



Arizona State Senate Issue Brief

January 17, 2014

Note to Reader:

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LEGAL DECISION-MAKING AND PARENTING TIME

INTRODUCTION

When parents separate or divorce, the term *legal decision-making* refers to the person(s) with the legal right to make all nonemergency legal decisions for a child, such as those relating to education, healthcare and religious training. *Joint legal decision-making* indicates that both parents share decision-making and neither parent's rights or responsibilities are superior. *Parenting time* means the schedule of time during which a parent has access to a child.

Sole legal decision-making means that one parent has the legal right to make major decisions for the child; the other parent is entitled to reasonable parenting time unless the court finds that it would seriously endanger the child's physical, mental, moral or emotional health. Unless otherwise provided by court order or law, both parents are entitled to equal access to documents and other information concerning the child's education and physical, mental, moral and emotional health.

Arizona case law established in 1936 that the court could divide custody for definite periods of time if the best interests of the child would be served by doing so. This divided or joint custody means that the parents share in the responsibility for the child, although it does not necessarily mean they share substantially equal parenting time.

DETERMINING LEGAL DECISION-MAKING AND PARENTING TIME

Child's Best Interests and Parenting Plans

If the child's parents cannot agree on a plan for legal decision-making or parenting time, each parent must submit a parenting plan, including procedures for exchange, communication and mediation. The court is not allowed to prefer one parent's proposed plan because of that parent's

or the child's gender. If the parents are unable to agree on any part of the parenting plan, the court decides that aspect.

In determining legal decision-making and parenting time, the court is required to determine what is in the child's best interest by considering all factors related to the child's physical and emotional well-being. Such factors include the relationship between the parent and child, the health of everyone involved and which parent is more likely to allow the child contact with the other parent. The court is required to adopt a plan that provides for both parents to share legal decision-making and maximizes both parents' parenting time, so long as such a plan is consistent with the child's best interests.

Special Circumstances

If the court determines a parent seeking sole or joint legal decision-making has committed an act of domestic violence against the other parent, the court must presume that awarding legal decision-making to that parent is not in the child's best interest. The parent who committed the act may present contrary evidence. To determine if that parent has rebutted the presumption, the court considers certain factors, such as whether the parent has committed any other acts of domestic violence or has completed a batterer's prevention program, a parenting class or alcohol or drug counseling. Additionally, the parent who committed the act of domestic violence has the burden of proving to the court's satisfaction that parenting time will not endanger the child or impair the child's emotional development. If the parent does so, the court must place conditions on the parenting time that will protect the other parent and child from further harm.

The court must also presume that awarding a parent sole or joint legal

decision-making is not in the child's best interest if the parent has, within 12 months prior to the request for legal decision-making, abused drugs or alcohol or been convicted of a drug offense or of driving under the influence. In the case of such a presumption, the parent may present contrary evidence to the court. The court determines whether the parent rebutted the presumption by considering all the evidence, including certain details such as the results of random drug testing and drug and alcohol screening.

The court is not allowed to award a parent sole or joint legal decision-making if it finds there is significant domestic violence or a significant history of domestic violence. The court is also not allowed to award a parent legal decision-making if the parent is a registered sex offender or has been convicted of first degree murder of the other parent, unless the court finds there is no significant risk to the child and states its reasons in writing.

Modification of Legal Decision-Making or Parenting Time

A person cannot make a motion to modify legal decision-making or parenting time earlier than one year after the decree is entered, except if the child's environment may endanger the child's health or if domestic violence, spousal or child abuse occurred since entry of the order. After that period of time, to modify the order a person must submit an affidavit or verified petition setting forth detailed facts supporting the requested modification. The person must also give notice and a copy of the affidavit or verified petition to the other parties, who may file opposing affidavits. Statute requires the court to deny the motion unless it finds that adequate cause for hearing the motion is established by the pleadings. Case law has determined that to change a previous custody order, the burden is on the

moving party to satisfy the court that there has been a material change in circumstances affecting the welfare of the child. If the parent proves such a change of circumstances exists, the court sets a date for a hearing on why the requested modification should be granted.

The court may modify a parenting time order whenever modification would serve the child's best interests, but the court cannot restrict a party's parenting time rights unless it finds that parenting time would endanger the child's health.

SANCTIONS

If a petition is filed with the court alleging that a parent has violated an order for visitation or parenting time, the court must allow the alleged violating party a chance to defend itself against the claim. If the court determines a parent has refused to comply with the visitation or parenting time order without good cause, it must penalize the violating parent. A parent may also petition the court for a modification of the original order six months after it is made if the other parent fails to comply with the original order.

If any party to a case for legal decision-making, parenting time or visitation knowingly presents false information to the court, accuses the other party of presenting false information when he or she knows it to be true, or violates a court order of disclosure or discovery, the court must sanction that person for costs and attorney fees paid by the other party, and may also: 1) impose additional fines; 2) initiate civil contempt proceedings; and 3) modify legal decision-making or parenting time according to the best interests of the child.

THIRD PARTY RIGHTS

A person other than a child's legal parents may petition the superior court for legal decision-making or placement of the child if: 1) the person filing the petition has been treated as a parent by the child and has formed a meaningful parental relationship with the child for a substantial period of time (*in loco parentis*); 2) it would be significantly detrimental to the child to be in the care of either legal parent; 3) a court has not entered or approved an order of legal decision-making or parenting time within one year prior to the petition being filed, unless the child's present environment may seriously endanger his or her physical, mental, moral or emotional health; and 4) one of the legal parents is deceased, the parents are not married to each other at the time of the petition or a proceeding for divorce or legal separation of the legal parents is pending at the time the petition is filed. The court must presume, however, that awarding legal decision-making to a legal parent is in the child's best interest, and it is the responsibility of the third party petitioner to present clear and convincing evidence that this is not the case.

A person other than the child's legal parents may also petition the superior court for visitation, a schedule of time the child spends with someone other than the legal parent, if: 1) one of the legal parents is deceased or has been missing at least three months; 2) the child was born out of wedlock and the legal parents are not married to each other; 3) for grandparent or great-grandparent visitation, the legal parents have been divorced for at least three months; or 4) for *in loco parentis* visitation, a proceeding for divorce or legal separation of the legal parents is pending at the time the petition is filed.

In deciding whether to grant third party visitation, the court must give special weight to the legal parents' opinions and certain other factors as prescribed in statute, such as the historic relationship between the child and the petitioner.

RELOCATION OF A CHILD

If both parents are entitled to joint legal decision-making or unsupervised parenting time and reside in Arizona, a parent who wishes to relocate a child outside the state or more than 100 miles within the state must provide the other parent at least 60 days' advance written notice. Case law has established that the 100-mile condition is measured from the relocating parent's physical location with the child as of the date of the court order or written agreement granting custody or parenting time. Statute requires the court to sanction a parent who, without good cause, does not comply with the notification requirement.

Within 30 days after the notice is provided, the nonmoving parent may petition the court to prevent the child's relocation. When a petition is filed, statute requires the court to determine whether to allow the parent to relocate the child in accordance with the child's best interests; the burden of proving what is in the child's best interests is on the parent who is seeking to relocate the child. The court must consider all relevant factors in determining the child's best interests, including specific factors listed in statute.

Pending court determination on relocation, a parent with sole legal decision-making or primary residence of the child may temporarily relocate with the child if circumstances of health, safety or employment of that parent or that parent's spouse require relocation in fewer than 60 days. A parent with joint legal decision-making and substantially equal parenting

time may temporarily relocate with the child only if both parents execute a written agreement to permit relocation.

MILITARY DEPLOYMENT

The United States Armed Services requires a family care plan for military personnel who are: 1) single parents; 2) a military couple legally responsible for family members; or 3) people with special circumstances as determined by their commanding officer. The plan is used to ensure that adequate care arrangements are made for the military personnel's family in the event of a permanent change in station or temporary duty. The plan designates a person to care for family members when a member of the military is absent fulfilling a military obligation. In addition, the plan outlines the legal, medical, housing, educational, monetary and religious arrangements for the care of the military member's family members.

Under state law, Arizona remains the home state of a child, which means Arizona courts retain jurisdiction of the child custody case, during the military deployment of the child's custodial parent under certain circumstances. Specifically, if Arizona is the home state of the child at the time of the custodial parent's military deployment outside the U.S. and the child is relocated outside the U.S. during the deployment, Arizona remains the home state of the child until the end of the deployment.

Arizona law establishes court responsibilities and limitations related to modifying legal decision-making or parenting time orders, entering temporary orders and delegating parenting time to another person during the military deployment of one of the child's parents. The court may not consider the parent's absence caused by deployment or

mobilization or the potential for future deployment or mobilization as the sole factor supporting a real, substantial and unanticipated change in circumstances with regard to legal decision-making or parenting time. When considering a petition to modify an order, if a custodial parent is a member of the U.S. military, the court must consider the terms of the family care plan to determine what is in the child's best interest during the custodial parent's military deployment. A decree or order made in contemplation of, or during, the military deployment of a custodial parent outside of the U.S. must specifically reference the deployment and include provisions governing the legal decision-making or parenting time arrangements of the child after the deployment ends. However, if the parent with whom the child resides a majority of the time is the parent who is deploying, and if the deployment involves the parent moving a substantial distance from the parent's residence, the court may only modify an existing order as follows: 1) 90 days after the deployment ends or 2) if the deploying parent agrees to the modification.

If a military parent who has court ordered legal decision-making or parenting time receives notice from military leadership that the military parent will deploy or mobilize in the near future, and if the deployment or mobilization would have a material effect on the parent's ability to exercise parental rights, responsibilities or contact, the court must enter a temporary modification order during the period of deployment or mobilization. This requirement only applies on motion of the military parent, and the court must hold a hearing before entering such a temporary order. Temporary modification orders must include a specific transition schedule to facilitate a return to the pre-deployment order within 10 days after the deployment

ends, taking the child's best interest into consideration.

In addition to entering temporary orders during a deployment, the court also may delegate a military parent's parenting time, or a portion of the parenting time, to a child's family member or another person with a close, substantial relationship with the child for the duration of the parent's absence if all of the following circumstances exist: 1) the military parent requests the delegation of parenting time to the other person; 2) the military parent has received temporary orders that involve moving a substantial distance away or that have a material effect on that parent's ability to exercise parenting time; and 3) if the court determines that doing so is in the child's best interest. The court cannot delegate parenting time to a person who would be subject to limitations on parenting time, and such an order does not establish separate rights to parenting time for a person other than a parent. The parties must attempt to resolve any disputes regarding a delegation of parenting time through the dispute resolution process specified in the parenting plan unless the court exempts them from that process for good cause. Statute requires the court to hear motions for legal decision-making or parenting time modification because of deployment as expeditiously as possible.

Either parent is allowed to file a petition after the deployment ends to modify the decree or order, and the court must hold a hearing or conference on such a petition within 30 days.

INTERSTATE AND INTERNATIONAL JURISDICTION

Arizona, along with a majority of other states, has enacted statutes to conform to the Uniform Child Custody Jurisdiction and

Enforcement Act (UCCJEA) drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). All states that have not enacted the UCCJEA have enacted the Uniform Child Custody Jurisdiction Act, an older version of uniform statutes drafted by the NCCUSL that contains similar provisions. The purpose of UCCJEA is to address jurisdictional problems arising in interstate child custody proceedings and to promote cooperation between the courts of different states.

In determining jurisdiction, courts consider the domicile, home state, presence, and best interests of and state connections to the child. Both *domicile* and *home state* refer to the physical presence of the child for the six-month period preceding commencement of the action. Initial jurisdiction over child custody is given 1) to the home state of the child or 2) if there is no state where the child has resided for six months, to a state with significant connections (other than physical presence) to the child and one or both parents. Before it conducts a legal decision-making or parenting time proceeding, a state court must determine it has exclusive jurisdiction under the UCCJEA, the Parental Kidnapping Prevention Act and any applicable international law concerning the wrongful abduction or removal of children. Once a state court has made a child custody determination under the initial jurisdiction guidelines, that state has exclusive, continuing jurisdiction over the determination unless either: 1) the court of that state determines that a significant connection no longer exists or 2) a court of any state determines that the child no longer resides in that state. If either of these two determinations is made, another state court may modify the child custody order.

Arizona statute requires Arizona courts to treat a foreign country as if it were another state in the United States for the purposes of child custody jurisdiction and

enforcement. However, Arizona courts are not required to apply the provisions of UCCJEA to a child custody order from a foreign country that violates fundamental principles of human rights.

ADDITIONAL RESOURCES

- Arizona Judicial Branch (includes forms, booklets and the current child support calculator)
www.azcourts.gov
- Legal Decision-Making and Parenting Time Statutes: Arizona Revised Statutes, Title 25, Chapter 4
- Uniform Child Custody Jurisdiction and Enforcement Act: Arizona Revised Statutes, Title 25, Chapter 8
- Laws 2011, Chapter 346 (S.B. 1283): Modifies child custody statutes related to military deployment
- Laws 2012, Chapter 309 (S.B. 1127): Updates terminology related to child custody, modifies statutes relating to legal decision-making and parenting time and establishes sanctions for providing false information.