

A Maryland family lawyer discusses the most common custody and visitation issues facing divorcing couples.

How does a divorcing couple decide whether sole custody or joint custody is best for their family?

That would first assume that the divorcing couple is divorcing amicably and that they would try to co-parent and decide what kind of custody would work best for their family. The court looks at the best interest of the child or children. I would assume the divorcing couple would be doing the same thing. Some of the issues may be if both spouses work and one travels for their work – maybe internationally or travels very frequently – and the schedule that each spouse has as far as work is concerned, if that would lend itself to a joint custody situation, or would it lend itself more to a sole custody, primary residential situation with some access with the other spouse.

There's also other considerations of how close they may live to each other, what activities the kids are in and how those might be affected, and things of that nature. The divorcing couple would need to sit down and really look at all the ins and outs of sole versus joint. We don't really call it sole custody anymore; we call it primary residential. It's a little softer and a little more politically correct because sole custody kind of has the connotation that the other party has nothing to do with parenting, which is not the case.

How does a joint custody agreement usually work? Is there a difference between joint legal custody and joint physical custody, or are they the same thing?

They're absolutely not the same thing. They are very different from each other. Joint physical custody is with respect to the actual time, and in Maryland, it's counted by overnights each party has with the child or children. There you can have joint physical custody without having 50-50. In other words, the minimum joint physical custody guideline is 128 overnights with one parent, with the other parent having the remainder. That's the minimum, so it's about 35%. The maximum, of course, is 50-50, and they're counted by the number of overnights.

Legal custody is the authority to make legal decisions with respect to the children or child, and that would be in regards to education, health or medical, religion, and general welfare. Legal custody is not the day-to-day ins and outs of their lives; it's the bigger issues.

With joint legal custody, you can have pure joint legal where both parents have joint legal and they have to agree before the issue is implemented, or you can have joint legal custody with one person having tie-breaker authority if they cannot come to a decision. You can even draft agreements with joint legal custody, and if they can't agree, they go to a mediator first. Then they can petition the court or someone has tiebreaker. There are all sorts of different models for the joint legal custody.

If there's a lot of conflict between the parents is joint custody still a possibility?

It's a possibility, but it's not a probability. There is case law that says if two parents cannot communicate effectively or as “adults,” then joint custody should not be granted

to the parents. If there is a lot of contention and acrimony, it makes co-parenting rather difficult.

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For example, with a legal decision like Johnny has to go to therapy, and the other spouse says “no” just to disagree with me because there's so much acrimony rather than looking into whether Johnny needs therapy.

With the physical custody, there are a lot more transfers back and forth between the parents. There may be a lot more acrimony. It depends on each case. Each case is very different and fact-specific. It is a possibility. A lot of times, after a case is done, a lot of that contention dies down and the parents are able to hopefully co-parent a little better. They also can use parent coordinators to help them communicate effectively.

Do you find that that collaborative law or mediation is often a better route for working out custody disputes than pure litigation?

Absolutely. First of all, in collaborative law or mediation, the parties have the power and authority to really decide what they're going to do with their family and with their children. Litigation is going in front of a judge and letting that judge decide what's best for your children, how much you get to see them or how much the other person gets to see them, or what kind of parenting you're still able to do in so far as making these legal decisions. Mediation is much better, as collaborative is as well.

You also can think outside the box. You can go outside the perimeters that the court would be authorized to order anyway. You can come up with very creative schedules or very creative things, and you're your own master. You're the one that divides this agreement or this collaborative agreement. It's always better if you can do that. I usually tell clients, “Do you want to put *your* kid through college or mine?” Because we can litigate this to death and you can put my kids through college, or we can go an easier route, hopefully, and try to resolve this and put your kids through college. I do believe that the optional processes are better.

What types of decision must parents share in a joint custody situation?

The most common decision that seems to come up is daycare and who's the daycare provider, or medical. For example, I had clients that were deaf. Their child was deaf and had a cochlear implant in one ear. Mom wanted a cochlear implant in the other ear, and dad did not. They needed to agree on that before that cochlear implant would be put in the other ear because they had joint legal custody.

Taking a child to therapy has to be agreed upon. In fact, even if you have tiebreaker authority, a lot of therapists won't take the child as a client until the other parent agrees to the therapy, even if you have tiebreaker authority. Education usually goes to where are they going to school, private or public? Possibly remedial, something like that. I don't usually run into boarding school as an issue. But those are some joint custody situations.

Does the child need permission from both parents to get something like a piercing or a tattoo, or what about even elective surgeries?

If they have joint legal custody, yes. That would all fall under some type of medical because it's sort of a procedure, even if it's a tattoo or a piercing. You would, with joint legal custody, need both parents' permission. Now, the establishment probably where you would go to get a piercing or a tattoo wouldn't require two parents to sign off on it. However, if you have joint legal custody, you're bound to coming to an agreement with the co-parent before that happens.

How can a parent increase his or her chances of being awarded primary residential care of the children in Maryland?

Have a stable home life and an established routine with your child or your children. Even if you're working, have a very established routine, a good school, and lots of interaction with the child or children, show up for activities, and do things with the child. What the court looks for is stability and consistency – and maybe a record of not moving so much.

I just had a case where it was really, really tough because the mom moved from Maryland to North Carolina and the dad was here. They were never married, and the child was three at the time. They did two weeks on, two weeks off sharing custody. But we all knew that when the child was turning five we'd need to go back and fight for primary residential, which we did. Even the judge said it was a thin razor-sharp decision because both parents were so good. My client and I actually ended up winning that case, and she lives in North Carolina, she was re-married, they had bought the house they were in, and they also owned a cottage in North Carolina. The school was the school her stepsons went to. She had changed her job so that she was home more, so there was no daycare needed for the child. The child was involved in all these community things.

Dad, on the other hand, here in Maryland, had a girlfriend, wasn't married, was still renting. He's talking about buying a house, but not sure where. He wasn't exactly sure which school she would go to. It just showed a little more; it was just razor thin though. That was what increased our chances of succeeding. We had the case here in Maryland even though my client won primary custody in North Carolina.

Is there any legal reason why fathers should not be awarded custody of their children just as often as mothers? How are Maryland judges ruling these days?

I believe the judges are ruling for fathers just as much as mothers. I don't have statistics, but when I walk into court representing a father who we're requesting custody for, and he's sitting proper and things of that nature, I don't feel any maternal preference from the court. They may, but they're not, by law, allowed to even express that. There is no maternal preference in Maryland anymore by case law. I've had many fathers awarded custody of their children. There's no legal reason why they should not be unless they're a hot mess. There are other reasons, maybe, but that would be for mothers too.

Are there some hard and fast rules that the court looks at when deciding who gets primary residential rights if both parents want it?

They weigh factors that are according to case law for primary factors. Unfortunately, we have tried to codify these factors – that means put them in a statute – and so far, we have not been able to do that. But it's in front of the legislation again this session. Those factors are actually from a child protective services or department of social services case. These are the only factors we have that the court looks at and we look at to try to argue. It's interesting because it's a 1977 case.

When the court gives its decision about the primary parenting rights, it looks at the fitness of the parents, the character and reputation of the parents, the potentiality of maintaining natural family relations, any agreements between the parties, the preference of the child – which is pretty age-specific – material opportunities affecting the future, age, health, and sex of the child, the residences of the parents and opportunity for visitation, if there's been any length of separation from the parents, and if there's been any prior voluntary abandonment or surrender.

Those are the factors that the court will actually say, and then they'll say the fitness of the parents like, “I find both parents fit and proper.” For the character and reputation of the parents, they'll go through each factor and give their findings based on the facts that were presented in the case. They use that to then decide who they're going to then grant custody to.

Can an existing custody agreement be changed and, if so, how is this done?

Many times, we incorporate that into an order and make it into an order, as well. How it can be changed is to file for a modification of the custody, access, or the legal custody due to a material change in circumstances that has occurred since the date of the last order.

In other words, the change has to be material; it has to be big enough. It also would warrant a change in the best interest of the child. If the court finds there's a material change in circumstances that may warrant a change in, let's just say, custody and the best interest of the child, the court then goes back to those factors I just talked about under the department of social services and takes a fresh look at those factors as they are since the day of the last order. And that's how it's changed.

All agreements that parties may enter into, many times they're full, they're global in nature, and they cover custody, support, property, retirement, and all of that. The two things that can be modified by the court is custody and child support. You cannot even agree that the court does not modify those. The court can modify those any time.

If a child is living by choice with one parent full-time, but the court granted joint physical custody to both parents, should the de facto full-time parent apply to change the custody arrangement from joint to primary? If so, how would that affect both parents?

First of all, the age of the child would be very important to know. At about 14, 15, 16, the court starts recognizing that it's hard to force a kid to go over to, let's say, dad's. But the parent could apply to change the arrangement from joint to sole custody.

However, it's usually tied into child support. Child support is lower if you have a shared custody arrangement than it is if you have a sole custody arrangement. It would affect both parents, and that one would be paying more child support. Sometimes, if you go try to change from the joint to the sole, the court will say, "No, you need to take your child over to his dad's house when he's supposed to be there. He's nine years old. I don't care what he wants, he needs to go spend time with dad because that's what you agreed to." And they won't change it. They won't change it based on historical actions of the child or children.

It depends on how much the ex, the other parent, would contest it. If they don't contest it, that's fine. Otherwise, if they contest it, they may just have the first parent have the responsibility to get the child over to them on the times the child is supposed to be with them. It could be a double-edged sword. But if the parent has refused to take the child and has been unavailable, and then you want to say, "Look, let's just put on paper what it is historically so we have it, so I'm protected, the children are protected, that I really do have primary residential custody, and it's not due to a child just demanding that they stay in one place." That could be a different story altogether.

If a parent removes the children from the state, or even the country, without the other's consent, what can the other parent do to have the children returned? Even if they had a court order, how can they enforce compliance?

They can get a court order. What they would first do is try to get an emergency ex parte, a temporary order that says they have custody and that law enforcement can use any force necessary to return the child. That's pretty important in some of these cases. They get this order over to law enforcement, wherever the child may be, and have that law enforcement work on getting the return of the child. A lot of the times, the parent will go there if it's another state. Another country would depend on our treaties with that country and if that country would honour our order and would then facilitate a return of a child. Sometimes, the state department gets involved. But if it's just another state and you can find the child, you have this order and you get it to the sheriff's department of the other place, and it says they can use any force necessary. There's been a lot of success getting the children back.

How is custody and child support decided when dealing with children of unwed parents in Maryland? Is it exactly the same as if they were legally married?

It is. It's really looked at as mom and dad, mom and mom, dad and dad, or parent one and parent two. The same factors apply, everything is the same, but they're just not getting a divorce. Even a married couple, one party could actually just file for custody; they don't have to file for divorce. The child support is the same – it's gross income and some expenses of the child or children – and it's put into the Maryland Child Support Guidelines, and it's considered the correct number unless you can argue why it should deviate from that number. So, unwed parents are treated no differently.

If Maryland awarded primary residential care to one parent, can the other parent file for joint custody in another state?

No, they can't, not successfully. Basically, the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) says that the jurisdiction for custody in any case is where the child has lived for the last six months prior to filing this matter. Unless, let's say, mom took the child and moved to Virginia and dad just found out, the last address the child had was here in Maryland, possibly for the last year or two, or whatever it is, Maryland is the state for filing the custody claim.

If another parent files for joint custody in another state, the other state shouldn't even entertain it. I would assume that they would put the other party on notice and that party would let that state know that there's already an order and now we have exclusive jurisdiction over the custody matter.

Do parents have to resolve all their custody issues before finalizing their divorce in Maryland?

Every county is a little different in the way they proceed with their cases. In Montgomery County, Maryland, the way we proceed is we do bifurcate custody from the merits, merits meaning the property and the divorce itself. We do resolve custody before resolving the divorce. It's just scheduled that way. In Frederick County, where our other office is, they do everything at once; custody and the merits are done all in the same hearing.

If there's a custody issue, it needs to be addressed. When it is addressed depends on the county. I don't know all the other counties in Maryland, unfortunately, and I don't know that there's any rule anywhere that says custody must be resolved before you can get a divorce. But if it's not resolved before, it's resolved during trying to get the divorce.

Some stepparents who are considering divorce want the legal right to stay in their stepchild's life permanently. How can they accomplish this? Do they need to, for instance, legally adopt their stepchild to be certain of getting some custody or visitation rights?

Unfortunately, yes. At this time, there is no protection, entitlement, or any kind of authority that would award stepparents any time with their stepchildren. We have introduced bills regarding de facto parents – de facto parents being someone like a stepparent, grandmother, or someone who has stepped in and acted like the child's parent – and why they should have some rights to at least see the child and have access. So far, those bills have not been passed. So, yes, the stepparent, if they're not legally adopted, would have no rights whatsoever to see the child.

Even if they played a major role in raising the child, paid for school, and was really involved in the child's life, there still would be no real claim without adopting them?

That's why we're trying to get de facto parenting bills in front of legislator. That, just that example alone, would be their argument – I helped raise this child since she was two, etc. – but at this time, there is nothing to afford that kind of access to stepparents.

Under what conditions will a judge grant a request for visitation with, or even custody of, a grandchild?

There was case law that did afford an argument for why grandparents should have visitation under certain conditions. And that was overturned. It was overturned by Troxel [Troxel vs. Granville] where it said grandparents don't have any rights. Now, custody is a little different. It's not just grandparents; it's any third party. But we see it with grandparents more so, and that is if the parents are not fit and/or there are exceptional circumstances the court can consider awarding custody to a third party.

I can give you an example. I represented dad, and mom had multiple personalities but then tried to deny it. Neither one of them was a candidate for custody, and my client agreed; he shouldn't have custody but neither should mom. So, we got his parents, grandparents, involved in the case. There was a best interest attorney for the child involved as well. You can imagine how crowded this courtroom was every day for a week. The court found that both parents were not fit and proper, and there were exceptional circumstances with the multiple personalities, mental health, and all these other issues that came up, and awarded custody to the grandparents.

They've had custody since. I heard a report that the child's doing really well, which is great because he was really doing not well before. That is a circumstance where the court would award custody to a third party. In this case, it was the grandparents.

If one spouse exercises visitation with his or her kids, can the parent with primary residential care move with them to another state? Under what circumstances would it be permitted?

If the custodial parent's going to move to another state that's far enough to interfere with what the ex-spouse has in so far as visitation, then the custodial parent must get the ex-spouse's agreement or petition the court for a modification and explain why it's best for that custodial parent to move. Let's say they got a job offer there or their job is actually moving somewhere else, they're moving closer to family, there are plenty of reasons you could think of.

If the court were to grant that, they would again look at the material change of circumstances, which is when the custodial parent has an opportunity or a change to live in, let's say, Minnesota. They would say this warrants possibly changing the custody or access of the child. They would go back to the factors again. Unless the ex-spouse is not looking for custody but looking for an access schedule that lines up with what they can do and has much more blocks of time, that's what we usually do when parents live far away from each other. The non-custodial parent gets big blocks of time, especially in the summer during the school break and things like that, to visit with the children.

At what age can a child choose which parent he or she wishes to live with?

At 16, they can file their own case. There is a statute in the family law article that says if they are 16 years old, they can file their own case for custody. That's an age where they can choose which parent they wish to live with and have a bonafide custody trial, if it gets that far. Kids who are 14 or 15 and getting up there in age, usually the court will listen to them, but it's not the end all, be all. Some people say it's a lower age, but I

don't agree with that. I think it's just the factor they take into consideration – the preference of the child. But at 16, they can actually file.