

## **OVERVIEW OF CUSTODIAL AGREEMENTS**

### **I. INTRODUCTION**

There is no more difficult type of action for a family law practitioner to be involved in than one involving custody of minor children. By its very nature, the emotions of the parties are quite high and there is additional pressure on the attorney to achieve a satisfactory result for his or her client. Today, a custody action involves many experts, and frequently mediation is undertaken in an effort to hopefully avoid a final trial and litigation if at all possible.

As the vast majority of domestic relations cases are settled (at least sooner or later), it is incumbent upon the practicing attorney to devote the same emphasis to drafting settlement agreements that they devote to trial preparation and other aspects of the case. However, all attorneys have probably reviewed settlement agreements that appear hastily drafted, which are incomplete, or vague in interpretation. As a result of the many settlement agreements attorneys see which contain ambiguous language the parties ultimately wind up back in court for interpretation, often in the form of a modification or contempt action. It is also probably true that attorneys have participated in negotiating and drafting such agreements, due to the exigencies of a particular situation. However, whenever possible, an attorney will best serve her client by carefully drafting and refining settlement clauses and fully informing the parties of the implications. Furthermore, by drafting a refined settlement agreement that fully details all issues of custody and visitation, the best interest of the parties and the children will be served now and throughout the subsequent years.

The enclosed materials, reflecting suggested language for custody and visitation agreements, are suggestions only, as all drafting is somewhat dictated by personal preference and

the specific facts of a given case, and this is especially true in the areas of custody and visitation. One factor that may come into play in drafting custody and visitation clauses that is not present in other types of matrimonial clauses, is the need to attempt to predict future difficulties and changes in conditions, and to accommodate the particular ages and circumstances of each child. Furthermore, in many cases, with the problems posed by mobile and relocating families, it may be necessary to address anticipated changes in residence with jurisdictional and self-effectuating modification clauses. These choices may be a matter of personal preference to the lawyers and/or litigants, as some practitioners prefer to let future changes be resolved in the future, while some prefer to attempt to address such changes in the initial document. Also, attorneys drafting custody agreements today are faced with far more choices regarding semantics and definitions concerning custodial rights and responsibilities, which the attorney must consider when drafting custody clauses whether or not they are engaging in only semantics, or whether the broad phrasing of agreements, often engaged in to make agreements more palatable, substantively affects the present and future rights of the parties and children. Finally, the level of conflict in a particular case may also require specific kinds of drafting, and will sometimes necessitate greater detail in drafting, in hopes that the inclusion of such detail will moderate future discord.

## **II. REVIEW OF FORMS**

### **A. "TRADITIONAL"**

The first attached form reflects a traditional concept of custody and visitation, which places sole custody with one parent and specified visitation rights in the other. There is a minimum amount of language included regarding the behavior of the parties, the exchange of information, and decision-making. This type of traditional agreement, with variations, has been

relied upon by practitioners for many years, and may still be entirely appropriate in cases where the roles and responsibilities of the parties historically fall in a traditional mode, or where the level of conflict between the parties precludes more extensive interaction between them.

## **B. "MORE LIBERAL"**

The second proposed model, entitled "More Liberal" is a more detailed form and reflects the evolution in the area of custodial rights, providing for joint legal custody and expanded visitation rights, as well as expanded opportunities for input and information by both parties. This form, despite its name, actually reflects what has become a customary format for many practitioners today. Initially, the form awards joint legal custody of the children to the parties and requires that the parties confer on legal issues. However, it allows the primary legal custodian to make final decisions in the event of an impasse between the parties. Naturally, it is assumed that the parties will communicate in good faith, and the consent of one party will not be arbitrarily withheld. However, if there is an issue with regard to open communication, a clause should be included to require open communication and good faith discussions between the parties.

The second model also proposes, as an alternate, awards of custody employing the terms "primary" and "secondary." While these terms may reflect an important effort to more adequately include both parties in the parenting process, some thought should be devoted to the implications of the use of such terms, such as the right to procure or to block the procurement of information regarding the children, the right to relocate, determination of the actual residence of children for legal and school enrollment purposes, and the right to claim the children as dependency exemptions.

The model also proposes alternates for visitation, which may largely be a matter of

personal preference to parties and lawyers, such as the choice between every other weekend visitation or first, third and fifth weekend of each month visitation. The model introduces the concept of having children spend the night during midweek visitations rather than being returned home the same evening, and anticipates the fact that some school systems now offer a winter break (in addition to the traditional Christmas and Spring breaks from school). An alternate form attempts to set forth holiday and vacation visitation in "chart" form, which again is a matter of personal preference to some practitioners.

Optional clauses address issues that arise in busy families, such as the right of the primary custodial parent to go on vacation unfettered by the legal obligation to observe visitation times, the mutual duty of the parties to participate in transporting the children to and from visitation, precatory language regarding the children's activities and events, the need found in some cases to ensure that the children's proper equipment and clothing are provided and the need to provide information regarding the children's location when they are out of town. Other clauses propose the "first right" to babysit often found in agreements nowadays, or the reverse obligation to provide child care if visitation is not exercised, and for visitation rights by grandparents if one party should die during the minority of the children.

Further optional clauses attempt to reflect the need in many cases to expand the rights and responsibilities of parties in sharing custody and co-parenting. One suggested form provides that the document itself acts as an absolute release for providing both parents medical and educational information regarding the children. Certain "precatory" clauses are suggested, reflecting the intentions of the parties that neither shall engage the children in conflict, neither shall attempt to turn the children against the other or undermine the relationship of the children with the other, and

providing that each shall be fully informed as to the children's activities and events.

A subsequent set of optional clauses, entitled "prohibitive language" attempts to address safety and "moral" issues, such as the use of alcohol and/or drugs, or a prohibition of having a member of the opposite sex present overnight when the children are present. One clause would provide for the posting of bond in appropriate cases, where the facts indicate that one parent might wrongfully remove the children. Bull v. Durham, 243 Ga. 72 (1979). Another clause attempts to at least raise the issue of visitation with an infant, and the need to expand visitation as a child matures (and practitioners would be urged to more fully develop this visitation beyond the suggestions set forth in the model). A final clause suggests that a child's passport remain with the primary custodian at all times.

### **C. "JOINT LEGAL CUSTODY"**

The third major portion of the model attempts to propose various clauses for "pure" joint legal custody of children, whereby parents truly share decision making. Practitioners in drafting agreements have enormous discretion in the area of joint legal custody, as the applicable statute (O.C.G.A. §19-9-6) and Georgia case law provide little substantive guidance on this issue. As a matter of practicality, when drafting provisions for joint legal custody, each and every agreement should invent and provide its own detailed definition of the parameters. Again, the level of cooperation between the parties may alleviate the need for some detail, but at a minimum such agreements should set forth the contemplated areas of decision making by the parties. For example, is decision making limited to the general areas of health, education and religion, or does it include the right to determine where a child shall vacation, disciplinary rules and household rules and matters such as access to an automobile or therapist? Some agreements may provide for

a kind of "split" joint custody, specifically contemplated by the Georgia statute, whereby one parent has responsibility for decision making in one area of the child's life, such as education, and the other parent makes decisions in other areas, such as health matters.

One of the proposed clauses provides that in the event that the parties cannot agree on an issue, the matter shall be resolved by a professional agreed upon by the parties. Of course, this clause could also be replaced by a mandatory mediation clause. In either event, the parties should be aware that such clauses, such as required consultation with a psychologist, or required mediation may in fact act as a condition precedent to filing an action in court. (Gould v. Gould, Ct. App. A99AI609, decided Oct. 6, 1999.) Clients should also be advised of the ramifications of decisions such as Carr v. Carr, 207 Ga. App. 611 (1993), in agreeing to an award of joint legal custody, as such clauses may restrict the ability of a parent to permanently remove the children from the jurisdiction. It may be important to include language addressing the issue of relocation of the children where joint legal custody is awarded, and whether or not such relocation is to be permitted without court intervention.

In awarding joint legal custody, it may also be wise to include a statement as to which parent's residence constitutes the residence of the children for legal purposes or purposes of school enrollment. Some proposed alternate clauses in the model would also specifically address the issue of religious training and which public and/or private school children will attend.

We note that the Georgia Court of Appeals has recently reaffirmed traditional Georgia case law, prohibiting a modification of custody based solely on a custodial parent's relocation to another state. In Ofchus v. Isom, 239 Ga.App. 738 (1999), the parties had been divorced in 1996, and the settlement agreement awarded them joint custody, with primary physical custody awarded

to the mother. The mother remarried and moved to Virginia in 1998, and the trial court found that the move was for the advancement of her new husband's career, and found that the child had lived in Atlanta, Georgia all of her life until that time and that all of her relatives lived in the Atlanta area. The trial court changed primary physical custody of the child to the father, but is reversed by the Court of Appeals on the basis of Georgia case law, stating that relocation alone may not be a basis for such a modification, although relocation may warrant a modification of visitation. [Also in accord, see the recent decisions of Helm v. Graham, 249 Ga. App. 126 (2001); Mahan v. McRae, 241 Ga. App. 109 (1999)].

#### **D. "JOINT PHYSICAL CUSTODY"**

The model attached for joint physical custody is fairly short, as these kinds of agreements will be highly individualized, based on the circumstances and preferences of the parties. The proposed clause sets forth a custodial arrangement where the parents exchange the children every four days, and provides for some summer and major holiday visitation. It further includes a "Carr v. Carr" clause, whereby an automatic change of custody occurs if one of the parties relocates beyond fifty miles, so that the remaining parent becomes the primary physical custodian and the moving parent receives specified visitation.

#### **E. "JURISDICTIONAL CLAUSES"**

Section E, entitled "Jurisdictional Clauses" attempts to deal with the frequently troublesome area of jurisdiction in custody cases. In cases where custody jurisdiction has been put in issue, it may be advisable to include clauses in the settlement agreement or decree reciting that the Court does have jurisdiction and the bases for the jurisdiction. The suggested attached clauses reference the PKPA and the UCCJEA. These clauses should be viewed cautiously, since the

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is the revised and updated version of the UCCJEA and was recently adopted by the Georgia legislature in July, 2001 and the practitioner does not have the benefit of case law providing interpretation of these clauses.

#### **F. "RELOCATION CLAUSES"**

Section F of the model addresses the current topical issue of relocation of children. Under the recently adopted UCCJEA, Georgia will retain continuing jurisdiction over its determination until either:

- (1) A court of this state determine that neither the child nor the child's parents or any person acting as a parent has a significant connection with this state concerning the child's care, protection, training, and personal relationships; and
- (2) A court of this state or a court of another state determines that neither the child nor the child's parents or any person acting as a parent presently resides in this state.

Other than the provisions contained within the UCCJEA, Georgia does not provide the court with the ability to place restrictions on the ability of a custodial parent to move outside of the state with the children. However, that restriction can be agreed upon by the parties in a Settlement Agreement. Once that agreement is incorporated into a Final Judgment and Decree of Divorce, the relocation provision is enforceable through either a contempt or modification action. Whether or not future Georgia law will change on this issue to provide our courts a

restrictive power is uncertain at this time; however, efforts have been and are being made at the legislature.

#### **G. "TRAVEL CLAUSES"**

Some proposed "travel clauses" are also set forth, as the issue is often encountered nowadays, and as federal and airline rules and regulations arguably provide minimal protection of and accommodation for minor children traveling alone. The clauses attempt to suggest solutions regarding the ages at which children may fly, nonstop flights versus flights that require changes, and payment of travel expenses.

### **III. CONCLUSION**

As with any proposed model or form, circumstances and particular cases will always arise requiring individual problem solving and drafting. Forms often, at best, may act as a helpful checklist for clauses, but may frequently not be appropriate for particular cases. The forms included with this lecture are culled and refined from many, many different sources, including practicing lawyers, journals and published treatises by Georgia lawyers and others. In selecting and compiling proposed forms, some personal bias may be inevitable, and there are certainly many, many other sources of excellent Georgia custody and visitation forms available to practitioners. The proposed attached forms may be added to, moved around, and synthesized with one's existing forms for optimum results. It is always important to remember that in any dispute involving custody and visitation of minor children, the specific facts of the case will influence the provisions to be contained in an agreement, and the parties should be encouraged to put the best interests of the children ahead of their own needs or desires.