

## Evaluating and Outlining a Custody Case

When a client with a child/ren first comes to see me, I start by walking them through the difference between joint and sole custody. Contrary to commonly held misconceptions that joint custody means equal parenting time, I explain to them that usually the difference between joint and sole custody really has nothing to do with the amount of time a parent spends with a child/ren, but rather, relates to decision making responsibilities with regard to major health, education and religion and whether or not there will be a mediation provision in the final judgment, since same is required in joint parenting agreements. An agreement can define other major decisions that need to be made jointly as well.

When parents generally agree on issues concerning health (ie: what medical providers their children should see and to follow that providers advice), education (what schools their children should attend) and religion (what religion their children are being raised in and/or how they practice), a dispute over joint or sole custody is not necessary nor in their best interest. Moreover, even when parents agree on those issues, the parties still may not be in agreement on an appropriate parenting schedule for the family. In those instances, there are many options short of a custody dispute for how to address these differences. Therefore, I often find myself explaining to one parent (usually the parent with primary responsibility) that we are no longer practicing in times when every other weekend and one weeknight is standard for a non-residential parent, more expansive schedules have become the norm, and there are many ways to try



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to resolve those differences. I also find myself explaining to one parent (usually the parent who has not traditionally had primary responsibility but now is seeking it) that equal parenting time is not necessarily a right and he or she needs to look at the right fit for their particular family. Sometimes I find myself explaining to my client that even though their family has always spent one holiday with her family and another

holiday with his family, absent an agreement, they are going to have to alternate annually. In those instances, there are various methods for parent to work together to come up with a solution, with or without their lawyers, perhaps with a mediator, and sometimes with their attorneys and a mediator.

Finally, even when parents can agree on decision making and/or an appropriate parenting schedule, they can remain at odds on the issue of who to designate as the “primary residential parent”. I often find myself explaining that practically speaking, many judges and attorneys these days are solving this problem by avoiding labeling a parenting judgment as “joint” or “sole” or as “residential” or “non-residential” and, instead, are creating a hybrid which is generically labeled simply a “Parenting or Custody Judgment”.

Unfortunately, however, there are certainly those circumstances when a client describes either significant disparities between each parent’s view on major decisions such as health, education or religion; or a parent suffers from a serious substance abuse problem;

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### Gregory C. Maksimuk named KCBA President



Congratulations to Schiller DuCanto & Fleck Associate Gregory C. Maksimuk on becoming the new President of the Kane County Bar Association for the 2015-2016 term.

# How to Help Children at Different Ages Cope with Family Transitions

**Introduction:** What our clients say and how they support their children during a divorce can have a major impact on custody disputes in court, and, more importantly, on the relationships they have with their children and their ability to co-parent with their former spouses after a divorce is finalized. We are fortunate to have a guest author today, who, as a Licensed Marriage and Family Therapist, is acutely qualified to advise us on how to communicate to our children during their differing stages of development.

When families are going through a transition like divorce or death it can be difficult for parents to know how to help their children cope with the situation. Depending on their age, children have different developmental needs. When making decisions for children, taking into consideration what they need at each stage of their life will help both parents and children transition more smoothly.

Below is a list of child development stages and needs and helpful ways parents can meet their developmental needs when their family is experiencing a hardship.

**Birth-18 months:** The developmental task at this stage is learning to trust and bond with primary caregivers. Infants notice and respond to changes in intonation or feelings and energy in the home. When your infant is experiencing difficulty in their environment you should:

- Give your infant plenty of attention;
- Soothe by rocking, holding, touch and contact;
- Interact often with talking and smiles;
- Start to build a consistent routine.

**18 months-3 years:** At this stage, a toddler is learning that they can be their own person. They are still completely dependent on their parents for safety and meeting their needs. Tantrums are common as they are figuring out their feelings and independence. Magical thinking begins and they often think they are the cause or are creating the stress in the home. When a situation is creating unpredictability and instability for a child this age, the key elements to keep in mind are to:

- Maintain a consistent routine. This helps them feel safe and secure;
- Avoid punishing a child for acting like a baby or regressing. Praise them when they are being mature;
- Be affectionate and reassure toddlers they are loved; and
- Set limits and take charge. Toddlers also need rules to feel safe and secure even though they will fight against it.

**3 years - 5 years:** During this developmental stage, children learn many new skills and are absorbing their world. They do not quite understand time or cause and effect. When their world is changing but they do not understand why, some helpful things to remember are to:

- Reassure your child that you will be back if you leave;
- Keep your promises;
- Do not make too many changes at one time;
- Find ways for your child to express feelings through reading, drawing, or labeling their feelings;
- Tell your child that you love them and nothing will ever change that; and
- Children learn about their own emotions by watching your reactions to things. Show them how to handle emotions and temper reactivity.

**6 years - 9 years:** Elementary aged children rely on their family structure at this stage. They need a stable family so they can explore their friends and social needs but come back to center. Children are developing self-esteem and identity. If your family structure is in flux and changing, it is important to:

- Listen to your child's feelings and be available to listen no matter what those feelings are;
- Model to your children how you can take good care of yourself so they do not feel like they have to take care of you;
- Be truthful and do not tell your child something that is not true just to appease them;
- Help your child understand that families are not always the same and can be different. No matter what, a family is still a family; and
- Express your love for your child by affection and words.



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**9 years-12 years:** At this stage children become much more independent from their parents. Friends play an important role. Your child may experience more challenging emotions such as anger, shame and embarrassment. If your child is experiencing difficulty with changes in the family, suggestions to cope with this difficulty are to:

- Encourage physical activity;
- Model how to take care of yourself and manage feelings;
- Stay involved in their lives and communicate even if they resist;
- Allow your children to have other important adults in their lives to connect with and confide in; and
- Take your child seriously.

**13 years-18 years:** The main task for adolescents at this stage is to gain complete independence and prepare to leave home. They may seem disconnected from the household but it's important to include them and remember to:

- Maintain your role as a parent and adult; do not be their peer;
- Allow your teen to have input in plans and schedules;
- Tell your teen often that you love them;
- Keep talking to them even if they act like they are not listening or do not care; and
- Do not take things personally when your teen reacts and is not kind to you.

## Evaluating and Outlining a Custody Case (*Continued from cover*)

or a parent is diagnosed with and not being treated for a mental health issue; or a parent has serious concerns regarding a threat to their child's welfare. In those situations, a custody dispute is inevitable. In those cases when it is apparent that there is going to be a custody fight, it is important to explain the process to your client in detail, so he or she knows what to expect.

Generally speaking, absent an emergency, in most cases the parties will first be ordered to confidential mediation, either by a public mediator for the specific county or with an agreed upon private mediator. If that approach is not successful, it is likely that a lawyer will be appointed to represent the children, either in the form of a child representative, GAL or attorney for the child. To read more about this, see <http://www.sdfllaw.com/documents/newsletters/Summer%20Newsletter%202012.pdf#page=2> In these highly contentious custody cases, either the court, the child's attorney or a lawyer for either or both parties will likely ask to have a 604(b) expert appointed as the court's witness to evaluate the child/ren's best interests. While the evaluation process varies greatly depending on the particular evaluator involved, the process is such that most experts will want to meet with each party separately, the children separately, as well as meet with each party and the children together. Some evaluators will order psychological testing for the parties. Many evaluators will ask for both parents to fill out a detailed questionnaire. Some evaluators will consider input from involved and relevant third persons such as therapists, teachers, family members, and/or friends. Other evaluators will ask to review documentation such as medical records, school reports, photos, or anything else which substantiates a parties' position. Regardless of how many of these methods are employed by the evaluator, these reports can easily take 6-18 months to complete and are very costly, especially if the evaluator is then going to be deposed or asked to testify. Finally, once this process is completed, each party has a right to rebut the 604(b) report by hiring their own 604.5 custody expert, who will follow a similar protocol. In short, what you have explained to your client is a long and difficult process that they are now engaging in to help ascertain what is in fact best for their children.

There is no question that custody disputes are long, costly, and emotionally draining. However, if there truly is a serious endangerment to the children, your client is often left with no choice. As the lawyer, it is your job not only to guide your client through the process, but to assist your client in evaluating what constitutes a legitimate concern and what is merely a difference of opinion that can be compromised. When handling these cases, it is our responsibility as attorneys to realize that we are usually dealing with our client's most precious commodities, their children, and we should address their concerns with the utmost of dignity and respect.

# Divorcing or Contemplating Divorce with Post-High School-Aged Children?

## Recent Case Law Updates and Helpful Tips

Children of divorced parents are in the unique position of having the payment of their post-high school education dictated in their parents' divorce decree. Illinois is one of few states that permit its courts to order divorcing parents to financially contribute to their children's higher educations.

The Court has the authority to allocate responsibility for the payment of college education expenses under Section 513 of the Illinois Marriage and Dissolution of Marriage Act. 750 ILCS 5/513. In allocating such responsibility, the Court is required to consider "all relevant factors that appear reasonable and necessary," including: (1) the financial resources of both parents; (2) the standard of living the child would have had the marriage not been dissolved; (3) the financial resources of the child; and (4) the child's academic performance. Section 513 also contains a list of expenses that can be allocated: room, board, dues, tuition, transportation, books, fees, registration and application costs, medical expenses including medical insurance, dental expenses, and living expenses during the school year and periods of recess. The parties by agreement can define these responsibilities; however, because such expenses are in the nature of child support, these obligations are always modifiable in the future upon the showing of a substantial change in circumstances.

The authority to order the payment of these expenses exists regardless of the children's ages at the time of the entry of Judgment. In some circumstances, particularly if the children are very young, the parties do not address this issue until a later date since their future financial resources, the child's future financial resources, and a child's desire to attend college are largely speculative.

Given the high cost of post-high school education and the Illinois court's ability to order a divorcing parent to pay for these expenses, the following are some tips to keep in mind as you negotiate and eventually implement the higher education provisions in your divorce decree:

**1) Be Specific.** Your Marital Settlement Agreement can expand upon the provisions of Section 513 to create a document that works best for your family's circumstances.

For example, if you and your spouse agree that fraternity/sorority dues should be included as higher education expenses, include that expense in your document. Similarly, if you both agree that a trade or vocational school should count as a college education, make sure to add that to your Agreement or you risk that it may not be covered. (*See In re Marriage of Holderrith*, 181 Ill. App. 3d 199 (1st Dist. 1989) (holding that a father was not required to contribute towards the cost of his son's attendance at an "Automotive and Diesel College" because the parties' new skills and are absorbing their world. They do not quite understand time or cause and effect. When their world is changing but they do not understand why, some helpful things to remember are to:

**2) Be Proactive.** Do not wait until your child has already incurred post-high school education expenses to seek a contribution to them. In 2011, the Illinois Supreme Court limited the time period in which you can request contribution to college expenses to the time of the filing of the initial petition. *See In Re Marriage of Petersen*, 2011 IL 110984. Therefore, parties who specifically reserve the issue of responsibility for college expenses in their Marital Settlement Agreements must file a petition for allocation of college expenses prior to the costs being incurred or risk

absorbing the entirety of any pre-filing expenses. *See also In re Former Marriage of Donnelly*, 2015 IL App (1st) 142619 (holding that the contribution limitation in *Petersen* applies only in instances where there is an express reservation of the payment of college expenses and no other language specifically obligating the parties to pay for such expenses).

One exception is that if you are in the midst of divorce proceedings (i.e., no final judgment has been entered), you can seek contributions to expenses incurred prior to the filing of your petition for contribution. *See In Re Marriage of Chee*, 2011 IL App (1st) 102797.

Given the length of time it often takes for a case to move through the court system, including conducting any necessary discovery, you should file a petition for contribution as soon as practicable, but ideally during the winter or spring months prior to the start of the fall school year you anticipate your child to commence his or her higher education.

**3) Be Careful with Pre-Decree Contributions.** Because your assets and liabilities are examined and allocated between you and your spouse at divorce, it may seem logical to simultaneously contribute some of those funds to a college savings account for your children. However, you must obtain your spouse's consent to do this or you risk being charged with dissipation. In *In re Marriage of Lee*, 246 Ill. App. 3d 628 (4th Dist. 1993) the Court found the husband to have dissipated marital assets when he transferred \$266,719 to the parties' children for savings and educational purposes without his wife's knowledge or consent during the three months before the parties' separation. The Court specifically noted that "[a] transfer of marital assets does not escape classification as dissipation merely because it is to, or for, the benefit of the children of the marriage." *Id.* at 633.

**4) Be Mindful of a New Spouse's Income.** In a contribution proceeding, your "resources" and not simply your income, may be considered for purposes of allocating contribution to college expenses. This means that if you remarry, your new spouse's income may be considered in determining your respective responsibility. In *In re Marriage of Dysch*, 314 Ill. App. 3d 640 (2nd Dist. 2000), the appellate court upheld an order requiring an ex-wife to pay 90% of the child's education expenses because her new spouse earned in excess of \$600,000 per year and his income was used toward the cost of her living expenses. In arriving at its holding, the appellate court found that the trial court could properly consider the income of the ex-wife's new spouse, because Section 513 references "resources" and not "income" or "salary." *Id.* at 644-45. *But see In re M.M.*, 2015 IL App (2d) 140772 (holding that the trial court erred when allocating an unemployed ex-wife responsibility for college expenses when such responsibility was based on imputing her with her new husband's income and she did not have access to her new husband's accounts, nor were there any joint accounts).

Post-high school education is a costly expense in and of itself – avoid making it more costly by pre-planning, carefully drafting your Marital Settlement Agreement, and properly implementing the terms of your Agreement.



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## IN THE NEWS

**Michele M. Jochner** has been reappointed to serve another term on the Family Law Section Council of the Illinois State Bar Association, and has been newly-appointed to the Association's Committee on Women in the Law.

**Dorothy A. Voigt** spoke at the April 8, 2015 Kane County Bar Association Meeting regarding "Medical Insurance for Former Spouses."

**Meighan A. Harmon** spoke at the USA and Canadian IAML Chapter Meeting in Quebec City on the topic of "What You Need to Know About How Executive Compensation is Affected by the Dodd-Frank Act."

**Patrick M. Kalscheur** was appointed to the Board of the Collaborative Law Institute of Illinois at the General Meeting on June 16, 2015.

**Karen Pinkert-Lieb** became a Fellow of the Litigation Counsel of America, the Trial Lawyer Honorary Society.

**Schiller DuCanto & Fleck LLP** held a networking event, "Summer in Chicago," at the Ivy Room on June 30, 2015.

**Jennifer Dillon Kotz** was featured in Loyola University School of Law's Alumni Spotlight.

**Schiller DuCanto & Fleck LLP** hosted the Coalition of Women's Initiatives in Law event on May 5th featuring a presentation by Dr. Arin Reeves on her book, *One Size Never Fits All, Business Development Strategies Tailored for Women (And Most Men)*.

**Jay P. Dahlin** was interviewed on NBC 5 Chicago for a story titled "Judge Denies Teen's Request for Access to Funds for Bali Appeal."



*The materials contained in this Newsletter are intended for general informational purposes only and not to be construed as legal advice or opinion.*

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