



FAMILY LAW LITIGATION

CUSTODY – FANTASY AND REALISM

I. THE PROBLEM OF REALISTIC AND UNREALISTIC EXPECTATIONS IN CUSTODY MATTERS

- Custody litigation causes reasonable people to act in unreasonable and unpredictable ways. The “fight” for their children can be as encompassing as any Civil War. Once loving and amicable people can turn vicious and unforgiving – casting blame, through verbal punches and behavior that would be great fodder for any afternoon talk show involving chair throwing.
- As counsel for litigants in custody, we are not only advocates for the parent we represent but also keepers of the goal. The goal being what is best for the children and how can the children have a relationship with your client.
- Parents involved in custody litigation generally fall into several categories:
 - A. *The “Reasonable” Parent* – These client’s show a heightened degree of awareness, putting the needs of the children before their desire to punish the other parent for any wrongdoing. These clients communicate on a sufficient level with the other parent and development of a custody Order is relatively uneventful.
 - B. *The “Completely Unreasonable I Can’t Even Believe I had a Child with that Idiot” Parent* – These parents can’t even agree to the day of the week let alone how they will raise their children or work together to assure the children have a stable and thriving relationship with both parents.
 - a. Starting with a Court Order outlining generally how the parents are to act. This gets the parents out of the gate. This provides for a bit of flexibility to see if the parents can work together on some level.
 - b. If problems arise, then a detailed Court Order is necessary to completely delineate what each parent should be doing. EXAMPLE: drop-of/pick-ups; who takes the children to religious classes; when do the children call on the telephone, etc...



- c. Some parents may need co-parent counseling to rein them in. Session can occur to focus on particular issues.
 - C. *The “Abusive” Parent* – These parents have either been accused of abuse or have acted abusively, either to the child or other parent. Depending on whether abuse did indeed occur or whether it is a false allegation deemed unfounded by an independent agency, this parent still maintains a cloud of suspicion.
 - a. Actual Abuser – Parents who have indeed committed abusive acts will need independent counseling/therapy and perhaps supervised visits if necessary. Each case of abuse is dealt with on a case-by-case basis.
 - b. Accused Abuser - These parents have not abused in any way but have been accused.
 - D. *The “I am the Grandparent but I might as well be the Parent” Parent* – This client comes to you with their own parents who tend to lead the custody litigation. Don’t lose sight of whose goals you are pursuing. Will the case back fire because the children report that they spend time with Granny and not Mommy, when on Mommy’s time?
 - E. *The “I have other people to parent my children” Parent* – These parents claim to want to be there for their children but cannot adjust their work and social schedules to accommodate those of the children. RED FLAG: Parent says they want to have shared or primary custody, but can they use the other parent as a babysitter.
 - F. *The “I need shared custody so I don’t have to pay support” Parent* – These parents are simply focused on the numbers. Can they assume a certain number of overnights in order to alleviate their support obligation? They’ve lost their eye on the ball.
- Realistic Custody Expectations
 - A. Out of the Gate – Trying to establish a starting point for custody depends upon which client you represent above. Filing a custody complaint and proceeding through the process.
 - B. First Court Order – Setting up an initial custody Order to give the parties direction. Helps set a tone for expectations.



- C. Trials/Hearing – unable to consent, parties need court assistance and can either have a trial with experts or move for partial custody.
 - D. Contempts – contempt of non-compliance with a custody order is relative to the action accuses of. Contempt of being ten minutes vs. contempt of missing a holiday.
 - E. Delay/Time Constraints of the Court
- Unrealistic Custody Expectations
 - A. Moving from periods of day visits straight to primary
 - B. Claiming one missed or late visits means immediate suspension of all custody time.
 - C. Asking for shared custody but living in different counties or different states for that matter.
 - D. A bad spouse does not a bad parent make
 - E. Custody litigation moves quickly when in fact it may be over three months until you have any hearing to address modification or even overnight visits for a parent.

II. THE STATUTORY CRITERIA AND THE REAL CRITERIA THAT JUDGES APPLY

A. Statutory Criteria on Custody:

- The Best Interest of the Child: The “ultimate guidepost” in a child custody case is the child's best interests. [*Meyer-Liedtke v. Liedtke*, 762 A.2d 1111, 1114 \(Pa. Super. 2000\)](#). Focus must be on what is best for the Child rather than on doing justice between the parties. [*English v. English*, 322 Pa. Super. 234, 469 A.2d 270, 273 \(1983\)](#).
- Stability: The stability of an individual, economic, emotional, psychological or otherwise, has great impact on the life of a minor child. The value of stability is a factor which should be greatly considered. [*Snarski v. Krincek*, 372 Pa. Super. 58, 77, 538 A.2d 1348, 1358 \(1988\)](#). The court has viewed maintaining



continuity and stability in custody arrangements as important factors in a child's emotional well-being. [Commonwealth ex rel. Jordan v. Jordan, 302 Pa. Super. 421, 448 A.2d 1113 \(1982\)](#).

- Ability to Care for the Minor Child: The court must view each parent's lives as provided by the evidence and testimony at the time of the custody hearing when determining the proper custody of the minor child. [Brooks v. Brooks, 319 Pa. Super. 268, 466 A.2d 152 \(1983\)](#).
- Primary Caretaker: The parent who has served as a primary caretaker for the minor child is a substantial factor which the trial judge must weigh. [Commonwealth ex rel. Jordan v. Jordan, 302 Pa. Super. 421, 448 A.2d 1113 \(1982\)](#); [Brooks v. Brooks, 319 Pa. Super. 268, 466 A.2d 152 \(1983\)](#). "[T]his court has long recognized that the removal of a young child from his environment is a factor which bears upon its emotional well being Therefore, continued residence of children with one parent may be controlling." [Hugo v. Hugo, 288 Pa. Super. 1, 6, 430 A.2d 1183 \(1981\)](#).
- Continuity of Current Custodial Arrangement: Modification of an existing custody order is not warranted simply because one parent is unhappy with the current arrangement. The parent who is requesting to change the current custody has the burden to establish that a change of the existing custody order is in the child's best interest. [Jackson v. Beck, 858 A.2d 1250 \(Pa. Super. 2004\)](#).

B. Judicial Criteria on Custody:

(Although case law and statutes exist for the Courts to follow, many Judges vary in different degrees on the application of the case law and custody statutes. One case may yield a particular result while another case, with similar circumstances; yield a totally different result from the same Judge. In addition, different Judges may rule differently on identical situations.

- The current primary parent – The outsider parent (this one has remained on the sideline during the intact family period while “super”parents made did most of the child rearing, scheduling of activities, doctors appointments, etc.) has a burden of



getting up to speed with “super”parent. At a minimum: Does outsider parent know doctor and teacher names of child? While some Judges don’t think this is relative, others may be appalled which makes your client look bad. Lack of knowledge = I don’t care about my child.

- Parties work schedules – While in today’s society both parents work, if one is home prior to bus drop-off, that parents looks better to being the weekday primary parent then parent who is off at 5 p.m. and may require after school care.
- Bonding – Judges use the word “bonding” to describe that natural parent/child relationship. Bonding is some type of barometer that can be secretly measured against either parent.
- And the winner is “Shared”, well maybe – Courts tend to communicate a desire for the parents to share custody. Absent a housing issue for one parent or a distance issue, most courts will move a case to shared and then limit shared if things start to go downhill.
- Teenagers – No matter how many psychological evaluators tell the Judge that the parents should share custody of the teenage children, try telling that to a 16 year-old girl who knows everything and hates the way Dad’s house smells.
- Something Bad is Going to Happen, Not. – Just because your client thinks something bad will happen when Junior is with undependable and ignorant ex, doesn’t mean the Court will prevent custody. Sometimes something bad had to happen first. Not necessary with the child, but perhaps ex is arrested for his third DUI.
- Current status/History

The current status plays a very important role. Judges may not like to upset the apple cart with little Jimmy and if nothing earth shattering has happened to warrant a modification or change, than things remain the same.

History is usually forgotten in custody. If de facto primary parent has in the past engaged in alienating behavior, lied about certain events and in all other ways tried to thwart non-custodial parent’s time, Courts tend not to change custody if



during the litigation, de factor primary parent behaves well, apologizes for past and the child seems well adjusted.

III. PREJUDICES, FOUL-UPS AND OTHER CRUEL REALITIES OF THE COURTROOM

A. WHEN DOES IT BECOME PREJUDICIAL TO YOUR CLIENT

1. PFA gives birth to a custody Order

- Out of the gate with a PFA Temporary Order that lacks foundation puts primary parent into first position and other parent running to catch up. Even if the Temporary PFA (obtain ex parte) is dismissed or vacated via consent Order, it tends to surface at every hearing.

2. CYF knocks at your door

- Like a dismissed or vacate PFA, if any Children Youth and Family agency (acting on a call of abuse) appears to investigate a parent, the other parent tends to make referenced to this investigation even if the report comes back unfounded.
- Remember CYF must investigate every report made to them. Follow through and obtain an official “unfounded” document.

3. Delay, Delay, Delay

- Dad moves out of family home due to sour marriage. Mother gets de facto primary custody. Father immediately files for custody and then he is forced to travel down the long road of the Court system. By the time you have a hearing, Mother has firmly established herself at primary parent.

B. HOW DID THIS GET SO CRAZY

1. Alienation

- Alienation is an ugly beast that appears often, either intention or unintentional. What seems like a minor infraction by the alienating parent (missing evening phone calls) multiplies like a bad case of chicken pox and turns into missing custody weekends because “child won’t get into the car.”



2. I thought I was being nice

- Parents are told to use a give and take approach. But if you represent the parent who is always giving, that additional overnight every now and then turns into a permanent Court Ordered overnight.

C. OTHER CRUELITIES YOUR CLIENT WILL FACE

1. Support vs. Custody – Some parents will dig in their heels on custody because it has a direct impact on their financial bottom line.
2. Set-Ups/Pushing Your Buttons
3. Sabotaging your Custodial Time – For Example, one parent over schedules the child in activities on the other parent's time
4. Never Underestimate the Power of the Parent/Child – It turns into a battle of the wills.

IV. HELPING THE CLIENT TO ACCEPT REALISTIC GOALS

A. COMMUNICATION

1. Identify the goals and discuss them with your client in different ways
2. Write it down
3. Be specific
4. Ask if they understand (a glazed over look is sure sign of confusion)

B. WHEN WE GET BEHIND CLOSED DOORS

1. Most conciliations takes place without the client there to hear what the Judge is saying. Tell the client to come to Court when at all possible and observe for themselves what the Judge has to say. (i.e. Motions)



V. HELPING THE CLIENT TO ACT RESPONSIBLY

A. GIVE A LITTLE TO GET A LITTLE

- A parent who wants the child for a family wedding should be willing to swap days with the other parent who wants the child for a family reunion.

B. PICK YOUR BATTLES

- Know what to give up on and let the other side “win” once in a while.

C. TAKE THE HIGH ROAD

- Otherwise known as “bite the bullet”. Example: Little Junior has no ride home from school activity and it’s not your night. Pick him up anyway and deliver to your ex. Junior’s not left out in the cold, knows you love him and appreciates the ride. You may not get a thank you from the ex but that’s not the point.

D. UNDERSTAND THE CONSEQUENCES OF YOUR ACTIONS

- Make your client understand that although the Order provides for telephone contact every evening at 7:00 p.m. and not when you feel like. May seem miniscule at the time (phone call with a four year old who watches TV instead of talking on phone), but will eventually catch up.