



# DIVORCE AND CUSTODY



## ○ STANDARDS FOR AWARDING CUSTODY

Custody of children denominates care, custody and control. There are different types of custodial arrangements. One parent may be denominated the custodian with the other party having visitation rights. Parents may share parental responsibility for decision making regarding the children. Joint physical may occur where the parties may more equally divide residential time. A joint custody arrangement may rotate physical custody week to week or month. Custody is initially decided in the divorce proceeding or in a proceeding ancillary to the divorce proceeding. Prior to now, most judges in this state would not award shared or joint custody in a trial but would generally approve an agreement for same. However, *Ala. Code §30-3-150, et. seq.*, mandates the courts to consider some form of joint custody in all cases. The critical word is *consider* - it does not require joint custody but, rather, simply directs that the courts consider it. The Court is still directed to award any form considered to be in the best interests of the child. This law was effective January 1, 1997, and, also, provides both parties access to all medical and school records of the child. If circumstances change after the initial custodial determination, then the court may modify the custody arrangement in a post-divorce modification. The standards for awarding custody in a divorce proceeding and in a post-divorce proceeding differ.

## ○ DIVORCE:

In the past, a mother enjoyed a rebuttable presumption that it was in the best interest of children under the age of seven to be with their mother. *See, Jenkins v. Jenkins, 376 So. 2d 1099 (Ala. Civ. App. 1979)*. This doctrine was abolished in 1981 by *Ex parte Devine, 398 So. 2d 686 (Ala. 1981)*, which established twelve elements to be considered in analyzing the issue of custody. Those twelve elements are as follows: the sex and age of the children; the characteristics and needs of each child, including their emotional, social, moral, material, and educational needs; the respective home environments offered by each party; the characteristics of those seeking custody, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; preference of the child, if the child is of sufficient age and maturity; the report and recommendation of any expert witness or other independent investigator; the available alternatives; and any other relevant matter which may be present. The courts in Alabama have held that, in applying the above factors, past performance should determine future capability. The analysis is sex neutral. The general standard is what is in the best interests of the child. This generally is a common sense approach to determining who has the

nurturing relationship with the child, who is better equipped to care for the child and other practical concerns. Several factors may be important. The affection which exists between the parent and the child must be considered. If the child is competent, evidence of the desire by the child to live with one parent is compelling, but not controlling. The circumstances leading up to the divorce may also be important in the custody determination. For example, the determination that one party was at fault in the termination of the marriage may be pertinent in making the custody determination. Moreover, while adultery is not, in and of itself, determinative of the custody issue, it is one circumstance that should be considered in making the determination. Particularly relevant is evidence showing that acts of immorality by one spouse may have had a detrimental effect on the child. The question is not merely was there sexual activity, but rather, did the presence of sexual activity by one spouse have a detrimental effect on the growth of the child and detract from a stable and worthwhile living environment for the child. Other misconduct may also be considered by the court in determining the issue of custody. If one parent is guilty of physical or mental cruelty to the parent, this may be considered in determining custody. However, this circumstance is not determinative of the issue. The fact that a spouse has severe mental or emotional problems may weigh heavily in the custody determination. If both parents exhibit psychological problems, the fact that one parent sought professional care while the other refused care is relevant to the determination of custody. While the financial well-being of both parents is relevant, it is pertinent more to the issue of whether the parent is responsible rather than whether the parent can provide for the child. The fact that one parent removed the child to another state without the other's consent in order to raise the child away from the other parent, weighs heavily against the removing parent's custody request.

The court may not permit religious or racial considerations to control an award of custody. However, the Supreme Court of Alabama has held that while a court cannot condition an award of custody upon a parent's attendance at religious activities, the parent's involvement in religious services or activities may be relevant, just as the parent's involvement in civic organizations or other activities. The involvement may have an effect on the welfare and best interests of the child.<sup>8</sup>

The Alabama Legislature passed a law in the 1995 Session called the *Presumptions Against Custody Act*. Ala. Code §30-3-131. It provides that a determination by the court that domestic or family violence has occurred raises a rebuttal presumption that is detrimental to the child and not in the best interests of the child to be placed in sole custody, joint legal custody or joint physical custody with the perpetrator of domestic violence. The court is further directed to take into account what, if any, impact the domestic violence has had on the child. It has sweeping provisions that help a custodial parent where domestic violence has occurred. If the parent relocates because of an act of domestic or family violence by the other parent, the absence or relocation may not be a factor that weighs against the parent in determining custody.

#### ○ **POST-DIVORCE MODIFICATION:**

It is more difficult in a post-divorce modification proceeding for the non-custodial parent to be awarded custody. The parent seeking to change custody must meet a stringent and heavy burden showing that the change of custody would materially promote the child's best interests and welfare sufficient to overcome the inherently disruptive effect caused by uprooting the child. The *McClendon* standard is a rule of repose and condemns frequent disruptions in the lives of children whose welfare is paramount. This standard also applies when there is a shared custody arrangement with a primary residential parent "The petitioner must prove initially that a material change in circumstances has occurred since the last decree and that a change in custody would promote the child's welfare and best interests." The standard for modifying a shared custody arrangement may differ when there is no primary custodial parent. The court held that a best interests and welfare of the children standard applies when custody has not been

awarded to one parent primarily and both parents have been held to be fit and proper persons to have custody.

In any proceeding where there is an issue regarding the modification of custody of the child, a finding that domestic or family violence has occurred since the last custody determination constitutes a finding of change of circumstances pursuant to the *Presumptions Against Custody Act*.

## ○ VISITATION

The trial court has broad discretion in determining visitation rights of a non-custodial parent, and must consider the child's best interests and welfare. Restrictions on visitation may occur where there are dangerous situations existing in the home of the non-custodial parent, such as mental instability or physical abuse. Most jurisdictions have standard visitation periods for parents graduated in time with the increasing age of the child and have separate standards for out of state visitation. It is important for the attorney to explain that one cannot withhold visitation privileges for failure to pay child support and vice versa.

The *Presumptions Against Custody Act* provides that a court may award visitation to a parent who has committed domestic or family violence only if the court finds that adequate provisions for the safety of the child and the parent who is a victim of domestic or family violence can be made. It allows the court to take certain specified actions in a visitation order to supervise the visitation, ensure that it occurs in a protected setting, to require counseling, to prohibit overnight visitation, to require a bond from the perpetrator for the return and safety of the child, and other important relief.

Grandparents of minor children may intervene in a divorce action to obtain visitation rights or may petition to modify a decree to receive these rights.

