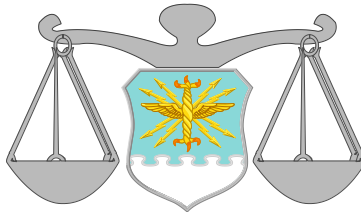


CHILD CUSTODY & VISITATION



**4th Fighter Wing
Office of the Staff Judge Advocate
1600 Wright Brothers Ave, Suite 265
Seymour Johnson AFB NC 27531
(919)722-5322**

Current as of September 2014

CHILD CUSTODY & VISITATION

1. Overview - Custody refers to the right to take care of, provide protection for, and exercising control over a child. Courts award custody when there is disagreement about which parent or guardian should control a child's upbringing. There are three types of custody: (1) legal custody, (2) physical custody, and (3) visitation.

Legal custody is the authority to make major decisions affecting the child's life. These decisions may relate to health, schooling, religious instruction, or other choices with long-term implications for the child.

Physical custody is the authority to live with and supervise child. A court may grant legal custody to one parent and physical custody to another. Thus a person who has physical custody may not be making major life decisions for the child (legal custody). Nevertheless, that person will still supervise the child on a daily basis.

Visitation is the right to periodically visit with the child.

2. Standard for Determining Custody – Similar to most other states, North Carolina law directs the courts to enter an award of custody that “will best promote the interest and welfare of the child.” Courts also use the best interest standard to award visitation.

The court will look at who has primarily taken care of the child in the past (washing, feeding and clothing the child, for example, or helping the child with homework), who has the best approach to discipline, what work schedules either person has, and how each person can provide for the physical, emotional, educational, religious and social needs of the child.

3. Who Can Seek Custody - Anyone can seek custody of a child. Moreover, most states, including North Carolina, do not establish an automatic preference for the mother or father. Rather, they look closely at who will best promote the welfare and interests of the child. Under certain circumstances, a relative or guardian may be able to seek custody even though the child has a living parent.

4. Custody Disputes Between Parents - A custody decision is difficult in part because it attempts to predict the future. Despite the difficulty, the custody decision should seek to award custody to the parent who will be better at meeting the child's future needs.

To determine the best interest of the child, the court will focus on the relationships between the child and parents. Many factors relating to the parents may bear on the strength of the relationship: the wishes of the child, the character and personality traits of the parents, and the conduct of the parents. The comparison may consider “physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.” The environment in which the child will live with each parent, though generally not as important, is another factor that may be considered.

5. Custody Dispute Between Parents and Nonparents – A parent wins custody in a dispute with a nonparent unless the parent is unfit, guilty of abuse, neglect, or abandonment. This is true even when the nonparent is a grandparent or another close relative.

6. Visitation - A parent who does not receive another form of custody has a right to reasonable visitation with their minor child, except when the parent is unfit to visit with the

child. If the court determines that visitation is not in the best interest of the child, it may limit the visitation, but it must allow the parent some visitation.

The court order for visitation must establish the time, place, and conditions. Parties and counsel may agree upon and propose their own schedule, but when they do not, the job falls to the court.

If the child is mature and has strong feelings against a person, the trial court may leave the decision on visitation in the child's discretion.

A court may provide for visitation by electronic communication, including telephone, email, instant messaging, video teleconferencing, or other means. This may be ideal when the child lives far away from the person seeking visitation.

Grandparents and other close relatives may seek visitation rights. To win, they must prove that the visitation will be in the best interest of the child.

7. Joint Custody - Joint custody may, in some states, mean joint *legal* custody, which is shared decision-making. At other times it means shared *physical* custody. Joint custody is only awarded to parents, and it is not likely to be awarded unless both parents desire it. Joint custody, both legal and physical, can have an excellent effect on both the child and the parents—if the parents are able to work together on issues concerning the child. However, it can have disastrous results for the child if the parents cannot or will not co-parent. The relationship between parents is often the largest factor affecting the outcome of any joint custody arrangement.

8. Joint Legal Custody - Joint legal custody means that the parents will share in making all major decisions that affect the child. These decisions might include whether or not the child will go to private or public school, undergo elective surgery, or move with one parent to another state. It does not mean that the parents will jointly make day-to-day decisions. Neither does it mean that the child will spend the same amount of time with each parent.

Joint legal custody will require both parents to discuss the child's needs more frequently than with a sole custody arrangement. Joint legal custody means that both parents will need to cooperate with each other and reach agreements where the child is concerned. This may not be easy to do. If spouses have been able to set aside differences, discuss, and agree on matters concerning the child, joint legal custody may be an acceptable solution. However, if disagreements include issues concerning the child, the arguments and disagreements will most likely continue well beyond divorce and will frustrate any attempt at true joint legal custody.

9. Joint Physical Custody - Sometimes referred to as "shared custody," means that each parent will share the physical care and supervision of a child. This can be accomplished in many ways. For example, the child can alternate weeks with each parent or spend three and a half days of each week with each one. However, the child must have a permanent address for purposes of school and medical records, so one parent's home should be designated as the "primary residence".

Joint physical custody was seen at one time as a wonderful answer to the problem of a child's growing up without the opportunity to spend equal time with both parents. Ideally, a shared custody arrangement means that both parents maintain a "real home" for the child, including a room, toys, and clothes. In sole custody arrangements, the non-custodial parent's every-other-weekend visits may not allow a real parent-child relationship to form or continue. Both parent and child are trying to do everything in one weekend. A joint physical custody

arrangement can allow both parents to spend real parental time with the child and thus develop a better relationship.

Recently, it has become apparent that joint physical custody is not the ideal solution it was once thought to be. Too often the child may be shuttled back and forth between parents and have no real feeling of a "home." Consistency is often difficult to achieve in such an arrangement. The rules may be different at each parent's home -- bedtime is 8:30 at Mom's but 10:00 at Dad's. Schoolwork sometimes suffers. For example, homework assigned while the child is staying at one home, but due to be turned in when he is at the other, can be inadvertently overlooked. Friends are different at each home and harder to keep up with, the babysitter may be different each time, and so on. Children who have difficulty adapting to change may find joint physical custody too chaotic. Generally, the parents must work very hard at such an arrangement. Joint physical custody seldom reduces hostility between the parties and may even increase it. It requires two parents who maintain a commitment over time to put the needs of the child first and are able to create a conflict-free zone for their child. Parents who choose joint physical custody must be willing to have open and frequent communication with each other. Joint physical custody requires two parents committed to be co-parents.

10. Procedure in Custody Actions – You will need to retain a civilian attorney for the presentation of the papers and the appearance in court. 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.

A claim for custody can be filed at any time. If a couple is getting divorced, the court may determine custody before, after, or during the divorce. Divorce decrees do not necessarily settle custody matters.

A custody suit is usually filed in the "home state" of the child, which is where the child has lived for the last six months. If the child does not have a home state or the child's home state refuses to hear the case, then the suit can be brought in any state where the child and one parent have significant contacts and connections (such as former neighbors, teachers, doctors, relatives and so on).

A claim for custody should be filed in the county where the child resides or is present or in a county where either parent resides.

Each party should provide the court with the addresses of the child for the last five years, the persons with whom the child has lived for the last five years, any proceeding involving custody or visitation in which the party has participated, and other related information. Before a custody case is tried, the parties will be required to participate in one mediation session. (See **Part 11. Mandatory Mediation**).

A North Carolina court 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 in 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). You may file and register the other state's decree with the Clerk of Superior Court at any county courthouse.

11. Mandatory Mediation - Before a custody case is tried in North Carolina, parents are ordered to participate in at least one mediation session. Although attendance is mandatory, the court does not require the parents to reach an agreement. The cost of this mediation is covered by the state.

Mediation is a process in which a professionally trained, neutral, third party assists parents in developing an agreement that provides for the care of their children during and after separation. The goal of the mediation process is to give parents an opportunity to discuss parenting issues that involve both parents in the continuing care of their children. The agreement focuses on the children's needs as well as the on the rights and responsibilities of both parents.

A court may also appoint a parenting coordinator to work on a case. The parenting coordinator's role is to identify disputed issues, reduce misunderstandings between parents, clarify priorities, explore possibilities for compromise, and help parents work together when parenting their child.

12. Modification of Order for Custody - No custody order is ever *permanent*. However, once a person is awarded custody in a court order, the judge can only change the custody order if there is a substantial change of circumstances affecting the best interest and welfare of the child.

A judge's ruling can be appealed. However, the law of custody vests enormous discretion in the trial judge, and reversals on appeal for abuses of discretion are relatively rare.

13. Counsel Fees for Custody Claims - Under North Carolina law, if the person asking for attorney's fees is acting in good faith (with good, honest intentions) 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.

14. Enforcement of Custody and Visitation Orders. - If a party violates a custody order, the law provides a number of remedies. The court may enforce a custody order by proceedings for civil contempt and punish the disobedience of its orders by proceedings for criminal contempt.

You may obtain other information concerning North Carolina Laws at the North Carolina Bar website at: www.ncbar.com