

CHILD CUSTODY AND VISITATION

1. QUESTION: DO MOTHERS AUTOMATICALLY GET CUSTODY OF THEIR CHILDREN WHEN A SEPARATION OCCURS?

ANSWER: The courts of most states including Hawaii, do not establish an automatic preference for either mother or father, but they do look very closely at which parent will best promote the welfare and interests of the children of the couple.

2. QUESTION: WHAT KINDS OF FACTORS DO THE COURTS CONSIDER IN GRANTING CUSTODY?

ANSWER: They usually look at who has primarily taken care of the child during the marriage (washing, feeding and clothing the child, for example, or helping the child with homework), who has the best approach to discipline, who has cared for the child since separation (if the couple has already separated), what work schedules either or both parents have, and how each parent can provide for the physical, emotional, educational, religious and social needs of the child.

3. QUESTION: CAN A LEGAL ASSISTANCE ATTORNEY HELP ME GET A COURT DECREE FOR CUSTODY?

ANSWER: No. You will need to retain a civilian attorney for the presentation of the papers and the appearance in court.

4. QUESTION: CAN THE COURT AWARD ATTORNEY'S FEES TO ME IN A CUSTODY CASE?

ANSWER: Under Hawaii law, if the person asking for attorney's fees is acting in good faith and is unable to afford the legal expenses of the lawsuit, it is possible (but not mandatory) for the court to award reasonable attorney's fees as part of the custody order.

5. QUESTION: DO I HAVE TO FILE FOR CUSTODY IN HAWAII?

ANSWER: No. While usually a custody suit is filed where the child is presently residing, a person can file an action involving custody of a minor child in the "home state" of the child (i.e., where the child has lived for the last six months) or in any state where the child and one parent have significant contacts and connections (such as former neighbors, teachers, doctors, relatives and so on).

6. QUESTION: CAN A CUSTODY ORDER BE CHANGED?

ANSWER: No custody order is ever permanent. However, once a parent is awarded custody in a court order, the judge can change the custody order only if there is a substantial change of circumstances affecting the best interest and welfare of the child or children.

7. QUESTION: WILL MY SEPARATION AGREEMENT PROTECT ME FROM THE OTHER PARENT SNATCHING MY CHILD?

ANSWER: No. A separation agreement which hasn't been incorporated into a court order or divorce decree is only a contract between you and the other parent, not a court order. A court order is enforceable by contempt of court. Court orders of one state can be filed and registered in another state and thus be treated as if they were issued by the second state for purposes of enforcement. None of this applies to separation agreements which are not incorporated into a divorce decree. If, on the other hand, your separation agreement has been incorporated into a court decree in Hawaii, then it is a court order and is enforceable by contempt of court.

8. QUESTION: IF MY SPOUSE IS GRANTED CUSTODY, WILL I GET VISITATION RIGHTS?

ANSWER: Ordinarily the noncustodial parent is entitled to reasonable visitation rights with a minor child except in extraordinary situations, such as when the noncustodial parent has a history of abusing the child. Visitation can be flexible and unstructured, assuming the parties can get along and agree on the times and terms of visitation, or it can be highly structured and rigid, with certain days and times set out with great specificity.

9. QUESTION: CAN I REGISTER A COURT ORDER FROM ANOTHER STATE HERE IN HAWAII SO THAT HAWAII CAN TREAT IT AS ONE OF ITS OWN DECREES FOR PURPOSES OF ENFORCEMENT?

ANSWER: Yes. You may file and register the other state's decree with the Clerk of Superior Court at any county courthouse. You may want to register the decree in the county where you reside or in the county where the other parent lives.

10. QUESTION: IF THE OTHER PARENT DOES NOT LIKE THE PRESENT CUSTODY ORDER, CAN HE OR SHE FILE FOR CUSTODY IN ANOTHER STATE?

ANSWER: Under the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, the court in a custody case must always inquire into whether the child or children have been the subject of custody litigation in any other state. When a judge finds that another court has made an award of custody, the judge should refuse to rule on the case. Only if the first court has released or transferred jurisdiction to the new state court may that court assume jurisdiction to hear the custody case (unless there is an immediate and clear emergency affecting the child's welfare).

11. QUESTION: WON'T CUSTODY BE SETTLED WHEN I OBTAIN A DIVORCE?

ANSWER: Divorce decrees do not necessarily settle custody matters, and a custody order can be entered before or after a final decree of divorce in Hawaii.

12. QUESTION: I'VE HEARD A LOT ABOUT JOINT CUSTODY. IF I ASK FOR THAT, DOES IT MEAN THAT I GET HALF OF THE CHILDREN'S TIME? THAT I HAVE "EQUAL RIGHTS" WITH MY EX? WHAT REALLY IS "JOINT CUSTODY"?

ANSWER: Joint custody may, in some states, mean shared physical custody. In other places, it means shared decision-making. Since there's no single definition of "joint custody," let's look at some general information on what it means -- 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," 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".

13. QUESTION: WHAT ARE THE EFFECTS OF JOINT LEGAL CUSTODY?

ANSWER: 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.

14. QUESTION: WHAT ARE THE BENEFITS OF JOINT PHYSICAL CUSTODY?

ANSWER: Joint physical custody was seen at one time as a wonderful answer to the problem of a child's growing up without the opportunity to spend equal time with both parents. Ideally, a shared custody arrangement means that both parents maintain a "real home" for the child, including a room, toys, and clothes. This helps reinforce the idea that families are forever. 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.

15. QUESTION: WHAT ARE THE DISADVANTAGES OF JOINT PHYSICAL CUSTODY?

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

16. QUESTION: WHEN IS JOINT PHYSICAL CUSTODY NOT ADVISABLE?

ANSWER: Joint physical custody is not advisable where there is a history of domestic violence, drug or alcohol abuse, child abuse or neglect by a parent, or where a parent suffers from a debilitating mental illness. Since joint physical custody requires joint decision making and a tremendous amount of cooperation between the parents, joint physical custody is not appropriate where there is a history indicating that the parents are unable to agree on child rearing. In addition, joint physical custody is not a good choice where the child involved becomes overanxious or confused when asked to cope with numerous things or has a temperament which makes it difficult for him or her to adapt easily to change.

17. QUESTION: WHAT EFFECT DOES A SHARED CUSTODY ARRANGEMENT HAVE ON CHILD SUPPORT?

ANSWER: 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 the 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.

18. QUESTION: CAN I BE GRANTED JOINT CUSTODY BY THE COURT?

ANSWER: If the decision concerning joint custody cannot be reached by you and the other parent, you will have to ask the court to award joint custody. You should first decide whether you want joint legal or physical custody. If you want joint physical custody, you must have a workable schedule to propose. You must also be able to show that you have the time, the room and the ability to care for the child, and that such an arrangement will be the least disruptive to the child. Beyond that, for both joint legal and physical custody, you should be able to show to the judge that you have always been substantially involved with the child's upbringing and have previously helped care for and make decisions concerning the child. You should be able to demonstrate that you and the other parent 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. Finally, all of your evidence should indicate to the judge that a joint custody arrangement would be in the best interest of the child.

19. QUESTION: MY SPOUSE WANTS JOINT CUSTODY--HOW CAN I KEEP THIS FROM HAPPENING?

ANSWER: 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 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 need to know that you and your spouse are not good candidates for joint custody and that joint custody is not in the child's best interest.

20. QUESTION: WHAT ARE THE PRO'S AND CON'S OF JOINT CUSTODY?

ANSWER: 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.

21. QUESTION: HOW DO I KNOW IF JOINT CUSTODY WILL BE RIGHT FOR ME -- AND OUR CHILD?

ANSWER: A 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 of you have, and this relationship should be carefully considered when you make your decisions concerning custody. You should consider your child's age, temperament and coping style, the current quality and nature of the parent-child relationships, and the practicality of such an arrangement. A successful joint custody arrangement requires a great deal of maturity, cooperation and a commitment to making the child's needs a priority. 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: Both parents will continue to be fully involved in making major decisions about their children's health, education, welfare and religion. 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. Both parents view themselves as having a family. Neither parent refers to the other as a "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 lifestyle or home life; each parent must support the other's relationship to the children. 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. 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 lives of the children. Parents must concede that they are jointly responsible for the rearing of the children and will work together to equitably share children's expenses, living arrangements and care. Both must invest time to teachers' conferences, doctors' appointments, religious activities, etc. Parents must agree that, even though they have differences, they will value and respect each other as a co-parent, and that this means that the children need to be involved with both parents. 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.

22. QUESTION: IF I HAVE OTHER QUESTIONS, WHAT SHOULD I DO?

ANSWER: See a legal assistance attorney or private attorney as soon as possible. Your lawyer can answer many questions and help you to make a fair and intelligent decision about your choices, options and alternatives. Our legal assistance office stands ready, willing and able to help you in these matters.

Appendix C

GUIDELINES FOR VISITATION

The following are suggested guidelines for visitation. Parents should fully consider the situation when determining appropriate visitation.

SITUATION A: The parents reside on the same island or in reasonable proximity of each other. The child or children are at least 3 years old. If possible, state pick-up or drop-off times of child in all visitation schedules.

Alternate Weekends with Each Parent

Ranging from one night per week from after school to an agreed time of return. If no agreed time of return, then no later than 7:00 pm. This is subject to the age of the child and their regular bedtime.

Telephone Contacts

Ranging from daily to once a week at reasonable hours. Reasonable hours are determined by the age of the child and the child's usual daily activities schedule.

Vacations

One week at Christmas break each year, alternating the first and second week. The first week will include Christmas Eve and Christmas Day. The second week will include New Year's Eve and New Year's Day.

Summer Vacation

Maximum one-half of summer with alternate weekends to the other parent. The child will be returned to the custodial parent one week prior to the start of school. State number of weeks.

Spring Vacation

One-half of spring vacation. State number of days if possible.

Holidays

- Alternate Easter, Thanksgiving and Halloween
- Child's Birthday. Parents to share one-half of child's birthday or alternate yearly
- Father's Day with father and Mother's Day with mother. Same with parent's birthday

Reports

The parents will share medical and school reports at appropriate times. Whoever has the reports will share the reports with the other parent.

Whenever possible, the parent who has the child will take the child to his weekend activities that are important to the child (e.g., team sports, birthday parties, etc)

SITUATION B: The child or children are at least 3 years old. One parent resides in another state or island. Depending on the age of the child, an adult may be needed to accompany the child on flights.

Correspondence

Correspondence ranging from daily and up to daily telephone contacts at reasonable hours. Reasonable hours are determined by the child's age and the child's usual daily activities schedule.

Vacation

- Christmas: entire vacation in alternate years with the return of the child to the custodial parent at least 2 days prior to the date school begins.
- Spring Break: alternate years.
- Summer: Depending on the age of the child, the maximum summer vacation period will be 2 months. Both parents should be flexible regarding the child's summer activities. The child should be returned at least 1 week prior to the start of the school year.

** Special accessibility to the child if the visiting parent comes to the child's usual area of residence. The visiting parent must give at least 2 weeks notice prior to visitation. The visitation should take into account the child's usual school activity schedule, if any. At minimum, one weekend and one day during the week from after school to reasonable night return on the same day.

Reports

Medical & school reports at least quarterly, or as appropriate Annual reports by the custodial parent to the other parent, or as appropriate for children with handicaps or special needs.

SITUATION C: For children below the age of 3, visitation should be as frequent as possible; at least once a week if on the same island. Conditions need to be determined based on the factors.