

## CHILD CUSTODY

Child custody jurisdiction in Nevada is governed by Nevada's version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). A primary goal of the UCCJEA is to avoid simultaneous proceedings in different states, or the wrongful modification of a court order of a previous state by a court of a new state. An initial custody determination must be made by a Court having one of the UCCJEA's four (4) jurisdictional criteria: (1) Home State Jurisdiction (the state where the child lived for 6 months immediately before the commencement of the action); (2) Significant Connection Jurisdiction; (3) More Appropriate Forum Jurisdiction; and (4) No Other State Jurisdiction. Once a state court has made an initial child custody determination, the issuing court retains exclusive continuing jurisdiction over the child custody determination unless an exception is met.

Chapter 125C of the Nevada Revised Statutes (NRS 125C), entitled "Custody and Visitation," provides statutory guidance for child custody. There are two (2) types of custody - Legal and Physical Custody.

### Legal Custody:

Legal Custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, religious upbringing, etc.

Sole legal custody vests this right with one parent, while joint legal custody vests this right with both parents. Joint legal custody requires that the parents be able to cooperate, communicate and compromise to act in the best interest of the child. In a joint legal custody situation, the parents must consult with each other to make major decisions regarding the child's upbringing, while the parent with whom the child is residing at that time usually makes minor day-to-day decisions. Joint legal custody can exist regardless of the physical custody arrangements of the parties. With an award of joint legal custody, both parents are permitted full access to information regarding the child, as well as full right to participate equally with the other parent with regard to making decisions concerning the child.

In the State of Nevada, the Court regularly awards joint legal custody to parents, which means that the decision making is shared by both parents. However, the parents need not have equal decision-making power in a joint legal custody situation. For example, one parent may have decision-making authority regarding certain areas or activities of the child's life.

If the parents in a joint legal custody situation reach an impasse and are unable to agree on a decision, then the parties may appear before the court "on an equal footing" to have the Court decide what is in the best interest of the child.

## **Physical Custody:**

Physical custody involves the time that a child physically spends in the care of a parent. During this time, the child resides with the parent and that parent provides supervision for the child and makes the day-to-day decisions regarding the child. Parents can share joint physical custody, one parent may have primary physical custody while the other parent may have visitation rights, or one parent may have sole physical custody while the other parent's visitation, if any, being in the discretion of the parent.

The type of physical custody arrangement is particularly important in three (3) situations. First, it determines the standard for modifying physical custody. Second, it requires a specific procedure if a parent wants to move out of the State of Nevada with the child. Third, the type of physical custody arrangement affects the child support obligation.

### **The Timeshare:**

In Rivero v. Rivero, 125 Nev. 34 (2008), the Nevada Supreme Court held that, to approximate an equal timeshare but allow for necessary flexibility (i.e., school schedules, sports, vacations, and parents' work schedules, etc.), each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody. If a parent does not have physical custody of the child at least 40 percent of the time, then the arrangement is one of primary physical custody with visitation.

### **Calculating the Timeshare:**

To determine the physical custody designation, the Court calculates the time during which a parent has physical custody of a child over one (1) calendar year.

For joint physical custody, each parent must have physical custody of a child at least 40 percent of the time, or 146 days per year. Calculating the timeshare over a one (1)-year period of time allows the Court to consider weekly arrangements as well as any deviations from those arrangements such as emergencies, holidays, and summer vacation. In calculating the time during which a parent has physical custody of the child, the Court looks at the number of days during which the parent provided supervision of the child, the child resided with the other parent, and during which the parent made day-to-day decisions regarding the child. The Court is not to focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party care giver or spent time with a friend or relative during the period of time in question.

The focus of primary physical custody is the child's residence. The parent with primary physical custody is the parent that has the primary responsibility for maintaining a home for the child and providing for the child's basic needs. The determination of who has primary physical custody resolves around where the child resides. Primary physical custody exists when one parent has the child more than 60% of the year (219 days) calculated over a one (1) year period. If a parent has physical custody less than 40 percent of the time, then that parent has visitation rights and the other parent has primary physical custody.

Assembly Bill No. 263:

Prior to October 1, 2015, Nevada Revised Statutes set forth provisions concerning the custody of a child as it relates to the dissolution of marriage (NRS 125.450-125.520). AB 263, effective October 1, 2015, repealed almost all of those provisions and added those repealed provisions with certain revisions to NRS Chapter 125C, which concerns custody and visitation of children generally. The addition of those provisions to NRS Chapter 125C expands their applicability to the custody of all children regardless of whether they were born to parents who were married or unmarried.

Significantly, one of the amendments to NRS 125C, is that, absent a determination by a court regarding the custody of a child, **each parent has joint legal AND joint physical custody of the child(ren) until otherwise ordered by a court.** What this means is that until such time as the Court has issued Orders regarding legal and physical custody of a child, each parent has joint legal and joint physical custody of a child.

When a Court is making a determination regarding legal custody, there is a **presumption** that **joint legal custody** would be in the best interest of a child **IF**

- (1) The parents have agreed to an award of joint legal custody or so agree in Court **OR**
- (2) A parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship with the child.

When a Court is making a determination regarding physical custody, there is a **preference** that **joint physical custody** would be in the best interest of a child **IF**

- (1) The parents have agreed to an award of joint physical custody or so agree in Court **OR**
- (2) A parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship with the child.

A Court may award primary physical custody to a parent if the Court determines that joint physical custody is not in the best interest of a child. An award of joint physical custody is **presumed** not to be in the best interest of the child **IF**:

- (1) The Court determines by substantial evidence that a parent is unable to adequately care for a child for at least 146 days of the year;
- (2) A child is born out of wedlock, a judgment or order determining paternity has not been entered, the parent has provided sole care and custody of the child in the other parent's absence, and the parent has abandoned the child (for not less than 6 months); **OR**
- (3) There has been a determination by the Court after an evidentiary hearing and finding by clear and convincing evidence that a parent has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child.

The Court shall award custody in the following order of preference unless in a particular case the best interest of the child requires otherwise:

- (a) To both parents jointly pursuant to section 6 of this act or to either parent pursuant to section 7 of the act. If the court does not enter an order awarding joint physical custody of a child after either parent has applied for joint physical custody, the court shall state in its decision the reason for its denial of the parent's application.

- (b) To a person or persons in whose home the child has been living and where the child has had a wholesome and stable environment.
- (c) To any person related within the fifth degree of consanguinity to the child whom the court finds suitable and able to provide proper care and guidance for the child, regardless of whether the relative resides within this State.
- (d) To any other person or persons whom the court finds suitable and able to provide proper care and guidance for the child.

**Best Interest of the Child:**

In determining physical custody of a child, the sole consideration of the Court is the best interest of the child.

In determining the best interest of the child, the Court shall consider and set forth its specific findings concerning the following factors:

- (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.
- (b) Any nomination of a guardian for the child by a parent.
- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the child.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the child.
- (h) The nature of the relationship of the child with each parent.
- (i) The ability of the child to maintain a relationship with any sibling.
- (j) Any history of parental abuse or neglect of the child or a sibling of the child.
- (k) Whether either parent or any other person seeking physical custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
- (l) Whether either parent or any other person seeking physical custody has committed any act of abduction against the child or any other child.

NRS Chapter 125C specifically provides that “preference must not be given to either party for the sole reason that the parent is the mother or the father of the child.”

**Domestic Violence:**

If a Court determines after an evidentiary hearing and finds by clear and convincing evidence that either parent or any other person seeking physical custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child, this finding creates a “rebuttable presumption” that sole or joint physical custody of the child by the perpetrator of the domestic violence is not in the best interest of the child.

Upon making such a determination, the court shall set forth:

- (a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and
- (b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

If after an evidentiary hearing, the court determines that each party has engaged in acts of domestic violence, it shall, if possible, then determine which person was the primary physical aggressor.

In determining which party was the primary physical aggressor, the court shall consider:

- (a) All prior acts of domestic violence involving either party;
- (b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;
- (c) The likelihood of future injury;
- (d) Whether, during the prior acts, one of the parties acted in self-defense; and
- (e) Any other factors which the court deems relevant to the determination.

If it is not possible for the court to determine which party is the primary physical aggressor, the “rebuttable presumption” applies to both parties. If it is possible for the court to determine which party is the primary physical aggressor, the “rebuttable presumption” applies only to the party determined by the court to be the primary physical aggressor.

**Abduction:**

If a Court determines after an evidentiary hearing and finds by clear and convincing evidence that either parent or any other person seeking physical custody has committed any act of abduction against the child or any other child, this finding creates a “rebuttable presumption” that sole or joint physical custody or unsupervised visitation of the child by the perpetrator of the abduction is not in the best interest of the child.

If the parent or other person seeking physical custody does not rebut the presumption, the court shall not enter an order for sole or joint physical custody or unsupervised visitation of the child by the perpetrator and the court shall set forth:

- (a) Findings of fact that support the determination that one or more acts of abduction occurred; and
- (b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other person from whom the child was abducted.

The following acts constitute conclusive evidence that an act of abduction occurred:

- (a) A conviction of any violation of NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct;
- (b) A plea of guilty or nolo contendere to any violation of NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct; or
- (c) An admission to the court of the facts contained in the charging document alleging a violation of NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct.

If the Court enters a final order concerning physical custody of the child, and a magistrate determines there is probable cause to believe that an act of abduction has been committed against the child or any other child and that a person who has been awarded sole or joint physical custody or unsupervised visitation of the child has committed the act, the court shall, upon a motion to modify the order concerning physical custody, reconsider the previous order concerning physical custody.

## **Confidential Mediation:**

In contested child custody actions, parents are required to participate in Confidential Mediation with a specialist from the Family Mediation Center (“FMC”). What this means is that, mediation is held with both parents (without attorneys), and directed by a mediator, in private, and all communications, verbal or written, are confidential and can not be disclosed, even upon waiver of the privilege by either or both parties, except where the mediator is required to report any information which falls within the scope of the child abuse reporting requirements.

The FMC is located at 601 North Pecos Road, Las Vegas, Nevada 89101, telephone number (702) 455-4186, on the first level of the Family Courts & Services Center. The cost of mediation will be assessed using a sliding scale based on each parent’s individual financial status with a maximum cost of \$200.00 per person.

During mediation, parents will discuss, and attempt to agree upon, Legal Custody, Physical Custody and a Holiday and Vacation Visitation Schedule.

Parents are not required to reach an agreement. If parents are unable to agree upon the issues discussed at mediation, the mediator will just inform the Court that mediation has been concluded and an agreement was not reached. Recall that Court Rules require that mediation at least be attempted before custody Orders are issued.

A partial agreement outlining any unresolved issues may be submitted. The partial agreement may include options A and B, which will describe each parties’ desired outcome, to be determined by the Court. At a minimum, parents should be able to agree upon legal custody provisions and a holiday visitation schedule. If parents are able to formulate a partial agreement, but are unable to agree to a physical custody designation and/or timeshare, then the parents can request that the mediator prepare a partial agreement outlining the parents agreements regarding legal custody and holiday visitation schedule.

If one or both parents fail to appear at any mediation conference, the mediator is required to report the identity of each person who failed to appear to the Court. The Court may, thereafter, take whatever action it deems necessary or appropriate, including imposing sanctions. Thus, barring an unforeseen medical emergency, it is necessary to attend confidential mediation.