



CUSTODY FOR THE MILITARY PRACTITIONER

MARK SULLIVAN

COL, USAR (Ret.)

mark.sullivan@ncfamilylaw.com

VISITATION STRATEGIES

WHAT IS “REASONABLE VISITATION”?

VISITATION STRATEGIES

- ***VISITATION “BY MUTUAL CONSENT”***
- ***BUT IF PARTIES CAN'T AGREE ...?***
- ***“BACKUP” OR DEFAULT SCHEDULE OF VISITATION***

A TYPICAL LOCAL SCHEDULE

- ☞ ***ALTERNATING WEEKENDS***
- ☞ ***ONE WEEK EACH CHRISTMAS***
- ☞ ***ONE MONTH EACH SUMMER***
- ☞ ***ALTERNATING HOLIDAYS***

SFC = Sergeant First Class??



or...

**“SITTER OF FIRST
CHOICE”?!!**

WHAT CAN DAD DO?

- ***DOCUMENT THOSE REFUSALS***
- ***GO TO COURT FOR VISITATION RIGHTS***
- ***SELF-HELP??***



VISITATION AND CHILD \$UPPORT

*UNLESS THE
COURT SAYS
SO...
NO LINKAGE!*



MILITARY FACTORS



FACTORS

- IRREGULAR CH. CARE SCHEDULES,
"FULL-TIME DUTY," PCS MOVES,
ALERTS, DEPLOYMENTS -vs.-
- QUALITY OF SCHOOLS ON BASE
- RECREATIONAL FACILITIES
- DEPENDENT YOUTH ACTIVITIES
- DAY CARE FACILITIES
- TRAVEL TO OTHER STATES &
COUNTRIES -- "ENRICHMENT"

THE VOICE OF THE CHILD



THE VOICE OF THE CHILD



REMEMBER -- THIS BLADE CUTS
BOTH WAYS...

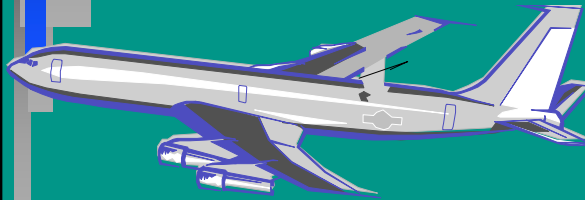
FORECASTING LONG-DISTANCE VISITATION

- SUMMERTIME
- CHRISTMAS



LONG-DISTANCE VISITATION

■ LOGISTICS...



SUPERVISED VISITATION...?

■ MYTH vs. REALITY



CHANGING CUSTODY

Factors and Scenarios

Factors for Custody Modification

- *Since the last custody order...*
- *Change of circumstances*
- *Substantial*
- *Unforeseeable*
- *Having an impact on child's welfare*
- *Impact is adverse, harmful*
- *So as to require change of custody*

Factors for Custody Modification

The "Usual Suspects" --
OBJECTIVE and VERIFIABLE

- HEALTH
- EDUCATION
- BEHAVIOR

SCENARIOS

- "Johnnie's mom was just thrown in jail for child abuse."
- **CHANGE OF CUSTODY
WILL BE GRANTED!**

SCENARIOS

- *"She's started living with her boyfriend."*

SCENARIOS

- *"She's started living with her boyfriend."*
- **MARITAL FAULT vs. PARENTAL MISCONDUCT**
- **EFFECT ON CHILD?**
- **JARRETT CASE IN ILL. '79**
- **ALMOND CASE IN N.C. '79**

SCENARIOS

- *"I've remarried and I'm able to take care of Johnnie now."*

SCENARIOS

- *"I've remarried and I'm able to take care of Johnnie now."*
- **NO SHOWING OF HARM, ADVERSITY**

SCENARIOS

- *"I just gave up custody to join the Army."*

SCENARIOS

- *"I just gave up custody to join the Army."*
- **NOTHING UNFORESEEABLE!**

SCENARIOS

- "She won't let me visit Johnnie."

SCENARIOS

- "She won't let me visit Johnnie."

- **IS A CHANGE OF CUSTODY REQUIRED?**

- **WHY NOT JUST REQUEST AND ENFORCE VISITATION RIGHTS?**

2 MORE SCENARIOS...

- "Johnnie says he wants to live with me now."

- "She's mentally abusing Johnnie."

SCENARIOS

- "Johnnie says he wants to live with me now."

SCENARIOS

- "Johnnie says he wants to live with me now."

- **POTENTIALLY DYNAMITE IF CHILD IS OF SUITABLE AGE & MATURITY**
- **NEED OTHER FACTS TO MAKE IT WORK; OTHERWISE...**

- **LIKE A GREAT BOMB WITH NO DELIVERY SYSTEM!**

SCENARIOS

- "She's mentally abusing Johnnie."

SCENARIOS

■ "She's mentally abusing Johnnie."

■ **Please help me...
HOW DO WE
PROVE THIS?**

CUSTODY TRIALS

■ **"DON'T LET HIM GET
AWAY WITH THAT...
DEMAND YOUR
SETTLEMENT!"**



The Ann Landers Theory of Lawsuits

Sometimes
NEITHER
parent is
willing to give
up custody!



LET'S GO TO COURT!

Becoming involved in a lawsuit is like "being ground to bits in a slow mill; it's being drowned by drops; it's going mad by grains. Hundreds of thousands of people are exposed to such torture each year, some of them actually choosing to initiate the process. They invariably find the experience painful, protracted and expensive. When it has run its course, they often realize that it was futile. Yet there remains a queue of victims impatient for their turn...."

--Charles Dickens

CUSTODY TRIALS

- Enforcement [ct. order]
- Clearing the air
- No need to wrestle with compromises, give-&-take



CUSTODY TRIALS

- Harder to change ct. order
- Bad blood, hard feelings
- Time and MONEY



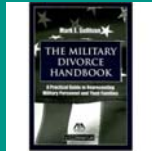
Custody Resources & Referral

- **CURRENT (OR FORMER) ATTY?**
- **WORD-OF-MOUTH**
- ***YELLOW PAGES?***
- ***Operation Stand-By – found at website for Military Committee, ABA Family Law Section, www.abanet.org/family/military***

Custody Resources & Referral

- ***MEMBER OF ABA FAMILY LAW SECTION***
- ***“SPECIALIST” IN FAMILY LAW***
- **Member, American Academy of Matrimonial Lawyers – www.aaml.org**

Custody Resources & Referral



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Custody Resources & Referral



← The Custody Fairy

CUSTODY TRIALS

WHAT IS THE COST?



CUSTODY TRIALS

WHAT IS THE COST? -- ASSESSMENT OF ATTORNEY FEES?



CUSTODY TRIALS

PRIMARY CARETAKER ISSUES: "WHO'S THE MOTHER?"



WOMEN & CHILDREN FIRST!



* ~~90~~% of all single-parent families are headed by women.

*1970... as of 1998, 80%

Custody Trials

A Role for Mediation?



WHAT TH'
&*%#\$\$@ % !!?? IS
JOINT CUSTODY?

A cartoon illustration of a man with yellow hair, wearing a blue suit and red tie, looking confused with several yellow question marks floating around his head.

JOINT CUSTODY

- LABELS
- "The ZERO-SUM Game"

A cartoon illustration of a man with yellow hair, wearing a blue suit and red tie, looking confused with several yellow question marks floating around his head.

JOINT PHYSICAL CUSTODY

A TIME-SHARE PROBLEM?

A large red arrow pointing upwards.

JOINT LEGAL CUSTODY

A large red arrow pointing downwards.

SHARED DECISION-MAKING?

THE "ROADBLOCK PROBLEM"

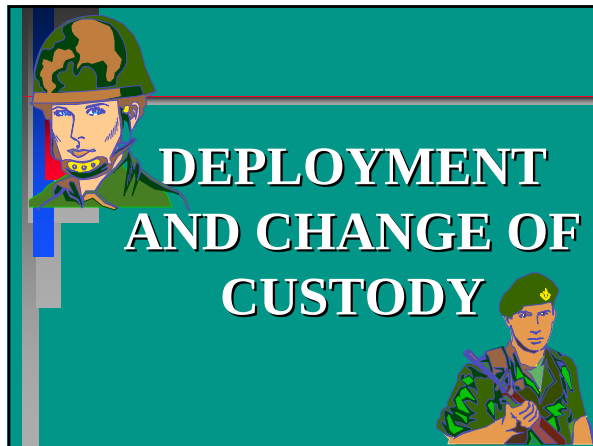
A large red octagonal sign with a black border and the word "STOP" in bold black letters.

THE OVERSEAS CLIENT...

(OR ONE THAT'S JUST FAR
FROM THE COURTROOM!)

A large red arrow pointing downwards.

*PEREMPTORY
SETTING!!*



Deployment and Change of Custody

QUESTIONS FOR THE CLIENT:

- HOW LONG WILL DEPLOYMENT LAST?
- WHO TAKES CARE OF JOHNNIE?
- WHAT EFFECT ON JOHNNIE?
- WHAT EFFECT ON OTHER PARENT?

Deployment and Change of Custody

OPTIONS FOR THE CLIENT:

- SCRA = FALSE SOLUTION?
- GET CONSENT TO TEMPORARY CUSTODY ARRANGEMENT
- HOPE (& PRAY) FOR SHORT DEPLOYMENT
- TRANSFER CUSTODY TO OTHER PARENT (PERMANENTLY?)



THE END

CUSTODY AND VISITATION FOR THE MILITARY PRACTITIONER

COL MARK E. SULLIVAN, USAR, RET.

I. VISITATION DRAFTING: What Can We Do? Two Problem Clauses--

- A. "Reasonable visitation" [vs. specified visitation provisions -- times, dates spelled out explicitly in the agreement or order]
 - 1. Who decides what is reasonable?
 - 2. If mom is in Charlottesville and dad is at Ft. Bragg, is it reasonable for him to drive up to get the child Friday night at 7 p.m. [a 4-hour drive that means they get back on base at 11 p.m.] and return the child Sunday night at 7? Is it unreasonable?
- B. "Visitation by mutual consent"
 - 1. What if mom disagrees with Wednesday night supper with dad? What if she disagrees with dad's having the children on the 4th of July?
 - 2. What if there is no mutual consent because one parent is being unreasonable? Can you solve the problem by adding a clause stating that neither parent shall be unreasonable in requesting or withholding visitation? Will it work with these parents?
- C. Accommodating predictability and flexibility
 - 1. The need to know when visitation will occur to avoid disappointing child or unnecessarily disrupting mom's schedule
 - 2. But also need to leave room for changes in visitation due to child's schedule [a sleep-over with a friend, a trip to the mountains or the beach on dad's weekend], mom's schedule or dad's schedule [as when he has a trip on his visitation weekend]
- D. See options set out in client handout at ATCH 1 after outline. One solution: *Reasonable visitation by mutual consent; if they can't agree, the following schedule applies...*

LEGAL ASSISTANCE ATTORNEY'S VISITATION CHECKLIST

4	<u>Reasonable visitation</u>	Does client really want NO specified visitation times? As him or her what will happen if they disagree on when and how visitation will occur.
		If client decides that specified visitation might be better, add the following terms:
	<u>Specified visitation</u>	
	Local schedule	Alternating weekends, from 6 p.m. Friday to 6 p.m. Sunday
		One week each Christmas holiday period
		Four weeks in the summer, taken two weeks at a time [specify dates, such as "First two weeks in July and in August"]
		Every Father's Day with dad (and every Mother's Day with mom), regardless of other scheduled weekend visitation
		Alternating Thanksgivings and spring breaks [specify dates]
	Long-distance schedule	
		Christmas holiday period
		Summers
	Long-distance logistics	
		Usual arrangement: non-custodial dad gets round-trip plane tickets in advance, sends them to mom
		Need for companion for the child if under a certain age? This means either mom or dad has to accompany child on the flight – at the cost of one more plane ticket! Have client check with specific airlines for rules; policies may vary.

- E. Using creativity: **SFC** -- the "sitter-of-first choice" option (when both parents are local)

1. Instead of hiring a sitter, call other parent and give him or her the right of first refusal to stay with the kids. This saves money **and** let him or her spend time with the kids! Everyone wins!!
 2. Sample clause: *If the parties live within [distance] of each other and one parent cannot care for the children for part of the time that he or she has them, then that parent shall immediately contact the other as soon as the conflict or commitment becomes known and shall offer the other parent the option of taking care of the children for the specified period. If the other parent declines or does not accept within a reasonable period of time, then the parent who made the contact may make other arrangements.*
- F. Back to the original problem: What can dad do? When you're stuck with an agreement or an order that's worse than useless, you can...
1. Go to court for modification. Especially if the client has worked hard to document the refusals, most judges will not like to hear about the constant refusals.
 2. Ask civilian counsel to request a peremptory setting so that the client's case will be heard "first up" on the date specified, rather than being continued if there are other cases that are before it on the docket.

II. CHILD SUPPORT DURING EXTENDED SUMMER VISITATION

- A. If it's in writing in the agreement or order, your client can reduce your support payments or stop them entirely for the time the children spend with him in the summer. If parties are still negotiating, it's a good idea to consider such a clause-
1. Reduction of some costs associated with full-time care of child -- food, gasoline
 2. But remember "embedded costs" -- extra bedrooms for the kids -- don't go away
- B. Answer -- reduce child support by 1/2 or 1/3 for each full month of visitation

- C. Potential problem if the support is paid through the courts -- how will clerk know that dad had visitation for that month and isn't in arrears? What if dad is paying by garnishment from his wages? Answer: Have mom "rebate" the cost to dad every September. What if she refuses? Add a penalty clause that grants him the right to take the dependency exemption and child tax credit for that tax year for the child or children involved if she breaches the "rebate clause"
- D. Visitation and child support (another view) -- what about dad withholding child support because mom will not allow visitation?
1. In most cases, child support and visitation are seen by courts as unrelated; enforcement of one cannot be accomplished by withholding the other
 2. In rare cases, the courts [not the parties] will link them if, for example, the suspension of child support is the only way of getting out-of-state mom's attention and compliance with court-ordered visitation rights. But you have to go to court for this!

III. "THE UNIFORM" AND CUSTODY AWARDS

A. Is there a bias against military parents? Given the problems associated with some military parents' duties, are they "shooting themselves in the foot" in asking for custody while on active duty?

LAA CHECKLIST FOR MILITARY CUSTODY

√	Factors against obtaining custody:	Irregular child-care schedules, weekend or night duty
		Mobilizations, alerts, deployments, frequent PCS moves
	Factors favoring custody	Stationed in garrison, deployment unlikely
		Quality of schools on base
		Recreational and day-care facilities on base, dependent youth groups
		Travel to other states, countries – cultural enrichment

IV. THE VOICE OF THE CHILD:

- A. Joke: "Where does the gorilla sleep at night?" Answer: "Anywhere he wants!"
Client Question: "When can my son decide where he wants to live?" Answer:
"Any time he wants; he just can't dictate that result to the judge!"

- B. Extract from *Kearns v. Kearns*, 170 S.E.2d 132 (N.C. App. 1969):

Defendant's assignment of error No. 3 is addressed to the refusal of the court to hear the testimony of the four minor children, who were tendered by defendant.... Counsel for defendant twice requested the court to hear the testimony of the children and the court refused both times. This was error. The case of *Spears v. Snell*, 74 N.C. 210 (1876), established the right for a child to have his testimony heard. The Supreme Court said:

'We think the boy was a competent witness, and ought to have been examined in that character. Indeed, we think, being the party mainly concerned, he had a right to make a statement to the court as to his feelings and wishes upon the matter, and that this ought to have been allowed serious consideration by the court, in the exercise of its discretion, as to the person to whose control he was to be subjected.'

The *Spears* case was cited with approval in *In re Gibbons*, 247 N.C. 273, 101 S.E.2d 16 (1957). In *Gibbons* the Court stated:

'There is nothing in the findings of fact to indicate that Judge Carr gave any consideration to the wishes of this ten-year old boy as to the person to whose custody he was to be given, though under the facts here the boy, being the party mainly concerned, had a right to have his wishes and feelings taken into especial consideration by the judge in awarding his custody. It seems that the learned Judge felt so 'cramped by his opinion that in law' the respondent had a primary right to the custody of the boy, that he overlooked the interest and welfare of the boy. This was error.'

These two cases leave no doubt that a child has a right to have his testimony heard. It is still, however, within the discretion of the trial judge as to the weight to be attached to such testimony. [citations omitted]

- C. What if the child doesn't want to visit dad? Remember: this blade cuts both ways! Should we let the child speak when it comes to custody but not when it comes to visitation? Should she be allowed to testify if she wants more time with dad but not if she doesn't want to visit with him?

- D. Extract from *Reynolds v. Reynolds*, 426 S.E.2d 104 (N.C. App. 1993):

David Reynolds has had limited contact with Judy Reynolds and Kelli Lynn Reynolds since December 1990. Judy Reynolds is very bitter about her divorce from David Reynolds and his affair and subsequent marriage to a former baby sitter, who is approximately twenty-five years younger than Mr. Reynolds.... Kelli Lynn Reynolds has been strongly influenced by Judy Reynolds' opinions in this regard. Judy Reynolds has denied Kelli Lynn Reynolds any visitation with Donna Campbell, the elder daughter of Judy and David Reynolds and elder sister of Kelli Lynn Reynolds.... Kelli Lynn Reynolds testified at the hearing that she loved the defendant but did not want to have visitation or telephone contact with him. The trial court believed this testimony, but found that David Reynolds is a fit and proper person to exercise reasonable and liberal visitation with Kelli Lynn Reynolds, and that it is in the best interest of Kelli Lynn

Reynolds that there be a specified visitation schedule between her and the defendant and that such visitation be allowed to occur....

The plaintiffs' sole contention on appeal is that the Order for visitation violates the Constitutional rights of the minor plaintiff. We find no merit to the arguments presented in the plaintiffs' brief, and, for the reasons that follow, we affirm the Order of the trial court.

The trial judge, unlike the judges of the appellate courts, has the opportunity to hear first hand the testimony of the parties in matters of child custody, and is, therefore, vested with broad discretion in such matters.... That discretion must be exercised in light of this Court's recognition that a parent has a "natural and legal right" to visitation with his child which should not be denied absent some conduct on the part of the parent constituting a forfeiture of the right or some finding that the exercise of the right would be detrimental to the best interests of the child. In re Stancil, 10 N.C.App. 545, 551, 179 S.E.2d 844, 849 (1971). The "paramount consideration" in matters of custody and visitation is the best interests of the child, and in determining such matters the trial judge may consider the wishes of a child of suitable age and discretion.... The child's wishes, however, are never controlling, "since the court must yield in all cases to what it considers to be the child's best interests, regardless of the child's personal preference." [citation omitted]

We recognize that Kelli Lynn Reynolds has expressed a desire not to visit her father. The trial court determined, however, based on findings of fact supported by the evidence in the record, that such visitation would be in her best interests. Despite Kelli Lynn Reynolds' desire to the contrary, "a trial judge has the power to make an order forcing a child to visit the noncustodial parent." Mintz, 64 N.C.App. at 341, 307 S.E.2d at 394.

- E. See client handout at **ATCH 2** (after outline) on children's testimony in custody cases

V. MARITAL FAULT, PARENTAL MISCONDUCT

- A. Jarett v. Jarett (Illinois Supreme Court, 1979 -- cohabitation = disqualification for custody per se)

- B. Extract from *Almond v. Almond*, 257 S.E.2d 451 (N.C. App. 1979):

The plaintiff was cohabiting with a male person. She, the two children and the male friend all live in a three-bedroom mobile home.... After finding both plaintiff and defendant to be fit and proper persons to have custody of the two minor children, the trial court awarded plaintiff custody.... Defendant argues three assignments of error on appeal. The first two assignments challenge the trial court's conclusions that plaintiff was a fit and proper person to have custody and that it was in the best interest of the minor children for them to be placed in plaintiff's custody. Defendant contends these findings were in error in light of plaintiff's open and continuous cohabitation with another male person.

We now review the factors considered by the trial court in awarding custody to plaintiff. The foremost factor challenged by defendant is the cohabitation by plaintiff with a male person in the presence of the children. Although cohabitation by unmarried persons of the opposite sex is not condoned by this Court, nor by the laws of this state, evidence of cohabitation alone is not always sufficient to support a finding that a party is not a fit and proper person to have custody of minor children. "The establishment of adultery does not *eo instanti juris et de jure* render the guilty party unfit to have custody of minor children."

In re McCraw Children, 3 N.C.App. 390, 395, 165 S.E.2d 1, 5 (1969). Adulterous conduct is only one of numerous factors to be considered by the court in determining the fitness of a party.... Where there are adverse circumstances affecting both parties that do not justify taking the children away from the parents, the court may rely upon the guidance of the old adage that it must choose the lesser of two evils. For the foregoing reasons, the order awarding plaintiff custody of the minor children is sustained.

- C. Need to educate clients that marital fault doesn't necessarily equate to parental disqualification.
 - 1. If mom cheated on dad, that makes her a bad wife -- but does it make her a worse mother?
 - 2. If dad assaulted mom, does that make him a worse father?
 - 3. Most judges look for some child-related impact before they start connecting *marital fault* and *parental fitness*

VI. "SUPERVISED VISITATION" -- A REALISTIC GOAL?

- A. Why the supervision? Check out the reasons, find out if they really make sense as a rationale for supervision
- B. Who's going to supervise? Check out the resources available for this.
- C. "Give dad enough rope to hang himself" -- absent clear evidence of an immediate danger of irreparable harm (the legal standard for a TRO), judge probably won't require supervised visitation until some problem or damage has already occurred

VII. CHANGE OF CUSTODY

- A. These can get expensive if the other side won't agree to custody modification
- B. Ordinarily there should be a strong reason for this, not just "I can't see my daughter!"
- C. Be sure to consider the practicalities of custody modification. It's not so easy as "We'll just have to get a change of custody." More realistically, it involves hiring an attorney [in the state where the other parent is located, or in the state where the original custody decree was entered], interviewing witnesses to determine what the facts are, checking on medical and school records, filing a motion for a change of custody, serving it on the other side, possibly going through depositions and discovery before the trial, calendaring a trial, getting the client and the attorney together for preparation before the trial [if they are in different localities], conducting the trial [if it's reached, rather than continued!], then preparing the order, sharing it with opposing counsel, then giving it to the judge for signing and filing.... And that's just the more predictable stages of this process!

D. Lawyer referral:

- i. www.lawyers.com
- ii. www.lawoffice.com/
- iii. www.aaml.org
- iv. www.attorneyreferral.net
- v. www.abanet.org/lawyerlocator/searchlawyer.html
- vi. www.abanet.org/legalservices/lris/directory/

LAA CHECKLIST FOR CHANGE OF CUSTODY

√	Legal Questions (check state law to confirm, clarify)	
		Is there a prior court order (not just an oral agreement or an unincorporated separation agreement)?
		Since the date of the order has there been a <u>change of circumstances</u> ?
		Is the change <u>substantial</u> or <u>significant</u> ?
		Does it have an <u>impact on the child/children</u> ?
		Is the impact <u>adverse</u> ?
		Was the change <u>unforeseeable</u> when the order was entered?
		Is the change one that <u>requires a change of custody</u> , as opposed to some other, less drastic remedy (i.e., change in visitation, change in child support)? In other words, <u>nothing but a custody change</u> will resolve the problem that exists.
√	Practical Questions	
		Will the other party <u>agree</u> to change custody? Can custody mediation be attempted?
		If not, can the client afford to hire a private attorney to take the case to court?
		If not, can the client secure representation <u>at no cost</u> (i.e., Volunteer Lawyer Program, legal aid, court-appointed attorney) or reduced cost?
		If not, can client employ a Guard/Reserve attorney for retirement points?
		[If no chance of securing representation, discourage client from attempting to handle case <u>pro se</u> ; a “do-it-yourself” root canal would probably be simpler!]

		Does the client have the funds to go back to the original custody court for a trial? [Consider travel, lodging, etc.]
		Does the client have the leave or vacation time for this?
		[If possible, contact client's attorney about requesting a peremptory setting]

VIII. CUSTODY TRIALS

- A. "Don't let him get away with that. Go straight to court and demand your settlement!" -- the Ann Landers strategy in custody disputes
- B. Cannot demand a settlement; you can give, compromise and agree on a settlement outside of court ...or you can refuse a settlement and try the case!
- C. Is going to court a good idea? Advantages--
 - 1. Clearing the air, getting it off your chest
 - 2. No need to wrestle with compromises, give-and-take
 - 3. Court order gives each protection -- enforcement by contempt, PKPA, UCCJEA; no change unless substantial change of circumstances
- D. Is court a good idea? Disadvantages--
 - 1. Court order is harder to modify later absent a substantial change of circumstances
 - 2. Bad blood -- hard to rescue a *working relationship* with the other parent out of a bloody trial.
 - 3. Time and money
 - a. Settlement -- free with legal assistance attorney; relatively inexpensive with private counsel if parties have agreed on most terms and attorney merely writes down their promises and then "tightens them up"
 - b. Trial -- *just plain expensive!*
 - c. Finding a good lawyer -- some tips:
 - (1) State bar-- board certification of family law practitioners

- (2) American Academy of Matrimonial Lawyers
 - (3) Reserve attorney directory
 - (4) Operation Stand-By (this is for lawyers to use, not clients)
 - (5) Lawyer referral service
 - (6) Call an officer of the state bar family law section
 - d. Costs? A "simple" custody trial might last just two days. If we assume preparation and negotiations equivalent to three days of legal work before the hearing -- and no expensive pretrial depositions -- this comes to 5 days x 8 hrs. x \$150/hr. = \$6,000! [The figure of \$150/hr. is an estimate based on legal rates near Ft. Bragg, NC -- obviously New York or California would be a different story!]
 - e. Assessment of attorney's fees against your client -- an additional cost of contesting custody. Some courts put the cost of custody litigation on the losing party, or on the party better able to pay it. So "you pay your own lawyer, and the other lawyer too!" Lesson: Don't play ball when you don't know the rules of the ball game!
- E. The judge's decision:
- 1. Is often based on track record-- what is the status quo? Or, "If it ain't broke, don't fix it." The crystal ball problem
 - 2. Primary caretaker issues
 - a. Presumption that custody of young children should be awarded to the parent who is the "primary caretaker." See, e.g., *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981) for primary caretaker criteria:
 - (1) Preparing and planning meals.
 - (2) Bathing, grooming, and dressing.
 - (3) Buying, cleaning, care of clothes.
 - (4) Providing medical care, including nursing and trips to physicians.
 - (5) Arranging for social interaction among peers after school, such as transportation to friends' houses and to girl or boy scout meetings.
 - (6) Arranging alternative care such as baby-sitters and day-care.

- (7) Putting the child to bed at night, attending the child in the middle of the night, and waking child in the morning.
- (8) Disciplining, including teaching general manners and toilet training.
- (9) Educating (religious, cultural, social, etc.)
- (10) Teaching elementary skills such as reading, writing, and arithmetic.

b. Problem: Truly nondiscriminatory on the basis of gender?

"West Virginia law does not permit a maternal preference in child custody litigation.... [However, the preceding] list of criteria usually... spells 'mother.' That fact reflects social reality; the rule itself is neutral on its face and application.... Our rule inevitably involves some injustice to fathers, who, as a group, are usually not primary caretakers."

-- *David M. v. Margaret M.*, 385 S.E.2d 912 (W. Va. 1989).

- 3. Strengths of each party as a parent are factor
- 4. Sometimes involves the wishes of child of suitable age, discretion and maturity
- 5. See client handout at **ATCH 3** (after outline), Checklist #4, "**Concerns of the Judge**"
- 6. "All things being equal..." mothers win most of the time.
 - a. But are all things ever equal? Is the courtroom an empty box, the judge a perfect neutral, and each parent equally qualified for the role of custody? What the judge brings into the court room:

"Like lawyers, judges have lives outside the law that affect their decisions in divorce cases. A judge's age, education, ethnic heritage, marital status, religion, and personal history can all have an impact."

--*Patricia Garity Smits, Family Advocate, Spring 1990.*

"The trial of a child custody issue has been stated by some to be 'the biggest crap game in town.' This is especially true where the control of the future life of a child is vested in the hands of a judge whose prejudices and attitudes necessarily color any decision. Who among the experienced matrimonial attorneys has not on occasion stated to a client, be it a mother or a father, that an award of custody will be an 'uphill climb' with the particular judge designated to try the case?"

--Willard H. DaSilva, "The Sense of Settlement in Child Custody," Fair\$hare, March 1989 at 12.

Judges bring to each case...

- (1) Beliefs about effective parenting.
- (2) Emotions.
- (3) Personal value system and experiences in life.

7. The bottom line: don't go to court if you can possibly avoid it!

*"While custody negotiations present unique problems for the attorney, credibility and concern for the child's welfare are primary considerations. Thorough trial preparation is a must if negotiations are to be successful, but a **fair settlement** is better than a **good contested victory**."*

--James T. Friedman

8. Currently about 80% of custodial parents are women (down from 90% in about last 20 years). But when you remove the settled cases, dads and moms are about equal in win-loss statistics!

IX. A ROLE FOR MEDIATION?

- A. Courts are increasingly turning to mediation to help parents arrive at a mutually agreeable custody determination.
- B. Technique: Mediator sets up several meetings with parents, finds out what they want, attempts to *fine tune* and reconcile differences, uses neutral language ["...son lives with father every other weekend"] rather than "loaded words" with win-lose implications [i.e., "custody" and "visitation"]
- C. Relatively inexpensive and more likely to achieve a result the parties will abide by.
- D. Benefits: cheaper, less traumatic, increased likelihood of compliance
- E. Who benefits most? Conflicting studies, but...
 1. By and large, women are much more satisfied with litigation results than men are.

2. Women seem to indicate no particular preference for the results of mediation compared to litigation.
 3. Men generally perceive fairer treatment in mediation than in litigation.
- F. Possible problems.
1. One party tends to dominate the other.
 2. Cases involving child or spousal abuse or substance abuse

X. JOINT (OR SHARED) PHYSICAL CUSTODY

- A. What is "joint custody"? (Ask your next client!)
1. Some parents think it's equal time with the children
 2. Others see it as just a label so that neither parent appears to have lost custody:

"...Almost all the lawyers and judges in Georgia were at best lukewarm about [joint custody], and not even all the mediators were in favor of it. Only a few respondents saw joint custody as the wave of the future and a symbol of changing attitudes toward women in Georgia. In New York, by contrast, there was greater acceptance of the idea of joint custody, especially among mediators as demonstrated by the fact that two-thirds of all custody awards included some variety of joint custody arrangement.

Divorce lawyers and judges in Georgia reported ambivalence about joint custody. Most interviewees saw it as a sop to the guilt of divorcing couples and of no real value. One lawyer said, "I hate it. I think it is a placebo... a cop-out. It is a way for judges to make two people feel good." Still others reported seeing it as a positive menace and disruptive to the stability of the children after a divorce. "We despise it, we don't recommend it... You can't just drag a poor little child from some other coast and have any kind of maturity or stability."

--from a study on joint custody and mediation in New York and Georgia,
published as "Effects of Different Dispute Resolution Methods," Fam. L. Qtrly., Vol.28, No. 2, Summer 1994 at p. 234.

- B. Custody is, for many parents, a "zero-sum game" -- for every winner, there must be a loser. For some parents, joint custody means an unacceptable label to be granted to the "visiting parent," something that "he doesn't deserve!"
- C. Joint (or shared) physical custody

1. What is it? The child or children live with one parent for a specified period of time and then live with the other parent for a separate specified period. Weekly or monthly alternations are often given as examples.
2. The military parent--can it work?
 - a. Irregular child-care schedules.
 - b. Frequent moves.
 - c. Need for parents residing in the same school district.
 - d. Need for sufficient income in both households to maintain two rooms and sets of clothes and necessities for the child.

XI. JOINT LEGAL CUSTODY

- A. True joint legal custody: one parent has primary physical custody, but both parents have an equal voice in major decisions for the child. See client handout at **ATCH 4**
- B. What are *major decisions*?
- C. Solving "the roadblock problem": finding a truly neutral tie-breaker [does such a person exist when the parties distrust each other?]
- D. Extract from a 1992 California joint custody order:

RESPONSIBILITIES OF JOINT LEGAL CUSTODY

7. Each of the parents shall make every effort to maintain free access and unhampered contact between the child and the other parent. Each of the parents is prohibited from making derogatory or demeaning statements concerning the other parent within the hearing of the child. Neither parent shall do anything which will estrange the child from the other parent or impair the natural development of the child's love and respect for each of the parents. Both parents need to understand that parenting requires the acceptance of mutual rights and responsibilities insofar as the child is concerned.
8. The parties shall consult and cooperate with each other in substantial questions relating to religious upbringing, educational programs, significant changes in social environment, and health care of the child. Before the parties separated, they agreed that the child should be raised as a Roman Catholic and attend worship services.
9. All schools, health care providers, day care providers, and counselors shall be selected by the parents jointly. In the event that the parents cannot agree to the selection of a school, the child shall attend the local public school pending mediation and/or further order of the court.
10. Each parent is authorized to obtain emergency health care of the child without the consent of the other parent.
11. Each parent is responsible for keeping advised of school, athletic, and social events in which the child participates. Both parents may participate in school activities for the child such as open houses, attendance at athletic events, etc.
12. Each parent shall provide the other parent promptly with information concerning the well-being of the child where the other parent is not likely to know of the information without prior or special knowledge or through discovery by routine inquiry. This information includes, but is not limited to: results of standardized or

diagnostic tests; notices of activities involving the child; samples of school work; all communication from health care providers, regular day care providers, and counselors.

13. Each parent shall provide the other parent with the address and telephone number at which the minor child resides, and shall notify the other parent within five days of any changes of address or telephone number. Each parent shall notify the other parent as soon as reasonably possible of any serious illness requiring medical attention, or any serious emergency involving the child.

14. Each parent shall provide the other parent with a travel itinerary and, whenever reasonably possible, telephone numbers which the child can be reached, whenever the child will be away from the parent's home for a period of seven (7) days or more.

15. Each parent is entitled to reasonable telephonic communication with the child. Each parent is restrained from unreasonably interfering with the child's right to privacy during such telephone conversations. Parent-initiated calls shall be made at the calling party's expense. The child has the right to initiate phone calls to the other parent for which the expense shall be borne by the receiving party.

TRANSPORTATION

16. The father shall be responsible for providing transportation to and from visitation. When the child is old enough to travel alone, the father shall be responsible for providing transportation to and from the airport nearest to the mother's home, and she shall be responsible for providing transportation to and from airport. The father is authorized to deduct from the spousal or child support (or both) ordered hereinafter 42.75% of the cost of such transportation upon providing to the mother documentary proof of such cost. For reasons that will appear below, that percentage will, in effect, cause both parties to bear the transportation expense in proportion to their present incomes.

E. Extract from a separation agreement:

33. Joint Custody. The parties shall share the joint legal care, custody, and control of the minor child(ren), _____, born _____, and _____, born _____. The _____ is awarded the primary physical custody of said minor child(ren), subject to the reasonable visitation rights of the _____. The parties shall make every reasonable effort to foster feelings of affection between themselves and the child(ren), recognizing that frequent and continuing association and communication of both parties with a child is in furtherance of the best interests and welfare of the child. In exercising joint legal custody, the parties shall share equally in all major decisions relating to the minor child(ren)'s educational training, extracurricular activities, medical needs, and religious training. In the absence of an agreement between the parties, the decision shall be made by (the primary custodian) _____. This arrangement is in the best interest of the child(ren), and the primary custodian is a fit and proper person for primary physical custody.

F. A final question: *Does joint custody work?*

1. Desirable preconditions--
 - a. Cooperative, communicative, flexible parents who respect each other.
 - b. Parents who are dedicated to providing for the child's best interests.
2. Psychological studies--perhaps not in the child's best interest, especially where the parents are likely to continue fighting.
3. The military parent--can it work? Need for maintaining close enough contact to participate in major decisions.

XII. LITIGATION SUPPORT AND LEGAL ASSISTANCE

- A. If your client, MAJ John Smith, is concerned about a fair but prompt trial...
 - 1. Contact the attorney who is representing him.
 - 2. If he has no attorney, use methods and resources mentioned above to get him a good one.
 - 3. Volunteer to help prepare him overseas
 - 4. Volunteer to help with the research -- create a brief!
 - 5. If he cannot be at the first hearing due to military duties, advise civilian counsel regarding the SSCRA
 - 6. To ensure a prompt trial, ask about a motion for a preemptory setting!

XIII. VISITATION: PROBLEMS AND SOLUTIONS

- A. Logistics for drop-off and pick-up
 - 1. There is no right answer -- except to spell it out and make sure everyone understands and there are no uncertainties.
 - 2. Usual situation -- noncustodial parent is responsible for all transportation
 - 3. Occasionally the parents agree to transfer child/ren at mid-point if there is a reasonable distance between them ... such as a 3- to 5- hour drive
 - 4. Sample "local" clause: John will pick up the children for visitation at 6 p.m. on the first and third Fridays of the month. If he is more than an hour late without explanation, Mary may cancel visitation. He shall return the children no later than 7 p.m. on the following Sunday. All arrangements for transportation shall be the responsibility of John.
- B. Missed visitation: penalties and make-up time
 - 1. A penalty might be necessary if dad regularly shows up late: **"If he's more than an hour late without calling to explain, then visitation is canceled without make-up"**

2. It also might be necessary if dad occasionally skips visitation without explanation, but this could be handled by "preventive drafting" -- **"Dad to call 48 hours in advance to confirm visitation or else it won't occur"**
3. Compare to alternative -- **"Dad to call 48 hours in advance to cancel visitation or else it will take place"**
4. Make-up time should occur if the schedule of the child or either parent requires a cancellation of visitation not due to dad's fault; make-up visitation would occur on one of next two weekends, at the choice of...[Mom if it was dad's schedule that caused the change; dad if it was mom's or child's schedule]

XIV. DEPLOYMENT CUSTODY/VISITATION CLAUSES

A. MAKE-UP clause--

1. If the NCP (non-custodial parent) is unavailable for visitation because of required military duty (including deployment) for up to seven (7) weeks, then he shall be entitled to make-up visitation. This make-up visitation shall consist of one replacement weekend for every weekend missed due to military duties. Each make-up weekend, taking the place of the missed weekend, shall be during one of the next two available weekends belonging to the CP [custodial parent], at the choice of [NCP][CP].

B. TEMPORARY CUSTODY clauses--

1. The arrangements below are entered into in light of the NCP's pending deployment for military duties which will make him unavailable for regular visitation, which is his right and his intention. They are intended as a temporary custody and visitation arrangement.
2. These arrangements are without prejudice to either party's right to request (from a court of competent jurisdiction) a revision or amendment thereof, and without the requirement for either party to show a substantial change of circumstances.

C. LET'S RE-NEGOTIATE clauses--

1. The arrangements below are temporary in nature. They shall be renegotiated between the parties no later than [date].

2. If the parties cannot agree as to further arrangements after that date, then this dispute will be submitted to a court of competent jurisdiction by either party, without a burden of proof for either one.

XV. CONCLUSION

* * *

ATCH 1

LAW OFFICES OF MARK E. SULLIVAN, P.A.

2626 GLENWOOD AVENUE, STE. 195
RALEIGH, NORTH CAROLINA 27608
(919) 832-8507 / FAX: (919) 833-2852

CLIENT INFORMATION LETTER # 32

SUBJECT: SPECIFIC VISITATION RIGHTS

Although flexible visitation rights are desirable for many parents who are separated or divorced, it usually helps to set out the specific terms for visitation if there is a disagreement or a misunderstanding. This prevents unnecessary trips to court, lost time with children or unmet expectations.

A good separation agreement or consent custody order will usually provide for visitation at such times as are reasonable, mutually agreeable to the parties, and consistent with the children's scheduled activities. In the absence of such agreement, a schedule of specified visitation should be spelled out. Please fill in the blanks below so we can understand your wishes for specific visitation.

a. *Place an X next to the visitation terms that will be mutually agreeable (or draft your own) below:*

- _____ Weekends: On every other weekend from pick-up at 6:00 p.m. Friday until return at 6:00 p.m. Sunday.
- OR**
- _____ Weekends:
- _____ Summer: For two weeks, with notice by **HUSB/WIF** to **WIF/HUSB** no later than April 1 of each year as to when summer visitation will be.
- OR**
- _____ Summer: For two two-week periods, separated by at least one week, with notice by **HUSB/WIF** to **WIF/HUSB** no later than April 1 of each year as to when this period will be.
- OR**
- _____ Summer: For an uninterrupted thirty-day period, with notice by **HUSB/WIF** to **WIF/HUSB** no later than April 1 of each year as to when this period will be.
- OR**
- _____ Summer:

_____ Christmas holidays: From 6:00 p.m. on the day school ends until noon on December 25 in even-numbered years, and from noon on December 25 until 6:00 p.m. on the day before school resumes in odd-numbered years.

OR

_____ Christmas holidays: From noon on December 25 until 6:00 p.m. on December 31 every year.

OR

_____ Christmas holidays: From 6:00 p.m. on the day school ends until 6:00 p.m. on the day before school resumes in even-numbered years.

OR

_____ Christmas holidays:

_____ Easter vacation/Spring break: For this entire period every year.

OR

_____ Easter vacation/Spring break: For this entire period every even-numbered year.

OR

_____ Easter vacation/Spring break:

_____ Thanksgiving holidays: At the Thanksgiving holiday period, from 6:00 p.m. of the Wednesday before Thanksgiving until 6:00 p.m. of the Sunday after Thanksgiving every year.

OR

_____ Thanksgiving holidays: At the Thanksgiving holiday period, from 6:00 p.m. of the Wednesday before Thanksgiving until 6:00 p.m. of the Sunday after Thanksgiving every even-numbered year.

OR

_____ Thanksgiving holidays:

_____ Other holidays: For the Friday or Monday holiday (i.e., Memorial Day) whenever such a holiday occurs in conjunction with regular weekend visitation, retaining the pick-up and drop-off times set out above.

OR

_____ Other holidays:

___ Mother's/Father's Day: On Mother's Day with the Mother and on Father's Day with the Father, regardless of other scheduled visitation.

___ Other visitation:

b. *Who will be responsible for transportation for visitation?* _____

c. *Will advance notice of visitation (or of non-visitiation) be required? If so, by how much time?*

d. *Other provisions to include under visitation terms:*

NAME OF CLIENT

ATCH 2

LAW OFFICES OF MARK E. SULLIVAN, P.A.

2626 Glenwood Avenue, Ste. 195
RALEIGH, N.C. 27608
919-832-8507/FAX: 833-2852

FAMILY LAW INFORMATION LETTER -- **TESTIMONY OF YOUR CHILD**

Preface

The purpose of this handout is to assist you in answering questions that you may have regarding the testimony of your child in a custody or visitation case and the law in North Carolina. It is, of course, impossible to answer all of your questions in a short brochure such as this, so we want to encourage you to ask other questions of your lawyer at the appropriate time. Feel free to take this handout with you so that you may refer to these answers from time to time and have a better idea of how your case is being handled. If you have any comments or suggestions for improving this handout, please do not hesitate to let us know.

* * * * *

1. Q. I VE HEARD MY DAUGHTER CAN TELL THE JUDGE WHERE SHE S GOING TO LIVE WHEN SHE BECOMES 12 YEARS OLD. IS THAT RIGHT?

A. Not quite. Nobody can tell the judge in a custody or visitation case what to do -- not you, not your lawyer, and certainly not your child. Not even at 17 years old, just six months from the age of majority in this state, can your child tell the judge what arrangements may be made for custody or visitation. The judge decides these issues based on the best interest of the child, whether or not the child agrees with the decision.

2. Q. WELL THEN, CAN MY DAUGHTER EVER TELL THE JUDGE WHERE SHE WANTS TO LIVE AND WITH WHOM?

A. Of course. Children often testify during custody and visitation trials. The cases in North Carolina state that it is very important for the judge in such a hearing to listen closely to the wishes of the child of the plaintiff and defendant (the parties to the lawsuit). But the cases also emphasize that the judge should only give strong weight to the preference of a child of suitable age, discretion and maturity. That means, basically, that if your child is really old enough and grown-up enough (and these are two different things!) to know with whom she wants to live, along with some good reasons for the decision, then the judge should be willing to listen to her explain her preferences.

3. Q. ARE THERE ANY AGE LIMITS FOR TESTIMONY? HOW YOUNG CAN A CHILD BE? CAN I ALSO HAVE MY THREE-YEAR-OLD SON TESTIFY THAT HE HATES HIS FATHER AND WANTS TO STAY LIVING WITH ME?

A. Not so fast! There are limits to everything. The youngest age of a child that testified in a court case that we've been able to uncover is six years old. It would be pretty hard for a judge to give

(cont'd)

(cont'd)

“considerable weight” to the testimony of a child who is younger than six (and, in many cases, to children who are between six and nine but are simply not mature enough). The older a child is, the more weight will be given to her testimony. At age 16, for example, a child’s testimony -- if straightforward, believable and honest (not subject to bribes or promises of rewards) -- would be very helpful to the judge and would probably be followed most of the time if the rest of the case also supports the child’s preference.

4. Q. WELL, THEN, CAN THE JUDGE DISREGARD MY CHILD’S WISHES ENTIRELY?

A. Yes, indeed. There’s no rule of law that says the judge must follow the child’s preferences. In a 1966 case, the North Carolina Supreme Court stated that a child’s wishes are not controlling in a custody dispute but must yield to the standard of the best interest of the child. And in a 1993 case, the Court of Appeals upheld a trial judge in Wake County who ordered visitation rights for a father over the strong objections of the teenage daughter, stating that visitation in such cases is “the father’s right,” which cannot be undone by the wishes of the child.

5. Q. DOES MY SON TESTIFY IN THE JUDGE’S OFFICE OR ON THE WITNESS STAND?

A. Unless the parties agree otherwise, the child testifies in open court like any other witness. If your lawyer cannot get the other attorney to agree to the son’s meeting with the judge “in chambers” (i.e., the judge’s office), your attorney may at least make a motion to clear the courtroom, as would be the case in a juvenile court hearing, but whether this motion is granted depends on the judge. There is no doubt, of course, that testimony in chamber is the most comfortable way of presenting testimony, not only for the son but also for the judge, and most judges will do a little “jawboning” of their own if it looks like the child is going to testify to see if the attorneys will agree to the “in chambers” approach to this important testimony.

6. Q. SUPPOSE WE AGREE TO LET MY SON TESTIFY IN CHAMBERS AND SO DOES THE OTHER SIDE. IS IT JUST JOHNNY AND THE JUDGE IN THERE? HOW WILL I KNOW WHAT HE SAYS? WHEN IF HE GOES OFF THE DEEP END AND STARTS SAYING UNTRUE THINGS ABOUT ME?

A. The judge can hear the child in chambers without the parties present, assuming that they consent to be absent. The judge can also exclude the attorneys if the parties consent. But the judge is not allowed to speak alone with the child with no record at all of what was said. A custody or visitation trial, after all, is supposed to on the record, meaning that everything is taken down and recorded (either by court reporter or by tape recorder). Without any record of the conversation, there is no end to the mischief that could occur based on the child’s comments, well-intentioned or otherwise. So the judge will usually make arrangements for one of the above two methods of memorializing the meeting in chambers with the child when the parties and the attorneys are not present.

* * *

[Rev. January 16, 1998]

ATCH 3

LAW OFFICES OF MARK E. SULLIVAN, P.A.

2626 Glenwood Avenue, Ste. 195
RALEIGH, N.C. 27608
919-832-8507/FAX: 833-2852

FAMILY LAW INFORMATION LETTER #24

SUBJECT: CUSTODY CHECKLISTS

CUSTODY CHECKLIST #1

Findings of Fact for Custody Order

See Green v. Green, 54 N.C.App. 571, 284 S.E.2d 171 (1981) and Montgomery v. Montgomery, 32 N.C.App. 154, 231 S.E.2d 26 (1977)

1. Residence of parties
2. Information regarding custody jurisdiction
3. Factual background -- marriage, separation, names and ages of child(ren)
4. Procedural background
5. Employment and income of each party
6. Reputation and character of each party
7. Physical ability of each party to care for child
8. Mental ability of each party to care for child
9. Emotional ability of each party to care for child
10. Facts regarding fitness of each party to care for child -- habits, church, attitudes, drinking
11. Living situation of each party
12. Any special needs of child -- medical, transportation, education, psychiatric, day care, etc.
13. Any special needs of either party
14. Relationship between Plaintiff and child (i.e., Plaintiff shows love and affection toward child and child reciprocates; or partiality; or unresponsiveness)
15. Relationship between Defendant and child

16. Living situation of child during marriage and after separation
17. Custodial history -- who took major responsibility for child care during marriage and after separation
18. Child care when custodian is absent
19. Living situation of child -- well-adjusted or not; healthy; well cared for; happy in current situation or not
20. Relationship between parties -- cooperation, conflict, indifferent or otherwise
21. Relationship between each party and child
22. Fit and proper -- either or both parents
23. Best interest of child

CUSTODY CHECKLIST #2

Transfer of Custody From Prior Court Order

See Rothman v. Rothman, 170 S.E.2d 140 (N.C.App. 1969) and Barnes v. Barnes, 286 S.E.2d 586 (N.C.App. 1982)

1. Change of circumstances
2. Since last court order
3. Must be substantial
4. Must affect welfare of child
5. Effect must be adverse or harmful in most cases [It's possible, but difficult, to persuade a judge to change custody while then child is thriving in the current environment.]
6. So as to require applicant to get custody

CUSTODY CHECKLIST #3

Testimony of Client and Witnesses

1. EDUCATION
 -Grades -Awards -Homework -Absences -Teacher Conferences
 -Tests-Aptitude and Achievement -Extracurricular activities
2. DISCIPLINE - Each parent's approach
 -spanking -rewards -reprimands -allowances
 -withdrawal of privileges -logic, predictability and structure
3. CHORES FOR CHILD (Clothes, Laundry, Bedroom, Housecleaning, Cooking)
 -How assigned? -Performance
4. CLOTHING
 How child is clothed by each parent -- style of clothing
 Maintenance and cleaning of clothing

5. FINANCES
 - Child's reasonable monthly needs
 - Incomes of parents and other sources of money
 - Use of money for child support
 - Child support actually paid
6. CHILD'S SURROUNDINGS
 - Playmates and friends -Neighbors -Schools, playgrounds, parks, etc.
7. CHILD CARE ARRANGEMENTS (by father, mother, third parties, such as sitters, grandparents, etc.)
 - Feeding -Clothing -Washing and bathing -Health care -Chores
8. RELIGION
 - Church attendance, youth groups, in-home instruction, etc.
9. LEISURE TIME (vacations, weekends, holidays, after school)
 - Camp -Music -Scouts -Dance -Athletics
10. LIVING ARRANGEMENTS FOR CHILD AT EACH RESIDENCE
 - Bedrooms -Play areas
11. VISITATION ARRANGEMENTS (regular or irregular, conflicts or cooperation, etc.)
12. RELATIONSHIP WITH OTHER SIBLINGS (brothers/sisters, step-children, etc.)
13. MEDICAL/DENTAL CARE
14. DAILY SCHEDULE OF CHILD AND PARENT
15. PARENTAL TRAINING AND ABILITIES
16. SPECIAL PROBLEMS OR CONSIDERATIONS OF CHILD OR EITHER PARENT

CUSTODY CHECKLIST #4

Concerns of the Judge

Which parent:

- is more likely to encourage visitation?
- is more respectful toward the other parent?
- will maintain greater continuity of contact with friends, relatives, neighborhood and school?
- relates better with children and provides more productive support, stimulation and guidance?
- is the more effective disciplinarian?
- is more likely to be mature and responsible in children's upbringing?

- is less likely to discuss with the children the failure of the marriage?
- is more able to provide an emotionally secure role model?
- is more resourceful in getting help?
- is more flexible and adaptable?
- has more time to devote to the children?
- has shown greater interest in the children and their activities?
- uses more "quality time" with the children?

CUSTODY CHECKLIST #5

Who Does What?

M = Mother; **F** = FATHER; **C** = CHILD; **O** = OTHER. IF SHARED, CIRCLE ALL INVOLVED

FAMILY TASKS

WHO HAS RESPONSIBILITY?

ROUTINE FOOD SHOPPING	M F C O
PREPARATION OF EVERYDAY MEALS	M F C O
PREPARATION OF SPECIAL MEALS	M F C O
SPECIAL HOUSEHOLD PURCHASES (such as furniture, appliances, etc.)	M F C O
ROUTINE PURCHASES	M F C O
ROUTINE HOUSE CLEANING	M F C O
-SWEEPING/VACUUMING	M F C O
-DUSTING	M F C O
-PICKING UP CLUTTER	M F C O
-BATHROOMS	M F C O
-CHANGING BED LINENS	M F C O
-TAKING OUT GARBAGE	M F C O
MAJOR HOUSE CLEANING	M F C O
-WINDOWS	M F C O
-CURTAINS	M F C O
-KITCHEN APPLIANCES/CABINETS	M F C O
-WALLS	M F C O

WASHING CLOTHES	M F C O
IRONING/MENDING	M F C O
HOUSEHOLD MAINTENANCE	M F C O
YARD WORK	M F C O
CHILD CARE	M F C O
-PREPARATION FOR SCHOOL	M F C O
-HELPING WITH HOMEWORK	M F C O
-CARE OF CHILDREN IN EMERGENCY/ILLNESS	M F C O
-CARE OF CHILDREN ON SCHOOL HOLIDAYS	M F C O
-PREPARATION OF CHILDREN FOR BED	M F C O
-DISCIPLINING CHILDREN	M F C O
-TRANSPORTING CHILDREN	M F C O
-PURCHASING CLOTHES FOR CHILDREN	M F C O
-OBTAINING CHILD CARE (BABY SITTERS, ETC.)	M F C O
HOLIDAY PLANNING AND ORGANIZATION	M F C O
FINANCES (BUDGETING, BILL PAYING, ETC.)	M F C O

ATCH 4
LAW OFFICES OF MARK E. SULLIVAN, P.A.

ATTORNEYS AT LAW
2626 GLENWOOD AVENUE, STE., 195, RALEIGH, NORTH CAROLINA 27608
(919) 832-8507 / FAX: (919) 833-2852

CLIENT INFORMATION LETTER # 27: JOINT CUSTODY

Preface

The purpose of this handout is to assist you in answering questions that you may have regarding joint custody and the law in North Carolina. It is, of course, impossible to answer all of your questions in a short brochure such as this, so we want to encourage you to ask other questions of your lawyer at the appropriate time. Feel free to take this handout with you so that you may refer to these answers from time to time and have a better idea of how your case is being handled. If you have any comments or suggestions for improving this handout, please do not hesitate to let us know.

"Joint Custody" is a term that comes up very often while parties are negotiating and discussing child custody and visitation. It is also a term which is frequently misunderstood. This Client Information Letter attempts to explain the meanings, effects, benefits and disadvantages of joint custody.

1. Q. WHAT IS "JOINT CUSTODY"?

A. Joint custody is not defined by the North Carolina General Statutes. The statutes provide only that a court can order joint custody. However, most lawyers agree that joint custody can be defined in two ways:

Joint legal custody. This term 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 physical custody. Sometimes referred to as "shared custody," this means that each parent will have an equal or nearly equal amount of time with the 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".

2. Q. WHAT ARE THE EFFECTS OF JOINT LEGAL CUSTODY?

A. Just as the definitions of joint custody differ, so do the effects of a joint custody arrangement. 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 you and your spouse have been able in the past to set aside your other differences, and discuss and agree on matters concerning the child, joint legal custody may be an acceptable solution. However, if your disagreements include issues concerning the child, the arguments and disagreements will continue well beyond your divorce and will frustrate any attempt at true joint legal custody.

3. Q. WHAT ARE THE BENEFITS OF JOINT PHYSICAL CUSTODY?

A. 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. 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.

4. Q. WHAT ARE THE DISADVANTAGES OF JOINT PHYSICAL CUSTODY?

A. 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". The rules may be different at each parent's home-- bedtime is 8:30 at Mom's but 10:00 at Dad's. Friends are different at each home and harder to keep up with, the babysitter may be different each time, and so on. Generally, the parents must work very hard at such an arrangement. Such an arrangement seldom reduces hostility between the parties and may even increase it. Joint physical custody requires two parents who maintain a commitment over time and are able to create a conflict-free zone for their child. Joint physical custody requires two parents committed to be co-parents.

5. Q. WHAT EFFECT DOES A SHARED CUSTODY ARRANGEMENT HAVE ON CHILD SUPPORT?

A. For purposes of determining child support, shared custody is defined as a parent's visiting with the child for 123 or more overnights a year. "Shared custody" will result in a different amount of child support than in a sole custody situation. The increased overnights will be figured into the calculations and the parent will receive a "credit" for that time. This is based on the theory that that parent must provide substantial support for the child during the extended visits and therefore the other parent is saved that expense. Joint legal custody, however, has no effect on child support.

6. Q. CAN I BE GRANTED JOINT CUSTODY BY THE COURT?
- A. If the decision concerning joint custody cannot be agreed upon mutually between you and your spouse, you will have to ask the court to award joint custody. You should first decide whether you want joint legal or physical custody.
- i. If you want joint physical custody you must have a workable schedule to propose.
 - ii. You must also be able to show that you have the room and the ability to care for the child and that such an arrangement will be the least disruptive to the child.
 - iii. Beyond that, for both joint legal and physical custody, you should be able to show to a judge that you have always been involved with the child and have previously helped care for and make decisions concerning the child.
 - iv. You should be able to demonstrate that you and your spouse have usually been cooperative and communicative as to the child and that you have the ability to continue this relationship during your separation and divorce.
 - v. Finally, all of your evidence should indicate to the judge that a joint custody arrangement would be in the best interest of the child.
7. Q. MY SPOUSE WANTS JOINT CUSTODY -- HOW CAN I KEEP THIS FROM HAPPENING?
- A. Again, if this decision is left to a judge, you must show the judge the opposite of the above. Based on changing perceptions about joint custody, courts seem to be less-inclined now to start with the assumption that joint custody is better than primary/secondary custody arrangements. It might be difficult for your spouse to convince a court that joint custody is appropriate when you can show that your spouse has never or rarely agreed with you on issues concerning the child, has had very little to do with caring for and raising your child, or if during your separation the child has been made a part of your disagreements and arguments. The court will know that you and your spouse are not good candidates for joint custody and this should be shown to the judge. In this case you want the judge to know that joint custody is not in the child's best interest.
8. Q. WHAT ARE THE PROS AND CONS OF JOINT CUSTODY?
- A. As mentioned earlier, joint custody, either legal or physical, gives both parents a greater opportunity to interact with the child and be a continuing part of the child's life. Sometimes this means that child support payments are made more regularly and each parent will have a better idea of where and for what the support is used. Many times a child can continue to maintain a relationship with both parents that may not otherwise be possible.

However, under joint custody the parents also have greater contact with each other than they would with a sole custody arrangement. For two bitter and uncooperative people this probably means that the arguments, disagreements and anger will continue. This in turn will create tension that is communicated to the child, and all the benefits of joint custody could well be negated by the parents' behavior.

9. Q. HOW DO I KNOW IF JOINT CUSTODY WILL BE RIGHT FOR ME--AND OUR CHILD?

A possible joint custody arrangement can be a good solution or a bad solution. Whether or not such an arrangement is right for you, your spouse and your child, depends entirely on the relationship that all you have, and this relationship should be carefully considered when you make your decisions concerning custody. A very important measure of whether or not joint custody is right for you is whether or not you and the other parent can be good “co-parents.” Co-parenting requires mutual commitments:

- i. Both parents will continue to be fully involved in making major decision about their children’s health, education welfare and religion.
- ii. Parents will not place the children between them and their conflicts. Parents must be business-like partners. As business partners, the parents are not in love and may (and often do) have areas of disagreement. When there are disagreements regarding the children, the parents are cordial and work out their differences in a fair and equitable manner.
- iii. Both parents view themselves as having a family. Neither parent refers to the other as “visitor”. Each has a family home and each is entitled to make decisions and have a life style which the children will be a part of when in that parent’s home. Neither parent may interfere with the other’s life style or home life; each parent must support the other’s relationship to the children.
- iv. Children are not allowed to “play” one parent off of the other. Decisions are made by the parents, then handed down to the children. The parents must guide the children, not the other way around.
- v. Parents must communicate with one another. This means *regular* discussions of children’s activities, needs, progress, and conditions. There must be a sharing of significant events in the life of the children.
- vi. Parents must concede that they are *jointly* responsible for the rearing of the children and will work together to equitably share childrens’ expenses, living arrangements and care. Both must invest time to teachers’ conferences, doctors’ appointments, religious activities, etc.

- vii. Parents must agree that even though there are differences, they will value and respect each other as a co-parent, and that this entails an essential need of the children to be involved with both parents.
- viii. Court must be seen only as the *final option*. All other means of settling problems must be tried first.

If some or all of the requirements of co-parenting are lacking from your relationship with the other parent, joint custody could be a very poor solution.

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 you have with your spouse concerning your child will be the largest factor affecting the outcome of any joint custody arrangement you might choose.

Comments, suggestions or questions are always welcome. Is there some way we can improve this handout? Are there questions that you have which are unanswered? Please let us know -- we're here to help you.

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Odd State Out:

How Georgia's Law On Child's Right to Elect Custodial Parent Compares With Other States

By John F. Lyndon and Debra M. Finch
Attorneys at Law, Athens, Ga.

In the fall of 2005, Steve Steele, chairperson of the Family Law Section, was asked by some Georgia legislators to compare Georgia's statute giving a 14-year-old child the right to elect his or her custodial parent with similar statutes in other states. I took on the task, with the assistance of Debra Finch, another family law attorney in Athens, and Wendy Furey, a third-year law student at the University of Georgia.

We conducted a survey of the statutes of the other 49 states addressing the right of children to express their preference for a custodial parent and the weight given to that preference.

We were shocked by the results.

O.C.G.A. § 19-9-1(a)(3)(A) provides that a child who has reached the age of 14 years shall have the right to select the parent with whom he or she desires to live. The child's selection shall be controlling, unless the parent so selected is determined not to be a fit and proper person to have the custody of the child. No other state has a comparable law.

In fact, eight states (Alabama, Massachusetts, New York, North Carolina, Oregon, Rhode Island, Vermont, and Wyoming) have no statute addressing the child's ability to state a preference. However, case law in most if not all of these states does incorporate a child's preference as a factor to be considered.

The laws of 10 states (Arizona, Delaware, Idaho, Illinois, Kansas, Kentucky, Missouri, Montana, Pennsylvania, and Wisconsin) provide that the courts shall consider the wishes of the child, along with other specifically stated factors, with no reference to the child's age, maturity or reasoning ability. The statutes simply provide that the child's wishes can be considered. In all of these states, the best interests of the child is the controlling standard.

Twenty-two states (Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Iowa, Louisiana, Maine, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, South Carolina, South Dakota, Virginia, and Washington) provide that a child's preference shall or may be considered if the child is of sufficient age and capacity to form a preference. No specific age is referenced, although there are varying thresholds that define the child's ability to express a preference. For example:

Arkansas: if the child is of sufficient age and capacity to reason, regardless of chronological age.

Florida: if the court deems the child to be of sufficient intelligence, understanding and experience to express a preference.

Maine: if the child is old enough to express a meaningful preference.

Nebraska: If the child is of an age to have comprehension, regardless of chronological age, when such desires and wishes are based on sound reasons.

New Hampshire: if the court finds clear and convincing evidence that the minor child is of sufficient maturity to make a sound judgment.

Washington: if the child is of sufficient maturity to express a reasoned and independent preference.

Again, in all of these states, the "best interests of the child" standard applies.

There are only nine states other than Georgia in which a specific age is enumerated. In these states (Indiana, Maryland, Mississippi, New Mexico, Oklahoma, Tennessee, Texas, Utah, and West Virginia) there are significant variations with respect to the age and weight to be given to the child's preference.

In Indiana and New Mexico, greater weight is given to a child who is over the age of 14 years.

In Mississippi, if the court finds that both parties are fit and proper parents, and that it is in the best interests of the child, then 12-year-olds have the right to select the custodial parent.

In Tennessee, a preference may be expressed by a 12-year-old, with greater weight normally given to older children.

In Texas, a 12-year-old may express a written preference subject to the approval of the court.

In Utah, the desire of a 16-year-old is given added weight but is not the single controlling factor.

In Maryland, there is no reference to age in the initial custody determination, but a child 16 years old may file a petition to change custody. However, case law has interpreted this statute to mean that the age of the child and his or her preference are merely factors to consider.

In Oklahoma, there is a rebuttable presumption that a 12-year-old child is of sufficient age to form an intelligent preference, but the best interests standard applies.

In West Virginia, custodial responsibility is allocated based on the historical time spent by each party in parenting the child. However, a 14-year-old child (or a younger child sufficiently mature) can express a preference that the court may consider.

Thus, in all 49 states, although the child is granted varying degrees of input, the court has the discretion to deny the stated preference of the child if the preference is not in the child's best interests.

That leaves the Georgia law, which stands alone in leaving the court with no discretion to determine what is in the child's best interests. Only if parental unfitness is found can the court deny the child's election.

The practical effect of the statute, as many of us have witnessed, is that custody is often determined by the son who would rather live with his dad who keeps the dirt bike at his house, or by the daughter who would rather live with her mother who has

the tanning bed. Or, it may be a question of which parent has no compunction about dragging the child to the lawyer's office to sign an affidavit, the effect of which the child often does not fully understand, and the circumstances surrounding which the court has no way of knowing.

How can it possibly be good family law for the trial court, both parents, and both attorneys to be controlled by the whim of a 14-year-old? All most of us have to do is to recall ourselves at age fourteen to recognize that children often do not possess the maturity to be making such a critical, life-changing decision.

We recognize the practical problem that exists when strong-willed older children insist on living with one parent and not the other. However, would it not be preferable for our courts to be able to simply consider this factor, along with all other factors, in making a custodial decision based as a whole upon the child's best interests?

The Ohio statute could perhaps be, in part, a model for a more enlightened process. It provides that either party may request that the court interview the child, of any age, in chambers, with the court having discretion to appoint a *guardian ad litem*. The court determines whether or not the child may state a preference, based upon the court's assessment of the child's reasoning abilities, and then decides whether it is in the best interests of the child to even express a preference. If that is the case, the court may consider the child's preference in determining what is in the child's best interests. No person is allowed to obtain or attempt to obtain from a child a written or recorded statement or affidavit setting forth the child's wishes.

The opinions expressed in this article are solely those of myself and Debra Finch. However, we would not be surprised to learn that they are shared by a number of other family law practitioners and superior court judges in Georgia. Perhaps it is time to consider a review and revision of this aspect of our custody statutes.

If anyone is interested in obtaining citations, summaries of relevant statutes and the supporting case law, you may e-mail me at jlyndon@lawlyndon.com and I will be happy to provide them. FLR