

# **SILENT PARTNER**

## **COUNSELING ON CUSTODY AND VISITATION ISSUES**

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain basic concepts about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

### 1) TYPES OF CUSTODY

- a) **SOLE LEGAL CUSTODY.** This is the most common situation. One parent, usually mom, has physical care and control of the child, plus the right to make any and all decisions affecting the child.
- b) **JOINT CUSTODY:**
  - i) Joint Legal Custody: This is shared legal decision-making. Many states recognize it, but beware of choosing this if the parents cannot agree on the major issues. Most cases are settled or tried on the basis of sole custody, with one parent having exclusive physical possession of the child and the sole right to make the major decisions regarding the health, welfare and education of the child. In a legal joint custody situation, both parents would share equally in the making of major decisions regarding the child's health, welfare and education (such as elective surgery, orthodontia, choice of religion or private schooling). The major problem with joint legal custody is how to avoid a roadblock when both parents cannot agree on a decision. Sometimes a structure is set up in the order or agreement whereby a tiebreaker is chosen to avoid this "veto problem." In other cases, the instrument is prepared so that the parents will share in major decisions if that is possible; otherwise, the parent with primary physical custody may make the decision if there is a "roadblock" so long as she or he have provided the other parent with reasonable, good-faith advance notice of the proposed decision to be made. (See below for more detail and analysis)
  - ii) Joint Physical Custody: This situation, also called shared physical custody, means that the custody of the child is alternated on some regular basis between the parents so that roughly half of the child's time is spent with each parent. This will only work when both parents are in the same community and plan to remain that way. It's not really practical in a military situation. It's also hard to sell to judges except in very unusual situations.
- c) **COURT OPTIONS.** Many judges have a hard time granting joint legal custody in a contested case. Most of them believe that, if the parties cannot agree on the course of their marriage or on the issue of joint legal custody, how is it possible for the court to impose agreement upon them?

### 2) JOINT CUSTODY—WHAT IS IT? WILL IT WORK?

- a) *"...Almost all the lawyers and judges in Georgia were at best lukewarm about [joint custody], and not even all the mediators were in favor of it. Only a few respondents saw joint custody as the wave of the future and a symbol of changing attitudes toward women in Georgia. In New York, by contrast, there was greater acceptance of the idea of joint custody, especially among*

mediators as demonstrated by the fact that two-thirds of all custody awards included some variety of joint custody arrangement.

Divorce lawyers and judges in Georgia reported ambivalence about joint custody. Most interviewees saw it as a sop to the guilt of divorcing couples and of no real value. One lawyer said, "I hate it. I think it is a placebo... a cop-out. It is a way for judges to make two people feel good." Still others reported seeing it as a positive menace and disruptive to the stability of the children after a divorce. "We despise it, we don't recommend it... You can't just drag a poor little child from some other coast and have any kind of maturity or stability." --from a study on joint custody and mediation in New York and Georgia, published as "Effects of Different Dispute Resolution Methods," Fam. L. Qtrly., Vol.28, No. 2, Summer 1994 at p. 234.

- b) What is "joint custody"? (Ask your next client!)
  - i) Some parents think it's equal time with the children
  - ii) Others see it as just a label so that neither parent appears to have lost custody.
- c) Custody is, for many parents, a "zero-sum game" -- for every winner, there must be a loser. For some parents, joint custody means an unacceptable label to be granted to the "visiting parent," something that "he doesn't deserve!"
- d) Joint (or shared) physical custody
  - i) What is it? The child or children live with one parent for a specified period of time and then live with the other parent for a separate specified period.
  - ii) Weekly or monthly alternation are often given as examples.
- e) The military parent--can it work?
  - i) Irregular child-care schedules.
  - ii) Frequent moves.
  - iii) Need for parents residing in the same school district.
  - iv) Need for sufficient income in both households to maintain two rooms and sets of clothes and necessities for the child.
- f) True joint legal custody: one parent has primary physical custody, but both parents have an equal voice in major decisions for the child.
  - i) What are *major decisions*?
  - ii) Solving "the roadblock problem": finding a truly neutral tie-breaker [does such a person exist when the parties distrust each other?]
- g) Look at this extract from a 1992 California joint custody decree:

#### **RESPONSIBILITIES OF JOINT LEGAL CUSTODY**

7. *Each of the parents shall make every effort to maintain free access and unhampered contact between the child and the other parent. Each of the parents is prohibited from making derogatory or demeaning statements concerning the other parent within the hearing of the child. Neither parent shall do anything which will estrange the child from the other parent or impair the natural development of the child's love and respect for each of the parents. Both parents need to understand that parenting requires the acceptance of mutual rights and responsibilities insofar as the child is concerned.*

8. *The parties shall consult and cooperate with each other in substantial questions relating to religious upbringing, educational programs, significant changes in social environment, and health care of the child. Before the parties separated, they agreed that the child should be raised as a Roman Catholic and attend worship services.*

9. *All schools, health care providers, day care providers, and counselors shall be selected by the parents jointly. In the event that the parents cannot agree to the selection of a school, the child shall attend the local public school pending mediation and/or further order of the court.*

10. *Each parent is authorized to obtain emergency health care of the child without the consent of the other parent.*

11. *Each parent is responsible for keeping advised of school, athletic, and social events in which the participates. Both parents may participate in school activities for the child such as open houses, attendance at athletic events, etc.*

12. Each parent shall provide the other parent promptly with information concerning the well-being of the child where the other parent is not likely to know of the information without prior or special knowledge or through discovery by routine inquiry. This information includes, but is not limited to: results of standardized or diagnostic tests; notices of activities involving the child; samples of school work; all communication from health care providers, regular day care providers, and counselors.

13. Each parent shall provide the other parent with the address and telephone number at which the minor child resides, and shall notify the other parent within five days of any changes of address or telephone number. Each parent shall notify the other parent as soon as reasonably possible of any serious illness requiring medical attention, or any serious emergency involving the child.

14. Each parent shall provide the other parent with a travel itinerary and, whenever reasonably possible, telephone numbers which the child can be reached, whenever the child will be away from the parent's home for a period of seven (7) days or more.

15. Each parent is entitled to reasonable telephonic communication with the child. Each parent is restrained from unreasonably interfering with the child's right to privacy during such telephone conversations. Parent-initiated calls shall be made at the calling party's expense. The child has the right to initiate phone calls to the other parent for which the expense shall be borne by the receiving party.

### **TRANSPORTATION**

16. The father shall be responsible for providing transportation to and from visitation. When the child is old enough to travel alone, the father shall be responsible for providing transportation to and from the airport nearest to the mother's home, and she shall be responsible for providing transportation to and from airport. The father is authorized to deduct from the spousal or child support (or both) ordered hereinafter 42.75% of the cost of such transportation upon providing to the mother documentary proof of such cost. For reasons that will appear below, that percentage will, in effect, cause both parties to bear the transportation expense in proportion to their present incomes.

h) Here's an extract from a joint custody clause in a separation agreement:

Joint Custody. The parties shall share the joint legal care, custody, and control of the minor child(ren), \_\_\_\_\_, born \_\_\_\_\_, and \_\_\_\_\_, born \_\_\_\_\_. The \_\_\_\_\_ is awarded the primary physical custody of said minor child(ren), subject to the reasonable visitation rights of the \_\_\_\_\_. The parties shall make every reasonable effort to foster feelings of affection between themselves and the child(ren), recognizing that frequent and continuing association and communication of both parties with a child is in furtherance of the best interests and welfare of the child. In exercising joint legal custody, the parties shall share equally in all major decisions relating to the minor child(ren)'s educational training, extracurricular activities, medical needs, and religious training. In the absence of an agreement between the parties, the decision shall be made by (the primary custodian) (\_\_\_\_\_). This arrangement is in the best interest of the child(ren), and the primary custodian is a fit and proper person for primary physical custody.

i) A final question: **Does joint custody work?**

i) Desirable preconditions—

(1) Cooperative, communicative, flexible parents who respect each other.

(2) Parents who are dedicated to providing for the child's best interests.

ii) Psychological studies--perhaps not in the child's best interest, especially where the parents are likely to continue fighting.

iii) The military parent--can it work? Need for maintaining close enough contact to participate in major decisions.

3) STANDARDS FOR CUSTODY The courts seldom if ever grant custody to a parent merely because he earns more than the other party, professes to love the child more or states that he needs the child more than the other parent. Decisions regarding custody have much to do with who has had the primary parenting role during the course of the marriage. Never are all things equal in this regard in any marriage; there is usually one parent who has been the primary

caregiver, taking the child to the doctor, enrolling the child in school, taking the child to swimming lessons, etc. The court will be looking to matters such as these in making the custody decision.

- 4) MILITARY CUSTODY Merely wearing a military uniform does not mean that a person is automatically disqualified from having or winning legal custody. It does put, however, a heavy burden on the custody claimant to prove that his or her military duties will not interfere unnecessarily with the custodial role. Detailed testimony is usually needed to assure the court that military readiness and one's professional duties are not inconsistent with the caregiver role of the custodian. Consider the following:
  - a) Is there a bias against military parents?
    - i) Given the problems associated with some military parents' duties, are they "shooting themselves in the foot/feet" in asking for custody while on active duty? What about irregular child-care schedules, full-time duty for the Army, frequent PCS moves, alerts and deployments?
    - ii) On the other hand, consider the advantages if scheduling and mobilization issues can be addressed:
      - (1) Quality of schools on base
      - (2) Recreational facilities
      - (3) Dependent youth activities
      - (4) Day care facilities
      - (5) Travel to other states and countries -- enrichment
- 5) VISITATION OPTIONS. Just as custody comes in two varieties (sole and joint), so visitation comes in the form of two options -- open or structured.
  - a) Unstructured or open visitation can take the form of "reasonable visitation" or "visitation by mutual consent." There are problems with both of these and they are seldom chosen by contesting parents. It is fine to allow reasonable, liberal and flexible visitation rights, or visitation by mutual consent of the parties. But what happens if there's a disagreement? Seldom do contesting parties believe they will be able to work out such an arrangement to their mutual advantage and to the benefit of the child if they have had a problem in making their marriage work. For this reason, most parents opt for some form of structured visitation. Be sure not to encourage unstructured visitation clauses when there might be a problem in the future deciding what's reasonable.
  - b) Structured visitation attempts to set out a basic minimum of visitation rights for the non-custodial parent. For the purposes of this illustration, the non-custodial parent is assumed to be the father. Such a provision in an order or a separation agreement might set visitation for a nearby father at:
    - i) Every other weekend from 6:00 o'clock Friday until 6:00 Sunday.
    - ii) December 25 at noon until December 30 at 6:00 o'clock p.m. of every year.
    - iii) Alternating Thanksgiving and Easter holidays.
    - iv) Four weeks in the summer if notice is given to mother not later than April 1.
    - v) Father's Day of each year regardless of whether it is his weekend or not.
  - c) A more extensive schedule might go on for several pages, containing provisions for "make-up" days, the birthdays of the children, visitation by the mother in the middle of dad's summer visitation with the child, and other matters.
  - d) A reasonable compromise might be to state that there's to be reasonable visitation but – if the parties disagree – "the following schedule will apply," and then set out the structured visitation schedule.
- 6) VISITATION FLEXIBILITY
  - a) Be sure to leave room so that the custodial parent (usually mom) knows when visitation will or will not occur – so as to avoid disappointing the child or unnecessarily disrupting mom's schedule

- b) But also leave room for changes in visitation due to the child's schedule [a sleep-over with a friend, a trip to the mountains or the beach on dad's weekend], or due to mom's or dad's schedule [such as when he has TDY on his visitation weekend]
- c) Using creativity: **SFC** -- the "sitter-of-first choice" option (when both parents are local):
  - i) Instead of hiring a sitter, call other parent and give him or her the right of first refusal to stay with the kids.
  - ii) Save money **and** let him or her spend time with the kids! Everyone wins!!

## 7) CUSTODY, VISITATION AND CHILD SUPPORT

- a) When drafting a clause, remember that many non-custodial parents (usually fathers) ask about child support during summer visitation. While this is solely in the discretion of the trial court judge, it is rare in most places to see a total suspension of child support during summer visitation. Visitation is seen as the right and privilege of the father, and he should not have to be encouraged to take advantage of this by giving him a monetary reward. Sometimes a reduction will be ordered (or agreed upon by the parties) in the event of visitation of long duration (4-6 weeks) with the children, but there is seldom a total elimination of child support. Although dad will have additional costs by way of gasoline, food, entertainment and other things, few of mom's "embedded costs" go away during a month period of visitation in the summer. She still has the burden of purchasing clothes for the children, having an extra room available for them, etc. A reasonable trade in most cases might involve a reduction of child support by one-half or one-third if the visitation were four weeks long or more.
- b) Also remember that, if the support is paid through the court, there will be book-keeping problems when this reduction occurs. Think about this before your client is cited for contempt to come up with some creative solutions. Having mom refund dad a part of his child support after the visitation takes place is sometimes the only solution in this case.
- c) On the other hand, maybe it's an enforcement problem that the basis for your counselling. If so, remember –
  - i) If it's in writing in the agreement or order, your client can reduce your support payments or stop them entirely for the time the children spend with him in the summer.
  - ii) When it's not in writing, dad can't reduce the money he pays mom even though he has the kids for the whole summer!
- d) What about dad withholding child support because mom won't allow visitation?
  - i) In most cases, child support and visitation are seen by courts as unrelated; enforcement of one cannot be accomplished by withholding the other, and self-help remedies are frowned upon.
  - ii) In rare cases, the courts [not the parties] will link them if, for example, the suspension of child support is the only way of getting out-of-state mom's attention and compliance with court-ordered visitation rights. The point here is, you have to ask the court for help, to allow the suspension of child support after a motion for same and a hearing on this in court – you can't just go out and do it!

## 8) PICK-UP AND RETURN PROBLEMS Another question that arises frequently is the issue of travel

- a) Who pays for the expenses? Visitation, being seen as a privilege of dad, carries a cost with it. This is the cost of transportation. Unless agreed otherwise, the court will rarely order mom to pay any travel expenses in order that dad may exercise his visitation privileges. The cost and making of travel arrangements is almost always the responsibility of the non-custodial parent.
- b) What about logistics for drop-off and pick-up? For long-distance travel? Legal assistance attorneys should anticipate future moves and go over the logistics of travel (such as who will accompany a small child on the airplane, and who will pay for the costs of the companion) in detail. There is no right answer -- except to spell it out and make sure everyone understands and there are no uncertainties.

- c) Occasionally the parents agree to transfer child/ren at mid-point if there is a reasonable distance between them ... such as a 3- to 5- hour drive
- d) Missed visitation: penalties and make-up time:
  - i) A penalty might be necessary if dad regularly shows up late: **"If dad is more than an hour late without calling to explain, then visitation is canceled without make-up"**
  - ii) It also might be necessary if dad occasionally skips visitation without explanation, but this could be handled by "preventive drafting" -- **"Dad to call 48 hours in advance to confirm visitation or else it won't occur"**
  - iii) Compare to the alternative -- **"Dad to call 48 hours in advance to cancel visitation or else it will take place"**
  - iv) Generally speaking, make-up time should occur if the schedule of the child or either parent requires a cancellation of visitation not due to dad's fault; make-up visitation would occur on one of next two weekends, at the choice of...[mom if it was dad's schedule that caused the change; dad if it was mom's or child's schedule]. Such a provision might state that:

*In the event that the father is more than one hour late without explanation on Friday evening for his weekend visitation, the visitation shall be cancelled at the option of mother. No make-up days shall be allowed in this situation. If, on the other hand, he is unable to exercise his weekend visitation rights not due to his own fault, and if he provides reasonable advance notice (of at least three days) to mother, he may use one of the next two non-visitacion weekends as his make-up weekend, with the choice of that make-up weekend belonging to the mother so as not to conflict with her plans.*

9) MARITAL FAULT, PARENTAL MISCONDUCT

- a) We sometimes need to educate clients that marital fault doesn't necessarily equate to parental disqualification. Just because "My wife's having an affair with SGT Smith" doesn't mean that dad automatically gets custody!
  - i) If mom cheated on dad, that makes her a bad wife -- but does it make her a worse mother?
  - ii) If dad assaulted mom, does that make him a worse father?
  - iii) Most judges look for some child-related impact before they start connecting "marital fault" and "parental fitness"
- b) Take a look at the following extract from **Almond v. Almond, 257 S.E.2d 451 (N.C. App. 1979)**:

*The plaintiff was cohabiting with a male person. She, the two children and the male friend all live in a three-bedroom mobile home.... After finding both plaintiff and defendant to be fit and proper persons to have custody of the two minor children, the trial court awarded plaintiff custody.... Defendant argues three assignments of error on appeal. The first two assignments challenge the trial court's conclusions that plaintiff was a fit and proper person to have custody and that it was in the best interest of the minor children for them to be placed in plaintiff's custody. Defendant contends these findings were in error in light of plaintiff's open and continuous cohabitation with another male person.*

*We now review the factors considered by the trial court in awarding custody to plaintiff. The foremost factor challenged by defendant is the cohabitation by plaintiff with a male person in the presence of the children. Although cohabitation by unmarried persons of the opposite sex is not condoned by this Court, nor by the laws of this state, evidence of cohabitation alone is not always sufficient to support a finding that a party is not a fit and proper person to have custody of minor children. "The establishment of adultery does not eo instanti juris et de jure render the guilty party unfit to have custody of minor children." In re McCraw Children, 3 N.C.App. 390, 395, 165 S.E.2d 1, 5 (1969). Adulterous conduct is only one of numerous factors to be considered by the court in determining the fitness of a party.... Where there are adverse circumstances affecting both parties that do not justify taking the children away from the parents, the court may rely upon the guidance of the old adage that it must choose the lesser of two evils. For the foregoing reasons, the order awarding plaintiff custody of the minor children is sustained.*

- 10) SUPERVISED VISITATION Is this a realistic goal? Will it work? We sometimes hear clients say, "Well, he'll just have to have supervised visitation – I'm concerned about his... [here fill in the blank – "drinking," "use of drugs," "firearms and dogs"?]" Ask your client --

- a) Why the supervision? Check out the reasons, find out if they really make sense as a rationale for supervision.
  - b) Who's going to supervise? Check out the resources available for this.
  - c) Alternative: "Give dad enough rope to hang himself" -- absent clear evidence of an immediate danger of irreparable harm (the legal standard for a TRO), the judge probably won't require supervised visitation until some problem or damage has already occurred. Mom's mere suspicion may not be enough!
- 11) CUSTODY TRIALS Sometimes a client says: "Let's just go to court." Is this a good idea? What happens in court? Here's a short primer on the subject:
- a) "Is going to court a good idea?" Advantages--
    - i) Clearing the air, getting it off your chest
    - ii) No need to wrestle with compromises, give-and-take
    - iii) Court order gives each protection -- enforcement by contempt, PKPA; no change unless substantial change of circumstances
  - b) "Is court a good idea?" Disadvantages--
    - i) Court order is harder to modify later absent a substantial change of circumstances
    - ii) Bad blood -- hard to rescue a "working relationship" with the other parent out of a bloody trial. [But will there be greater cooperation after settlement? Who knows?]
    - iii) Time and money
      - (1) Settlement -- free with legal assistance attorney; relatively inexpensive with private counsel if parties have agreed on most terms and attorney merely writes down their promises and then "tightens them up"
      - (2) Trial -- *just plain expensive!*
      - (3) Finding a good lawyer -- some tips:
        - (a) State bar-- board certification of family law practitioners
        - (b) American Academy of Matrimonial Lawyers (Chicago)
        - (c) Reserve attorney directory
        - (d) Special Legal Assistance Attorney Directory
        - (e) Lawyer referral service
        - (f) Call an officer of the state bar's family law section
      - (4) Costs? A "simple" custody trial might last just two days. If we assume preparation and negotiations equivalent to three days of legal work before the hearing -- and no expensive pretrial depositions -- this comes to 5 days x 8 hrs. x \$150/hr. = \$6,000! [The figure of \$150/hr. is an estimate based on legal rates near Ft. Bragg, NC -- obviously New York or California would be a different story!]

- (5) Assessment of attorney's fees against your client -- an additional cost of contesting custody. Some courts put the cost of custody litigation on the losing party, or on the party better able to pay it. So "you pay your own lawyer, and the other lawyer too!"  
Lesson: *Don't play ball when you don't know the rules of the ball game!*

c) A judge's decision:

- i) Should be based on track record-- what is the status quo? Or, "If it ain't broke, don't fix it."  
The crystal ball problem

ii) Primary caretaker issues

- (1) Presumption that custody of young children should be awarded to the parent who is the "primary caretaker." See, e.g., Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) for primary caretaker criteria:

- (a) Preparing and planning meals.
- (b) Bathing, grooming, and dressing.
- (c) Buying, cleaning, care of clothes.
- (d) Providing medical care, including nursing and trips to physicians.
- (e) Arranging for social interaction among peers after school, such as transportation to friends' houses and to girl or boy scout meetings.
- (f) Arranging alternative care such as baby-sitters and day-care.
- (g) Putting the child to bed at night, attending the child in the middle of the night, and waking child in the morning.
- (h) Disciplining, including teaching general manners and toilet training.
- (i) Educating (religious, cultural, social, etc.)
- (j) Teaching elementary skills such as reading, writing, and arithmetic.

- (2) Problem: Truly nondiscriminatory on the basis of gender?

*"West Virginia law does not permit a maternal preference in child custody litigation.... [However, the preceding] list of criteria usually... spells 'mother.' That fact reflects social reality; the rule itself is neutral on its face and application.... Our rule inevitably involves some injustice to fathers, who, as a group, are usually not primary caretakers." -- David M. v. Margaret M., 385 S.E.2d 912 (W. Va. 1989).*

iii) Strengths of each party as a parent are factor

iv) Sometimes involves the wishes of child of suitable age, discretion and maturity

- v) "All things being equal..." mothers win most of the time. But are all things ever equal? Is the courtroom an empty box, the judge a perfect neutral, and each parent equally qualified for the role of custody?

*"Like lawyers, judges have lives outside the law that affect their decisions in divorce cases. A judge's age, education, ethnic heritage, marital status, religion, and personal history can all have an impact." -- Patricia Garity Smits, Family Advocate, Spring 1990.*

*"The trial of a child custody issue has been stated by some to be 'the biggest crap game in town.' This is especially true where the control of the future life of a child is vested in the hands of a judge whose prejudices and attitudes necessarily color any decision. Who among the experienced matrimonial attorneys has not on occasion stated to a client, be it a mother or a father, that an award of custody will be an 'uphill climb' with the particular judge designated to try the case? --Willard H. DaSilva, "The Sense of Settlement in Child Custody," Fair\$hare, March 1989 at 12.*

- vi) Judges bring to each case...
  - (a) Beliefs about effective parenting.
  - (b) Emotions.
  - (c) Personal value system and experiences in life.
- vii) The bottom line: "While custody negotiations present unique problems for the attorney, credibility and concern for the child's welfare are primary considerations. Thorough trial preparation is a must if negotiations are to be successful, but a **fair settlement** is better than a **good contested victory**." --James T. Friedman

12) A ROLE FOR MEDIATION?

- a) Courts are increasingly turning to mediation to help parents arrive at a mutually agreeable custody determination.
- b) Technique: Mediator sets up several meetings with parents, finds out what they want, attempts to *fine tune* and reconcile differences, uses neutral language ["...son lives with father every other weekend"] rather than "loaded words" with win-lose implications [i.e., "custody" and "visitation"]
- c) Relatively inexpensive, and more likely to achieve a result the parties will abide by.
- d) Benefits: cheaper, less traumatic, increased likelihood of compliance
- e) Who benefits most? Conflicting studies, but...
  - i) By and large, women are much more satisfied with litigation results than men are.
  - ii) Women seem to indicate no particular preference for the results of mediation compared to litigation.
  - iii) Men generally perceive fairer treatment in mediation than in litigation.
- f) Possible problems—
  - i) One party tends to dominate the other.
  - ii) Cases involving child or spousal abuse or substance abuse

13) MISCELLANEOUS ISSUES IN VISITATION

- a) Another wise idea for an order or agreement regarding visitation is to require each party to keep the other notified of the whereabouts of the child or children at all times. For dad during his summer visitation, this will mean he has to give mom his regular work and home addresses and telephone numbers, as well as the dates and locations of any vacation trips he is planning.
- b) Another common provision is to allow unlimited telephone access by the visiting parent with the child. In the event some disputes are anticipated, it would be a good idea to "lock in" a particular night of each week for dad, at his own expense, to call the child. Great care must be taken, however, that dad only negotiates such a clause if he intends to exercise these rights. Mom will also need to be advised that she should keep conflicting telephone calls to a minimum and have the child ready and available on the specified evening.
- c) Finally, another desirable clause for a custody agreement would be to require the custodial parent to provide copies of school progress reports, report cards and medical reports to the non-custodial parent. Such mandated cooperation between the parents can usually avoid a great deal of bitterness. Federal law already provides for equal access to medical and educational records by both parents, and most states have followed suit by requiring this also.

14) THE VOICE OF THE CHILD

- a) Some dads (and non-custodial moms too) will ask: "My son keeps on telling me he wants to live with me. When will my son be old enough to decide for himself where he wants to live?" For these clients, we could suggest:

- i) Joke --"Where does the gorilla sleep at night?" Answer: "Anywhere he wants!" OR PERHAPS...
- ii) Client Question: "When can my son decide where he wants to live?" Answer: "Any time he wants; he just can't dictate that result to the judge!"

- b) Here's an extract from **Kearns v. Kearns, 170 S.E.2d 132 (N.C. App. 1969)** that might help explain the problem:

*Defendant's assignment of error No. 3 is addressed to the refusal of the court to hear the testimony of the four minor children, who were tendered by defendant....Counsel for defendant twice requested the court to hear the testimony of the children and the court refused both times. This was error. The case of Spears v. Snell, 74 N.C. 210 (1876), established the right for a child to have his testimony heard. The Supreme Court said:*

*'We think the boy was a competent witness, and ought to have been examined in that character. Indeed, we think, being the party mainly concerned, he had a right to make a statement to the court as to his feelings and wishes upon the matter, and that this ought to have been allowed serious consideration by the court, in the exercise of its discretion, as to the person to whose control he was to be subjected.'*

*The Spears case was cited with approval in In re Gibbons, 247 N.C. 273, 101 S.E.2d 16 (1957). In Gibbons the Court stated:*

*'There is nothing in the findings of fact to indicate that Judge Carr gave any consideration to the wishes of this ten-year old boy as to the person to whose custody he was to be given, though under the facts here the boy, being the party mainly concerned, had a right to have his wishes and feelings taken into especial consideration by the judge in awarding his custody. It seems that the learned Judge felt so 'cramped by his opinion that in law' the respondent had a primary right to the custody of the boy, that he overlooked the interest and welfare of the boy. This was error.'*

*These two cases leave no doubt that a child has a right to have his testimony heard. It is still, however, within the discretion of the trial judge as to the weight to be attached to such testimony. 3 Lee, N.C. Family Law (1963), s 224; Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966); James v. Pretlow, 242 N.C. 102, 86 S.E.2d 759 (1955).*

- c) Now turn the problem around. Instead of the child saying he wants to live with dad, what if he says that he doesn't want to visit dad? Remember: this blade cuts both ways! Should we let the child speak when it comes to custody but not when it comes to visitation? Should he be allowed to testify if he wants more time with dad but not if he doesn't want to visit with him? Read the following extract from **Reynolds v. Reynolds, 426 S.E.2d 104 (N.C. App. 1993):**

*David Reynolds has had limited contact with Judy Reynolds and Kelli Lynn Reynolds since December 1990. Judy Reynolds is very bitter about her divorce from David Reynolds and his affair and subsequent marriage to a former baby sitter, who is approximately twenty-five years younger than Mr. Reynolds.... Kelli Lynn Reynolds has been strongly influenced by Judy Reynolds' opinions in this regard. Judy Reynolds has denied Kelli Lynn Reynolds any visitation with Donna Campbell, the elder daughter of Judy and David Reynolds and elder sister of Kelli Lynn Reynolds.... Kelli Lynn Reynolds testified at the hearing that she loved the defendant but did not want to have visitation or telephone contact with him. The trial court believed this testimony, but found that David Reynolds is a fit and proper person to exercise reasonable and liberal visitation with Kelli Lynn Reynolds, and that it is in the best interest of Kelli Lynn Reynolds that there be a specified visitation schedule between her and the defendant and that such visitation be allowed to occur....*

*The plaintiffs' sole contention on appeal is that the Order for visitation violates the Constitutional rights of the minor plaintiff. We find no merit to the arguments presented in the plaintiffs' brief, and, for the reasons that follow, we affirm the Order of the trial court.*

*The trial judge, unlike the judges of the appellate courts, has the opportunity to hear first hand the testimony of the parties in matters of child custody, and is, therefore, vested with broad discretion in such matters.... That discretion must be exercised in light of this Court's recognition that a parent has a "natural and legal right" to visitation with his child which should not be denied absent some conduct on the part of the parent constituting a forfeiture of the right or some finding that the exercise of the right would be detrimental to the best interests of the child. In re Stancil, 10 N.C.App. 545, 551, 179 S.E.2d 844, 849 (1971). The "paramount consideration" in matters of custody and visitation is the best interests of the child, and in determining such matters the trial judge may consider the wishes of a child of suitable age and discretion.... The child's wishes, however, are never controlling, "since the court must yield in all cases to what it considers to be the child's best interests, regardless of the child's personal preference." [citation omitted]*

*We recognize that Kelli Lynn Reynolds has expressed a desire not to visit her father. The trial court determined, however, based on findings of fact supported by the evidence in the record, that such visitation would be in her best interests. Despite Kelli Lynn Reynolds' desire to the contrary, "a trial judge has the power to make an order forcing a child to visit the noncustodial parent." Mintz, 64 N.C.App. at 341, 307 S.E.2d at 394.*

15) HOW ELSE CAN YOU HELP? "LITIGATION SUPPORT" AND LEGAL ASSISTANCE

- a) If your client, MAJ John Smith, is concerned about a fair but prompt trial...
  - i) Contact the attorney who's representing him.
  - ii) If he doesn't yet have an attorney, use methods and resources mentioned above to get him a good one.
  - iii) Volunteer to help prepare him overseas
  - iv) Volunteer to help with the research -- create a brief!
  - v) If he cannot be at the first hearing due to military duties, advise civilian counsel regarding the SSCRA
  - vi) To ensure a prompt trial, ask civilian attorney about a peremptory setting! This is a request to the judge for a priority hearing on the case because your client is coming from far away. Can he or she make such a motion to the judge? Can you help by preparing an affidavit of your client to support the motion?

[rev. 1/24/08

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