

Child Custody: What the Courts Consider

Whenever a couple with children divorces, they must come to grips with an arrangement for custody and visitation, which will foster the well being of their children. Fortunately, most couples are able to agree to the form of custody they will employ for the future rearing of their children.

However, when one parent, contrary to the wishes of the other parent, seeks to be granted "sole" custody (or, be appointed the "primary residential parent" in joint custody cases) the court must ultimately make the decision.

During the initial custody determination the question "What is in the best interest of the children?" means the court must decide which parent can best provide for the particular child's needs. It does not require a showing that the opposing parent is "unfit" or has "abandoned" the children. Rather, the court attempts to determine the child's best interest by examining the following factors as they relate to the child and the proposed environments of the two parents.

(1) The age and sex of the child. For example, as a child matures the same-sex parent may better meet his/her needs.

(2) The wishes of the child's parent(s). One parent might wish to provide the child numerous forms of cultural, spiritual, academic or athletic enrichment. The other parent may have wishes that are not so ambitious but, perhaps, more realistic for their particular child.

(3) The wishes of the child, with more consideration given to the child's wishes if the child is at least 14 years old. This factor does not give the child final say, rather, it requires the court to take more seriously the desires of the child.

(4) The interaction or interrelationship of the child with his parent(s), his siblings and any other person who may significantly affect the child's best interest. One parent may provide a warm and nurturing relationship whereas the other may not be so adept. One may provide frequent interaction with extended family members the other may be more isolated.

(5) The Child's adjustment to home, school and community. The child's adjustment can be measured by school performance and the extent and quality of his involvement in his community.

(6) The mental and physical health of all individuals involved. For example, an Indian trial court was affirmed on appeal even though it awarded custody of a child to a quadriplegic parent instead of the physically healthy parent because the latter was a pathologically self-centered person who took no interest in the child, quit his job and squandered some of the quadriplegic parent's settlement money.

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(7) Evidence of a pattern of domestic violence by either parent. This latest factor was added to the law in 1996. It is well recognized that abusive adults learn these patterns for behavior as children. Thus, the court may want to avoid placing a child with a parent who is abusive.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider [other factors].

While any one or a combination of these factors may lead a client to seek sole or primary custody of a child, a parent must still keep in mind that to be selected as the primary custodial parent he or she will need to demonstrate to the court a plan for the successful day to day fulfillment of being the custodial parent.

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