

Divorce & Child Custody Issues

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THE MARRIAGE CONTRACT

- ▶ English common law tradition, marriage was a **contract** based upon a **voluntary private agreement** by a **man** and a **woman** to become **husband** and **wife**
- ▶ Marriage was viewed as:
 - the basis of the family unit &
 - vital to the preservation of morals and civilization
- ▶ Traditionally, husband had a duty to
 - provide a safe house
 - pay for necessities such as food and clothing and
 - live in the house
- ▶ The wife's obligations were
 - maintaining the home
 - living in the home
 - having sexual relations with her husband and
 - rearing the couple's children



DIVORCE: WHAT IS IT?

- ▶ **Dissolution Of The Marriage Contract**
 - **Allocates Property: Who Gets What Stuff**
 - **Allocates Finances: Who Gets What Money**
 - **Allocates Child-rearing: Who Gets Whom**



STATE POLICY OF JOINT CUSTODY

- ▶ It Is The Policy Of The State Of Alabama To Assure That Minor Children Have Frequent And Continuing Contact With Parents
 - Who Have Shown The Ability To Act In The Best Interest Of Their Children *AND*
- ▶ To Encourage Parents To Share In Their Rights And Responsibilities Of Rearing Their Children (ALA. CODE Section 30-3-150)



JOINT CUSTODY DEFINITION

- ▶ JOINT CUSTODY IS DEFINED AS
 - JOINT LEGAL CUSTODY AND
 - JOINT PHYSICAL CUSTODY



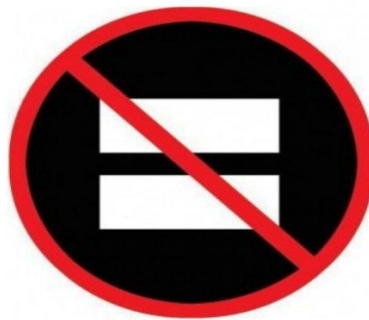
JOINT LEGAL CUSTODY DEFINITION

- ▶ Both Parents Have Equal Rights And Responsibilities For Major Decisions Concerning The Child, Including But Not Limited To:
 - Education
 - Health Care
 - Religious Training
- ▶ Court May Designate One Parent To Have Sole Power To Make Certain Decisions



JOINT PHYSICAL CUSTODY DEFINITION

- ▶ Physical Custody Is Shared By The Parents In A Way That Assures Child Frequent & Substantial Contact With Each Parent
- ▶ Does NOT Necessarily Mean Physical Custody Of Equal Durations Of Time



SOLE LEGAL CUSTODY DEFINITION

- ▶ One Parent Has Sole Rights & Responsibilities To Make Major Decisions Concerning The Child
- ▶ Including, But Not Limited To:
 - Education
 -
 - Health Care
 - Religious Training



SOLE PHYSICAL CUSTODY DEFINITION

- ▶ One Parent Has Sole Physical Custody
- ▶ Other Parent Has Rights of Visitation
- ▶ Except As Otherwise Provided By Court



SHARED CUSTODY DEFINITION

- ▶ Not Found In Statutes
- ▶ Alabama Rules of Judicial Administration Rule 32, “Child Support Guidelines”
- ▶ Rule 32(A)(1) – “Reasons for Deviating from the [Child Support] Guidelines”
- ▶ “(a) Shared physical custody or visitation rights providing for periods of physical custody or care of children by the obligor parent substantially in excess of those customarily approved or ordered by court.”

ALABAMA'S JOINT CUSTODY LAW

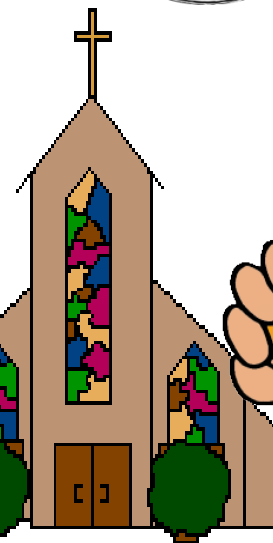
- ▶ Court Shall Consider Joint Custody In Every Case
- ▶ But Court May Award Any Form Of Custody It Determines To Be In Best Interest Of Child
- ▶ ALABAMA CODE Section 30-5-152(a)

5 FACTORS CONSIDERED BY COURTS FOR JOINT OR SOLE CUSTODY

- Agreement Or Lack Of Agreement Of Parents On Joint Custody
- Past And Present Ability Of Parents To Cooperate With Each Other And Make Decisions Jointly
- Ability Of Parents To Encourage The Sharing Of Love, Affection And Contact Between The Child & Other Parent
- Any History Of Or Potential For Child Abuse, Spouse Abuse Or Kidnapping
- Geographic Proximity Of Parents To Each Other As Relates To Practical Considerations Of Joint Physical Custody

PARENTING PLAN REQUIRED AS PART OF SETTLEMENT AGREEMENT

- ▶ Required By State Law
 - ALABAMA CODE Section 30-3-153
- ▶ Tie-Breaker For Certain Areas
 - Academic
 - Athletic
 - Civic
 - Cultural
 - Dental
 - Medical
 - Religious



SOFTBALL



SAMPLE PARENTING PLAN

3.2. Primary Authority if Parties Unable to Agree.

Should Husband and Wife be unable to agree on a particular issue of the academic, religious, civic, cultural, athletic, clothing, medical, and dental activities of the Minor Children, the following party is hereby designated as having the primary authority and responsibility regarding involvement in said activity:

Academic.....Wife

Athletic.....Husband

Civic.....Husband

Cultural.....Wife

MedicalWife

Religious..... Husband

The exercise of this primary authority is in no way intended to negate the responsibility of the parties to notify and communicate with each other as otherwise set forth herein.

CHILD'S RECORDS TO BE AVAILABLE TO BOTH PARENTS

- ▶ Medical
- ▶ Physiological
- ▶ Dental
- ▶ Scholastic
- ▶ Athletic
- ▶ Extracurricular
- ▶ Law Enforcement
- ▶ Regardless of Custody Arrangement
- ▶ ALABAMA CODE Section 30-3-154



“Tender Years Doctrine” Abolished

- ▶ *Ex Parte Devine*, 398 So.2d 686 (Ala. 1981)
- ▶ Presumption In Alabama That The Natural Mother Was Presumed, In Absence Of Evidence To The Contrary, To Be The Proper Person To Be Vested With Custody Of A Child Of “Tender Years”
- ▶ Deprived Fathers Of Equal Protection Under The Law
- ▶ Children In *Devine*: 1st Grade & Nursery School



ALABAMA PARENT-CHILD RELATIONSHIP PROTECTION ACT AKA “THE RELOCATION ACT”



WHAT IS THE RELOCATION ACT?

- ▶ Creates A Rebuttable Presumption That A Change Of Principal Residence Of A Child Is Not In The Best Interest Of The Child
- ▶ Sets Forth Procedure When Moving A Long Distance From The Other Parent
- ▶ Required To Be In ALL Child Custody Orders
 - Divorce Cases
 - Juvenile Dependency Cases



THE RELOCATION ACT REQUIREMENTS

Alabama law requires each party in this action who has either custody of or the right of visitation with a child to notify other parties who have custody of or the right of visitation with the child of any change in his or her address or telephone number, or both, and of any change or proposed change of principal residence and telephone number or numbers of a child. This is a continuing duty and remains in effect as to each child subject to the custody or visitation provisions of this Decree until such child reaches the age of majority or becomes emancipated and for so long as you are entitled to custody of or visitation with a child covered by this Order. If there is to be a change of principal residence by you or by a child subject to the custody or visitation provisions of this Order, you must provide the following information to each other person who has custody or visitation rights under this Decree as follows:

1. The intended new residence, including the specific street address, if known.
2. The mailing address, if not the same as the street address.
3. The telephone number or numbers at such residence, if known.
4. If applicable, the name, address, and telephone number of the school to be attended by the child, if known.
5. The date of the intended change of principal residence of a child.
6. A statement of the specific reasons for the proposed change of principal residence of a child, if applicable.
7. A proposal for a revised schedule of custody of or visitation with a child, if any.
8. Unless you are a member of the Armed Forces of the United States of America and are being transferred or relocated pursuant to a non-voluntary order of the government, a warning to the non-relocating person that an objection to the relocation must be made within thirty (30) days of receipt of the notice or the relocation will be permitted.

The relocating parent must give notice by certified mail of the proposed change of principal residence on or before the 45th day before a proposed change of principal residence. If you do not know and cannot reasonably become aware of such information in sufficient time to provide a 45-day notice, you must give such notice by certified mail not later than the 10th day after the date that you obtain such information.

Failure to notify other parties entitled to notice of your intent to change the principal residence of a child may be taken into account in a modification of the custody of or visitation with the child.

If the non-relocating party does not commence an action seeking a temporary or permanent order to prevent the change of principal residence of a child within thirty (30) days after receipt of notice of the intent to change the principal residence of the child, the change of principal residence is authorized.

WHAT DOES THE RELOCATION ACT DO?

- ▶ Custodial Parent Who Intends To Relocate Must Notify Noncustodial Parent (NCP) At Least 45 Days In Advance By Certified Mail
 - Moves More Than 60 Miles From NCP
 - Also Moves Closer To NCP If The Move Is Out Of State
- ▶ Non Custodial Parent May Make A Formal Objection; Hearing Required
 - Relocating Parent Must Then Show How Move Is In Child's Best Interest
 - Non-relocating Parent Must Then Show How Move Is Not In Child's Best Interest

COURT CAN PREVENT CHILD FROM RELOCATING & CHANGE CUSTODY

- ▶ *Toler v. Toler*, 947 So.2d 416, 417(Ala.Civ.App.2006)
- ▶ Mother, Custodial Parent, Sought Change Of The Principal Residence Of The Parties' 14 Y.O. Child & Notified Father
- ▶ Father Objected
- ▶ Trial Court Allowed Mother To Relocate Son From Birmingham To Headland, Alabama
- ▶ Court Of Civil Appeals **Reversed; Child Not Allowed To Move**
- ▶ Appellate Court: Evidence Indicated That Relocation Caused:
 - A Disruption Of An “Enviably Custodial Situation,”
 - Father To Enjoy Less Frequent Visitation, Caused Longer Drives To Exchange The Child, &
 - Child To Be Uprooted From His Church, Friends, Sports Activities, & School He Had Attended Since First Grade
- ▶ Furthermore, Child Had Expressed His Preference To Return To Birmingham

MODIFICATIONS: THE MCLENDON STANDARD

- ▶ Original Custody Determination: Best Interest Of Child Standard
- ▶ Custody Modification: McLendon Standard
- ▶ McLendon – Higher Standard; Heavier Burden
- ▶ NCP Seeking Change Must Demonstrate
 - He/She Is Fit To Be Custodial Parent
 - Material Changes Have Occurred Since Original Award Of Custody
 - The Positive Good Of Custodial Change Will More Than Offset Disruptive Effect Of Uprooting Child

Custody Modified: Lewis v. Lewis

958 So.2d 896 (Ala. Civ. App. 2006)

- ▶ Material Change In Circumstances Occurred Which Warranted Change In Primary Physical Custody Under Joint Custody Award From Mother To Father
- ▶ Conditions In Mother's Home Had Become More Hectic & Chaotic & Conditions Materially Affected Children
- ▶ Presence Of Additional “High Maintenance” Children Exacerbated Problems Arising From Mother's Lack Of Time & Attention To Children
- ▶ Children Expressed Strong Desire To Live With Father &
- ▶ Disruptive Effect Of Change Of Custody Was Not Great Because:
 - Father & Mother Lived In Same Community
 - Father Exercised Visitation Rights
 - Father Was Actively Involved In Children's Lives &
 - Children Would Continue To Attend Same School & Participate In Same Activities Regardless Of Which Parent Had Primary Custody.

CUSTODY NOT MODIFIED: WATTERS v. WATTERS, 918 So.2d (Ala. Civ. App. 2005)

- ▶ Mother's Remarriage, Ability To Stay Home, & Move To Larger House Alone Insufficient To Change Joint Custody To Mother's Sole Custody
- ▶ No Evidence That Those Changes, Although Positive, Had Affected Child In "Anything More Than A Tangential Way"



V.L. v. E.L. 136 S.Ct. 1017 March 16, 2016

- ▶ Biological Mother's Former Same-sex Partner Filed Petition Seeking Visitation With Biological Mother's Children, Whom Former Partner Had Adopted In Georgia
- ▶ 2013: The Family Court, Jefferson County, Awarded Former Partner Periodic Visitation, And Biological Mother Appealed
- ▶ 2015: The Alabama Court Of Civil Appeals Affirmed Judgment Recognizing And Giving Effect To Georgia Adoption Decree, And Biological Mother Appealed.
- ▶ 2015: The Supreme Court Of Alabama Reversed And Remanded
- ▶ 2016: Upon Granting Certiorari, The United States Supreme Court Held That Georgia Superior Court Had Subject-matter Jurisdiction To Hear And Decide Adoption Petition, Triggering Alabama Courts' Full Faith And Credit Obligation
- ▶ Now: The Woman Must Go Back To State Court To Gain Visitation

QUESTIONS?

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