

*Internal publication. Published online in 2005, updated in 2015. The site online where it was published is no longer around.*

## **How to Stay Sane In a Custody Battle Educate Yourself, Document Everything, and Keep the Kids Out of It by Wendi Whitmore**

There is a lot of information out there about what a custody process is that gets into all the definitions and legal nitty-gritty involved. I encourage you to read up as much as you can. However, this, is not that. This is a cautionary tale. People often forget the toll that a divorce and a custody battle takes on a child. There is a lot of change involved, and they need their parents to be their constants. To do that, you need to remember that every thing you do and say is being absorbed by your child. Find a way to enter this new chapter with grace, for yourselves and your child. It's not easy, but it is doable and totally worth it.

The terminology can really get convoluted when you start discussing specific types of custody. Here are the basics:

- **Physical custody:** Where the child will live most of the time.
- **Legal custody:** Who makes decisions on behalf of the children until they reach the age of majority. This includes decisions about medical issues, healthcare, education or any decision that the child cannot make on their own.
- **Joint custody:** When both parents share custody. This either legal, physical, or both. This is traditionally a 50/50 shared custody arrangement.
- **Sole custody:** One parent exclusively has physical and legal custody of the child.
- **Primary caretaker:** When both parents share custody, but lives with one parent most of the time. These arrangements vary in regards to the percentage of time the child spends with the parent he or she doesn't live with.
- **Visitation:** When one parent is the primary caretaker, or if one parent has sole custody, visitation will be arranged. There is supervised visitation when there are issues regarding the child's welfare, but traditional the visitation is unsupervised.

You'll need to understand the basics of these terms to properly fill out your paperwork and make decisions for your family.

### **The court does not care about what is best for parents.**

First and foremost, you want to discuss an arrangement with your spouse before even filing paperwork to file with the court. People think getting the court involved is the only option, but a judge must look at any and all custody or visitation issues in the parameters of what is in the best interest of the child. That means, that once the judge gets involved with the process it can be very difficult to institute what you want if the judge doesn't see agree that it is, in fact, in the best interest of the child. The court is not concerned with

inconvenience to the parents as long as the judge feels that whatever orders he or she issues are in the best interests of the child.

The challenging fact about divorce when children are present in the marriage is that in spite of your decision to split you must still co-parent. The court does not like to force this to happen, and indeed it becomes much more emotionally difficult for everyone involved if they have to. The first step of learning to co-parent is navigating your divorce and custody arrangements.

Find a way to agree on fair arrangements for yourselves and the kids. You can do this with or without counsel, whatever is more beneficial for the two of you. However, keep in mind that bringing in attorneys can often complicate the process. An attorney's job is to zealously represent their client, and it is an adversarial process by nature. You will need to decide where the child or children will live day-to-day, what school they will go to, and what arrangements can be made for extracurricular activities. This means discussing holidays, special occasions (including birthdays), and vacations. It's an uncomfortable conversation, but it will save you heartache, time and money in the long run.

**If you can't agree, bring in reinforcements.**

Many courts will require a couple to see a mediator prior to issuing an order to see if a more mutual agreement can be met. This is called Alternative Dispute Resolution. You can do this on your own, or you can do it through the court. Sometimes a couple just needs a cool-headed referee. If you have a friend or family member that is willing (and neutral), this may be all you need. Emotions run high in divorces, so having someone call you out for being unreasonable or suggest options and alternatives can help break through to an agreement you can both live with.

If a private mediator is an option, it's a great way to go (for both custody and any dissolution issues). Although a private mediator can be somewhat expensive, the financial and emotional cost in long court battle is much higher. If a private mediator is not an option, most courts offer mediation through the court. There will still be a fee, but it can be adjusted based on income considerations. The difference between a private mediator and a court-appointed mediator (depending on the state) is that a court-appointed mediator will make a recommendations directly to the court based on his or her conversations with you. The judge often will accept these recommendations.

If you can decide on arrangements between the two of you or a private mediator, you can file that information with your divorce petition and that particular issue is out of your way. The court can still rule on the dissolution of assets without getting involved with the custody arrangements. If you cannot decide on how to share custody, especially if one of you wants sole custody, you will be in for a much longer and more expensive battle.

**Sole custody means proving the other person an unfit parent.**

In order for the court to order sole custody, one parent must relinquish their rights expressly through signing them away or the court must determine that the other person is an unfit parent. Sole custody is the most extreme type of custody award, and the ramifications of it must be carefully considered. To determine someone an unfit parent, there is typically abuse, neglect or abandonment involved. There needs to be a severe and repetitive pattern of failing to provide adequate care for the child for this to be a realistic and fair course of action. Even in cases where drug or alcohol abuse is an issue, or when a parent abandons the family for period of time, the preferred option of the court is to get family members in counseling or otherwise take steps to unify the family. In the long run, a child will want to know that parent and totally removing them from their life can be damaging.

To determine whether or not a parent is unfit, the court will look into personal relationships, business history, financial decisions, and any other issues that the court deems relevant. Keep in mind, that if you want to sling dirt in a court room, your opponent can always sling back. Often things that seem benign when they are happening can be spun in a way that sounds quite scandalous in a court room. This is not an area of this process you want to take lightly.

In most states, if the child is over 12, the judge will ask him or her in-camera (a private meeting in chambers) if they have a preference as to who they live with. Imagine what this would be like for your child. Think about what it would feel like to have to choose between your parents. Oftentimes, the child may even choose the more “unfit” parent because they feel sorry for them or feel guilty about what is happening. A child will find a way to make this entire process their fault.

In many situations, the judge will take the in camera statement rather than traumatize the child further, but not always. They will take the child’s statement into consideration with other factors, and, if there is nothing out of the ordinary, often will let that be the basis of their decision.

### **Write it all down. Keep all the records.**

Memories are often skewed by our emotions, and they definitely degrade over time. One way to make this process as simple as possible, is to write things down. Keep a journal, file away medical records and receipts, have copies of your taxes, know where the vaccination records are. Divorce is a business transaction in so many ways. It’s about separating a long time partnership and dividing the assets. These records are fundamental to raising children and can only help in making decisions regarding custody.

This documentation becomes even more important if you are in a battle for sole custody. The judge cannot take one person’s word over another, so introducing proof in the court process is the best way to make sure that you are being accurately represented. Keep an accurate, detailed calendar of visitations and child-exchanging arrangements. If there is a problem with one parent not showing up for scheduled time or being late, the court will want to see that. Keep detailed medical records, medical history, lists of doctors/dentists,

and insurance information. Both parents need to have all of these things filed away. It's also important to keep things like report cards, school activities, lists of activities. You'll need to share that with each other and possibly with the court. Keeping these records make the child's transition between the two residences more smooth, as well as making each parent's life easier. If there is a problem you need the judge to address, you have now have a documented record of what is going on that you need assistance with.

If the split is tumultuous, the judge needs to know the facts. Going into court alleging one problem or another will not help the situation in any way. Save emails, text messages, voice mail messages, or any other written communication between you and the other parent. There is less to fight about when the facts are in front of you. The point here is not to be petty or vindictive, just be organized. Stay calm, and remember the goal: A smooth transition and happy life for the children in your care. Choose carefully what you want to bring into court. Pick your battles, as they say, because it's time to move forward.

### **The agreement is not set in stone, but it's pretty close.**

Once you have a legal arrangement filed and settled with the court, you can change it at a later time. It is not an instantaneous process, and can be just as challenging as the original proceeding. If you decide to change the arrangement, you can file a motion with the court requesting that the court reevaluate your custody situation. For example, if you had lost joint custody originally because you were unable to provide something the court wanted you to, and now you were able to provide that, you could make that known to the court. Your motion would show that your status had changed and you would like to be reconsidered for joint custody. Other reasons to change the custody order range from one parent moving, a major change in financial status or a change in days/times/holidays that each parent is with the child. Couples sometimes make changes to the custody arrangement on their own. However, it's important to keep in mind that what is enforceable is the order that was given by the judge at the end of your divorce and custody proceedings. So, if there is a conflict on your "informal" order, you cannot go to court to ask the judge to order the other party to do whatever you agreed to outside your formal agreement.

Once you get the judge involved, it is harder to make any changes. The judge has to agree to the changes, and will again look at what is best for the child not what is best for the parents. If you cooperate as parents to make the agreement, and agree as parents to the changes, there is a lot less interference from the court. The best case scenario is to have a mutually agreed upon arrangement, file it together, and make any changes together. It is best, even in an amicable divorce, to have the custody order on file in case of any future emergencies or in case things become adversarial. The order of the court is the final word on custody.

### **Act like grownups and keep the kids out of your issues as a couple.**

Handling a child custody situation, and all the many details that can come along with it, can be overwhelming and scary. If you and your spouse are in agreement over

everything, you can fill out the paperwork, type up any attachments, sign it all, pay the fees, and file it. That's it, it's finished. But, if there are any complications regarding custody, jurisdiction, support, or in the divorce itself, you'll need to turn to some form of mediation or hire an attorney.

The most important advice I gave my clients in child custody situations was always to take the high road and to remember that everything they do during this process matters. In fact, everything matters because there could be custody issues down the road as well. Kids observe everything, and they understand more than what we give them credit for. They may not understand exactly what is happening, but they absorb the emotions involved. No divorce is fun, but speaking unkindly about the other parent in difficult times profoundly impacts the children involved. Just venting about your problems where your child can hear you can cause them to have negative feelings for you or their other parent, and even cause them to alienate the other parent. These are not just legal matters, but matters of well-being for the child, now and in the long run.