court, stability, availability, emotional ties, legal preferences, morals and lifestyle of the parent seeking custody, domestic violence, religion, race, wishes of the child, and expert witnesses.
10. define the parental alienation syndrome.
11. state the current validity of presumptions in the award of custody.
12. identify the factors that a court will consider in deciding whether a homosexual parent can be granted custody.
13. state the holding in *Troxel v. Granville* and identify the major factors that a court will consider in making a decision on visitation.
14. state the difficulties faced by attorneys in custody litigation when one parent charges the other with sexual abuse of the child.
15. state the role of the Minnesota Multiphasic Personality Index test in such litigation.
16. identify the standards a court will use in determining whether custody should go to a biological parent or to a psychological parent.
17. state how a court will resolve a dispute about whether to allow a parent to change a child's surname.
18. identify the factors that a court will consider in deciding whether to modify its own custody order.

19. identify why child snatching was once so common and easy to accomplish.
20. state how a court acquires jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).
21. state when a court has jurisdiction under the UCCJEA to modify the custody order of another state.
22. describe how the Parental Kidnaping Prevention Act operates.
23. state the options available to a parent in the United States whose child has been “abducted” by the other parent and taken to a foreign country.

*The student should also know:*

1. when a court will order that visitation be supervised.

## B. Introduction

Here are some quotes you may want to use while covering chapter 9:

*“A woman who does less than everything for her child is seen as a terrible mother. A man who does more than nothing is seen as a wonderful father.”*

Justice Ruth Bader Ginsburg, 80 American Bar Association Journal, 43 (12/94).

*A judge asks a child to state his custody preference. His response: “Which one do I want to live with? Hmmm . . . who’s getting the VCR?”*

James Estes, California Lawyer, 128 (2/90).

*In an application for legal help from the Legal Aid Society in a custody case, a client wrote she was seeking “soul custody” of her child. Seeing the error, a paralegal at the office remarked, “I’m not sure we can get jurisdiction.”*

80 American Bar Association Journal 45 (3/94).

Deposition of wife in a custody case:

Q: Your husband says you smoked marijuana. Is that true?

A: I quit.

Q: Why did you quit?

A: My attorney told me I would have to if I wanted to get custody.

Jerry Buchmeyer, 56 Texas Bar Journal 727 (7/93).

## C. Assignment 9.1 (drafting a joint custody agreement)

In addition to the drafting component of this assignment, you may want to consider this assignment as the basis of a role-playing exercise in front of the class. For example, you could have a student (or the entire class) interview each parent separately—using the General Instructions for the Interview Assignment in Appendix A.

Another idea is for *you* to draft some clauses on this case and discuss them with the class. You could, for example, build a measure of ambiguity into the clauses that you draft in order to see if the students can recognize the ambiguity during the discussion. Such a discussion will be of great help to the students in drafting their own clauses.

## D. Assignment 9.2 (*Schutz v. Schutz*)

- a. She can encourage the children to have positive and frequent contact with their father because the law requires it, not because she thinks it is a good idea. Hence by encouraging such contact, she is not necessarily expressing an opinion she does not hold.
- b. Yes. The statement, “Your father is a good man” would be a forced expression of an opinion that she does not believe. To force someone to express such an opinion would violate the first amendment.
- c. “Your father paid his child support on time.” “Your father said he said he wants to see you often.” Etc.
- d. Failing to mention the father in the presence of the children would be a bit extreme. The test would be whether the children continued to be hostile toward their father. If not, her silence would not be a problem. If, however, the hostility continued, a court could conclude she was not using her best efforts to foster a positive relationship between the children and their father.
- e. The trial court listed a number of sanctions such as contempt, imprisonment, and loss of custody.

**E. Assignment 9.3(a) (religion)**

- a. The order John wants would be difficult to enforce. This difficulty would discourage a court from requiring Helen to continue raising the children in the Jewish faith. Continuity in religious upbringing is important, but how would a court enforce an order to raise children as Jews to “a moderate extent”? At what age would the children be permitted to make their own choice to follow Judaism or a different path?

**F. Sample Custody Evaluation by an Expert (Figure 9.2)**

You might want to use the facts of the Johnson case (covered in Dr. Gardner’s Psychiatric Custody Evaluation, Figure 9.2) to be the basis of a drafting assignment:

- Assume the Johnsons want a *joint custody* arrangement pertaining to all the children, rather than what is recommended by the expert’s report in Figure 9.2. Draft the joint custody agreement.
- Assume that the parties want to follow the recommendations of the expert (Dr. Gardner) who filed the report in Figure 9.2. Draft an agreement that reflects his recommendations. Assume that both parents want visitations rights with respect to the child or children in the sole custody of the other parent.

Tell the students to use the General Instructions for the Agreement Drafting Assignment in Appendix A.

The facts in Figure 9.2 also present role-playing possibilities as Mr. and Mrs. Johnson (or their attorneys) bargain over the custody issue in anticipation of drafting the custody terms of a separation agreement.

**G. Assignment 9.5 (visitation)**

Supervised visitation is a relatively drastic step and can also be expensive if the visitation is supervised by a private agency. The chapter gives two examples of when a court might order supervised visitation: a danger that the non-custodial parent might take the child from the state or country and a danger of physical or emotional harm. In the assignment, Flora mentions two reasons why she wants the visitation by Harry to be supervised:

- he often misses child support payments
- his girlfriend is an alcoholic

The first reason is not good enough. In most states the failure to pay child support is not a reason to make visitation supervised. There is no relationship between the failure to pay child support and the safety of the child. Supervised visitation is primarily designed to protect the child. There is no indication in the facts that Mary is in any danger due to the tardiness of the father’s payment of support.

The girlfriend’s alcoholism also does not appear to be substantial enough to warrant supervised visitation. The court would need some evidence that Mary is in some kind of danger by having contact with the girlfriend.

**H. Assignment 9.7 (Allen v. Farrow)**

- a. The majority opinion shows an undercurrent of hostility toward Allen’s behavior. You get the impression that Justice Ross wants to come out and call Allen scum. But the opinion bases its conclusion on the negative impact Allen’s conduct has had on the children. His “parenting skills” are called into question, not his compliance with a moral code.
- b. (i) Allen says Farrow is on a campaign to discredit him as a parent, whereas he has not fostered any hostility in the children toward Farrow. Allen says that the children adore him and Soon-Yi and that they would love to spend time with (have fun with) them. Etc. (ii) Farrow says Allen molested Dylan. Allen expressed little interest in her pregnancy. Etc.
- c. No. The marriage should make no difference. The issue is the psychological damage the personal relationship with Soon-Yi was having on the children.
- d. The majority opinion acknowledges that Farrow’s reaction helped cause some of the turmoil. But Justice Ross says that Farrow’s reactions were quite understandable. “The reasons for her behavior, however prolonged and extreme, are clearly visible in the record.” In effect, Ross is saying: How would you expect a mother to react to what Allen was doing?
- e. Yes, if Allen is correct, Farrow’s behavior is being rewarded. The critical fact, however, is that the court is basing its conclusion on Allen’s behavior, not on Farrow’s reaction. Allen has failed to convince the court that Farrow’s conduct has been detrimental.
- f. The agreement would not affect Allen’s duty of child support. See the *Straub* case in chapter 10.
- g. This would be a good place to discuss whether the courtroom is the best place to decide family matters such as custody. The adversary system is a system of combat, hardly the best environment to make therapeutic de-

cisions. Ask the class what differences it sees between allowing custody to be resolved in adversary litigation and allowing children to sue their parents over decisions such as how much TV they should be allowed to watch. When is the courtroom a good setting for conflict resolution and when does this setting make no sense?

### I. Assignment 9.8(c) (biological parent vs. psychological parent)

c. Here are some options to consider:

- Pick one of the best fact hypotheticals written by the students and conduct a mock trial in class on the custody issues involved in the case.
- After the students have written their fact hypotheticals, invite a local family law judge to your class so that the students can discuss their hypothetical cases with the judge.
- Invite an experienced family law attorney to your class. Ask the attorney to discuss how he or she would handle some of the fact hypotheticals that the students have written. What further facts would have to be obtained? How would expert testimony be used? Etc.

### J. Assignment 9.9(c)(d) (custody modification)

c. See the same option ideas listed above for Assignment 9.8(c).

d. Also ask the class what they think of the strategy of the father who is asking for the reconsideration of the custody decision in Figure 9.3:

- Doesn't he come off as a bit of a whiner?
- He is very anxious to criticize the mother. In general, courts do not like to see parents beat up on each other if there is a danger that they will impose their views on the children. Custody is often given to the parent who expresses the merit of the other parent maintaining contact with the children. Even though the father wants to change the custody order here and therefore must relate negative characteristics about the mother, isn't there a way to do this in a little less heavy-handed manner than demonstrated in Figure 9.3? Strategically, couldn't he say that the mother has some good points (listing at least a few marginal ones) and *then* go into the reasons why he feels that what she is providing the children is unacceptable?

### K. Assignment 9.10(a) (UCCJEA)

a. On April 4, 2000, Iowa is the home state. The home state is the state where the child has lived with a parent for at least six consecutive months or since birth if the child is less than six months old. Bob is less than six months old. Since his birth, about a month ago, he has lived in Iowa.

On November 6, 2000, Bob is about eight months old. Except for some visits to California, he has lived in Iowa for at least six consecutive months up until November 5, 2000. Temporary absences are counted as part of the six months. See Figure 9.4(1). Of course on November 5, 2000, the absence no longer became temporary since Fred decided not to return Bob on that date. But even if Iowa no longer was the home state as of November 5, 2000 because of Fred's decision, Iowa still has jurisdiction since it "was the home state of the child with six months . . . and the child is now absent from the state but a parent continues to live in this state." Figure 9.4(1). Bob is absent from Iowa on November 6, 2000, but a parent, Jane, is still in Iowa. Therefore, Iowa still has home state jurisdiction to make the custody decision on November 6, 2000.

Note the slight ambiguity in the facts. We are told that "[a]fter a scheduled one-day visit on November 5, 2000, Fred decides not to return the child," but we are not told precisely *when* he made this decision. Did he make it at the end of the day of November 5, 2000, or some days later? We have assumed above that he made the decision on November 5, 2000, but the ambiguity exists.

On January 1, 2001, Bob has been in California since November 5, 2000—about two months. Iowa still has home state jurisdiction on January 1. Iowa was the home state within the last six months. Bob is not in Iowa, but one of the parents, Jane, is in Iowa. California can't be the home state since Bob has not been in California for six months. Also, there does not appear to be any emergency in California.

As of December 1, 2001, Bob has been back in Iowa for a month. On November 1, 2001, Fred returned the child to Jane in Iowa and went off to the Army. He had been in California for just under a year (November 5, 2000 to November 1, 2001). If the custody action were brought in California on December 1, 2001, California would be the home state. Note that Iowa was not the home state within six months prior to December 1, 2001. Therefore the alternative home state basis of jurisdiction under Figure 9.3(1) does not apply.

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But would California decline to exercise its jurisdiction on the basis that Iowa is a more convenient forum since the child and mother are in Iowa and the father is away in the Army? (Fred may have left California. We are not told where he went in the Army.)

On October 6, 2003, Bob has been in Iowa since November 1, 2001—the day that Fred returned him to Iowa over two years. If the custody action is brought in Iowa on October 6, 2003, Iowa would be the home state. If it was brought in California on October 6, 2003, could California exercise emergency jurisdiction? No, since the child is not in California on October 6, 2003. The child is allegedly being mistreated by his mother, but this is occurring in Iowa.

### L. Assignment 9.11 (UCCJEA)

- a. On 5/1/00, Sam is about six weeks old and has lived all of his life in State A. Ursula takes him to State B on 5/1/00. State A is the home state. Although Sam is no longer in State A, this state was the home state within the last six months and one parent, Ted, is still in State A.

Ursula could not obtain a custody order in State B on 5/1/00. Sam has been in State B for only one day.

- b. Assume, however, that State B does have jurisdiction under the UCCJEA and issues an order. State A can modify it if State B loses its exclusive, continuing jurisdiction (ecj). This can occur under three conditions. First, State B can lose its ecj if everyone moves out of State B. This is unlikely since Ursula has brought the child to stay with her parents in State B. Second, State B can lose its ecj if State B determines that State B no longer has a significant connection to State B and that substantial evidence on the child's care no longer exists in State B. This also is unlikely since the child is now in State B with his mother, Ursula, and his maternal grandparents.

Another basis for an order from State A is if the child is in State A and an emergency exists. This does not apply since Sam is in State B. Also there does not appear to be any emergency.

### M. Taking a Witness Statement in a Custody Case

Here is an additional assignment you may want to give the students. Photocopy the facts and instructions for distribution to the students. If needed, give them any additional instructions you want them to follow on preparing the witness statement, for example the format you want them to use or how much detail you want from them.

#### Facts:

*George and Mary Smith were married in your state ten years ago. They have one child, Jim, age five. George and Mary are full-time accountants. During the day (from 8 a.m. to 6 p.m.), Jim goes to the Day Care Town Center.*

*Unfortunately, the parents cannot agree on how to raise Jim. Each parent thinks the other should quit work in order to raise him at home. But both insist on keeping their careers. George feels that Mary imposes too much rigid discipline on Jim; Mary thinks that George is spoiling Jim by letting him do anything he wants. They argue constantly. George wants to take Jim out of the Day Care Town Center and hire a full time maid/baby-sitter/nanny who will stay with him at home. Mary disagrees. Contrary to George, she thinks that Jim is doing very well at the Center.*

*The disagreements have become unbearable. One evening they engage in actual slapping and a fist fight. The police are called, but no one is arrested. George and Mary decide to get a divorce. Neither will ask for alimony. In a separation agreement, which they will ask the court to approve, they have divided their marital property to their mutual satisfaction.*

*They do not, however, agree on custody of Jim. Each seeks sole physical and legal custody and wants the other to contribute half of Jim's child support needs.*

#### Prepare a Witness Statement:

Assume that you work as a paralegal in a law office that represents one of the parents. You can select either George or Mary.

You have been asked to interview someone. It can be a fellow class member, a relative, co-worker, or friend. Use the technique of fact particularization to help you obtain sufficient factual detail during the interview. (See Appendix A on fact particularization.)

Below, you will find INSTRUCTIONS for the person you will interview. The instructions also outline the purpose of the interview. Give these instructions to the person you have selected. Then proceed with the interview. Take extensive notes. Ask questions that cover the details of what the witness knows. Then write out your notes in the form of a witness statement. Go back to the person you interviewed. Ask him or her to sign/initial it as indicated in the instructions to this person.

**Instructions to the Person from Whom You Will Take the Witness Statement:**

You will be interviewed on a fictitious case and a witness statement will be prepared on the basis of what you say. The person interviewing you will take notes and prepare the witness statement. You will then be asked to read the statement. If it accurately reflects what you said during the interview, sign the last page (using a fictitious name) and sign or initial each of the other pages. Make any corrections in the margins or on the back of the statement that are needed, and initial each correction separately.

For most of the interview, you can *make up the facts* needed to answer the questions, e.g., names, dates, events. There are, however, some basic facts that we want you to use. Any facts you make up should be reasonably consistent with the following facts.

You are a teacher at the Day Care Town Center where you have worked for seven years. One of your students is Jim Smith, age five, who you have known for about a year. Everything has been fine at the school except for the last six months when Jim has gone through extremes. On some days, he was very quiet and cooperative. On other days, however, particularly in the mornings, he was very disruptive. He would fight with other students, refuse to follow instructions, go into crying fits, etc. You have had very little contact with either of his parents, George and Mary Smith. You tried to call each of them at work, but they never returned your calls. A maid brings Jim to the Center in the morning and takes him home at the end of each day. Hence, you and the staff have simply tried to deal with Jim as best you could. Since he eventually calms down by the end of the day, the situation has never reached emergency proportions.

You will be interviewed on what you know about Jim. Simply describe what you have observed at the day care center. Again, invent facts needed to answer the questions that will be asked. Above, we have given you an outline of the basic facts. Fill in the details as best you can. The person interviewing you works at a law firm that represents one of Jim's parents who are now going through a divorce. Both of them are seeking custody. Since you don't know the parents very well, do not express an opinion on which parent should get custody. The purpose of the interview is merely to obtain as much information as we can about Jim's life at the day care center. The attorney will later decide if and how to use this information in the custody dispute.

**N. Ethics in Practice**

The paralegal works for the law firm that represents the father in a custody dispute with the mother. The mother has her own attorney. The paralegal communicates with the mother without the permission of her attorney. It is unethical for anyone in a law office to communicate with an opponent without the permission of the opponent's attorney.