



## **CUSTODY DETERMINED BY BEST INTERESTS OF CHILD IN DIVORCE CASES**

In divorce cases the court shall determine custody in accordance with the best interests of the child. A.R.S. §25-403, provides eleven (11) factors from which the Court is to consider in determining the best interests of the child. A.R.S. §25-403.01 further provides that in awarding child custody the court may order sole or joint custody. While the statute provides that the court is not to take into consideration the parent's sex, historically, physically custody favored mothers as it is very common for them to be stay-at-home custodial parents. However, in today's society where both parents are usually employed it is very common for the court to award joint physical custody. Joint physical custody can be an equal access schedule (50/50), or something close to that including a 5-2-2-5 plan or a 3-4 plan.

Legal custody involves decision making and can either be joint legal or sole legal custody. Joint legal custody is the most common award where as sole legal custody is the exception. A typical situation of sole legal custody would involve wherein one parent is a drug user, alcoholic, there is a significant history of domestic violence, or is unreasonable to the extent that co-parenting is difficult or impossible.

In divorces involving children, a parenting plan will be included that sets for where children will live and which days they will spend with each parent. The process of agreeing on a parenting plan is often very difficult for parents. Often times, the children are placed in a difficult position having to express their desires to which parent they would want to reside with.

In Maricopa County the parties maybe referred to Conciliation Services for a parenting conference or to a private mental health evaluator for a full custody evaluation if the facts and circumstances warrant.

A parenting conference involves both parents meeting with a professional who will interview both and issue a report to the Judge for review. Depending upon the children's age and wishes and desires of the parents, the court may order the children to be interviewed. The Interview is done low key so the children are not put on the spot as to being asked which parent they prefer to live with. Often times the interviewer will ask questions such as what they like about living with Dad and what do they like about living with Mom and other such questions.



The children's age will have some effect on the court's decision in determining which parent will be the residential parent. There is no set age in Arizona as to when the Judge will follow the child's wishes. As a general rule, the older the children are the more weight the court will put on their wishes. Typically, teenagers, ages 14 and above, the court will put much more weight on their wishes whereas younger children will be taken into consideration but not given any significant weight. There is a rare situation where the court will go against a teenager, age 16 or 17, wishes as to where he/she wants to live.

The parenting plan also provides for holiday access and vacation. The parenting plan can be changed when there is an ongoing significant change in circumstance warranting the court's consideration. However, A.R.S. §25-411 provides "a person shall not make a motion to modify a custody decree earlier than one year after its date, unless the court permits it to be made on the basis of Affidavit that the reason is believed is that the child's present environment may seriously endanger the child's physical, mental, moral or emotional health. Also, if there is evidence of domestic violence, then modification of custody is warranted.

Any evaluation of a child's best interests including the child's wishes should be done over a period of days or weeks not in one session. If it is done properly, the child will not be forced to state their preferences but be invited to speak if they choose. When a child speaks, his or her wishes should be honored as stated, not subject to interpretation by an expert or a lawyer. Children are very perceptive and they can tell the difference between being bribed and manipulated and being respected, and understood in having their reasonable needs met.

As part of the custody assessment, due consideration should be given to the child's functioning at home, at school, and in having age appropriate peer relationships. If it appears that the child is failing in these areas, then, it may be time to revisit the parenting plan.