

## Virginia Dugan Podcast

*An Albuquerque family lawyer explains child custody and visitation laws in New Mexico divorce cases.*

### **How does a divorcing couple decide whether sole custody or joint custody would be best for their family?**

**Dugan:** The standard is the best interest of the child. Divorcing people need to understand the difference between sole custody and joint custody. In the state of New Mexico, joint custody refers to decision-making for the child regarding residence, healthcare, education, extracurricular activities, and so on. The parents communicate with each other and make a decision together in the best interest of the child.

Sole custody means that one parent has the ability to make all decisions for the child or children, which is quite important when you're looking at residence. If one person has sole custody, that means they can make the decision to remove the child from the state, which they can't do if they have joint custody with the other party. The courts generally say that it is in the children's best interest to have both parents in their lives.

### **Is there a distinction between joint, sole, and legal custody versus physical custody where the children are living with one parent most of the time?**

**Dugan:** Yes. Sole custody and joint custody are about decision-making for the child. Custody and visitation refer to the amount of time each parent spends with the children.

### **How can a parent increase his or her chance of a being awarded primary or sole custody of the children?**

**Dugan:** Primary custody means having the children more than 50% of the time. If the family's arrangement is that one parent has been responsible for the children and the other parent hasn't been as involved, that might be one reason for awarding primary custody. Domestic violence and anger issues in the family may be another reason for the court to say that one parent should be the primary caretaker of the children, while the other parent should be the visitor and may be supervised.

### **Are there any legal or practical reasons fathers should not be awarded child custody just as often as mothers?**

**Dugan:** There is absolutely no legal reason the father should not be awarded custody of the children. In today's world, both parents are usually very involved with their children, so it depends on the age of the children and what their best interests are. If the children are older – 13, 14, or 15-years-old – then they are able to say with whom they would like to live. There are now more 50/50 custody arrangements, which work out well for the child if the parents live close to each other. They can stay in the same school and have lots of contact with both parents.

### **In cases where the mother is an alcoholic or has drug addiction issues, would the father be more likely to get custody of the children?**

**Dugan:** It is unfortunate that many families have one partner who's an alcoholic or has a drug problem. However, it does not cut off the parents' rights to their children. Either the father or mother might be the physical custodian of the children and the person who has the addiction might be able to see the children in a supervised situation. If the other party comes to the house to visit, we tell the custodial parent not to leave the children or to allow the visitation if there is any indication of alcohol or drug abuse. The court may arrange for the other parent to go through a treatment program and the court will set up how they are supposed to see the child, but usually it's through supervised visitation.

**If a child is living with one parent full-time despite the fact that the court granted joint custody to both parents, should that parent apply to change the arrangement from joint to sole custody?**

**Dugan:** We're crossing over a line with this question. Sole and joint custody are applicable to the decision-making for the child. If the custodial parent is trying to keep the child away from the other parent for whatever reason, then the parent who is not seeing the child can apply to the court to modify custody. Sometimes if one parent is actively keeping the child away from the other, the court can reverse custody – which is not something the custodial parent would want. Of course, it is the best interest of the child to be seeing both parents.

**If the parent the child is living with is not trying to prevent visitation but the child has decided to live at that parent's house, would that change child support in a joint physical custody or visitation situation?**

**Dugan:** In New Mexico, the number of overnight stays is one of the determinants of child support. For that reason, there are two different worksheets: A and B. The A worksheet has a formula for minimum time under 35% and the B worksheet is for over 35% of the time. If the child is living full-time with the father and the mother is only seeing the child on weekends, that would require worksheet A and the child support should be more than if the mother were spending more time with the child.

**If a couple has a separation agreement but has not yet finalized their divorce, will the agreement prevent one spouse from taking a child and leaving the state or county?**

**Dugan:** When parties petition the court for divorce and they are separated, they have a temporary domestic order that says neither of the parties shall remove the child from the state they are living in.

One way a parent can take a child out of the state is by getting permission from the other party; for instance, to visit grandma and grandpa in Florida for two weeks. However, there's nothing physically preventing one party from snatching the child and leaving the state or the country. Unfortunately, it is all too prevalent. It is in the newspapers, it's on the talk shows, and it's very difficult to get a child back once they have been snatched and taken to another country. States are different and states will return the child. The countries that sign onto the Hague will return the child, but if the parent takes a child to some other country that is not a Hague signatory, it's almost impossible to get the child back.

**If one parent takes a child to another country without consent and the other parent's lawyer secures an order for the child's return, how do you enforce compliance – especially if it's not a Hague country?**

**Dugan:** If it's not a Hague country, you have no means to get the child back. If it is a Hague country, you will most likely be able to get the child back. You have to go through a long and difficult legal process, but there have been many successful cases where the children were returned to the parent who was supposed to have child custody.

**If one spouse has full custody of the children, can he or she move to a different state with the children without the other parent's permission? For instance, if their work is taking them to a different state, are they able to take the children with them?**

**Dugan:** A parent who has sole custody may move, because he or she has the decision-making power to move with the child. However, they need to give notice to the other parent and to the court. Even if they have joint custody and one party is a primary physical custodian of the child, they can apply to the court to allow relocation. The standard is whether the move is in the children's best interest or is an attempt to keep one parent away from the children.

If you have joint custody and one parent won't agree to a move, you have to petition the court for relocation. It would involve working with a child custody evaluator to determine if the move would be good for the child.

**If the custodial parent is planning a move in good faith, is it possible to change the visitation schedule for the non-custodial parent to have longer holidays with the children since every other weekend will no longer be practical?**

**Dugan:** The visitation schedule definitely would change. When relocation is granted, visitation is decided at the same time. If a child is in another state, weekend visitation is not practical. How much visitation time there is in the summer depends on the age of the child. Sometimes there are as many as eight weeks in the summer; sometimes there are alternating Christmas holidays and winter breaks. If the states are contiguous or close, it might be practical to have visitation during long three-day holidays. We try to make up the time as much as we can if one parent is going to relocate.

**If the court grants permission for an ex-spouse to take the children to another state, can the non-custodial parent appeal the judge's decision? What is the process?**

**Dugan:** Yes. They can appeal if they think there has been a mistake of law or the judge has made a mistake. They can also ask for a reconsideration, where the judge looks back over the decision or takes new testimony as to why it was not a good idea to let the custodial parent go. Or maybe it's just not working out for the custodial parent with the children in the new location. In that case, the parent who has been left behind can file for a modification and state all the reasons why the move has not been good for the children.

**Is custody and child support decided the same way for unwed parents as it is for legally married parents?**

**Dugan:** No. When unmarried parents who have decided to have a child together split up, you have to petition the court for a determination of parentage to confirm the father of the child. You petition for custody, visitation, and child support. Sometimes both parties will agree that he is the father of the child, so the court can stipulate that he is the father. Then the father is allowed to get the child's birth certificate with his name on it. We proceed to determining the best kind of custody and the best form of visitation for the child, and go through the process of determining the child support in accordance with the statute.

**If neither parent is particularly responsible, do the courts ever award custody to grandparents?**

**Dugan:** They can award custody in the form of a guardianship to the grandparents if both parents are irresponsible, drug-addicted, neglectful, or not taking care of the child. When there is a danger to the child and the grandparents are standing right there wanting to help their grandchild, the courts can allow them to take custody of the child and it can be reviewed later on. If the parents get better, then they can come back in for a modification.

This is happening around the United States. Many grandparents who were done raising children are now raising the next generation, because their own children cannot be responsible parents. In answer to your question: yes, grandparents are looked at first as potential caretakers for the children. It's preferable to putting them into foster care.

**In some cases where the breakup has been very bitter, there may be parental alienation or one parent who is actively preventing the other from seeing the child. How is parental alienation defined and how is it dealt with?**

**Dugan:** Parental alienation is talking to the child and "badmouthing" the other parent, making them see the other parent in a very negative way, alluding to things like mistreatment or inappropriate activity between the parent and the child, and scooping out the bottom of the relationship with the other parent. The child may start to really believe the other parent is not suitable and is bad. When they no longer want anything to do with the other parent, that's when parental alienation happens. It is very, very serious. It takes counselling and professional therapy to reverse all those years of talking poorly about the other parent.

**Are there any legal measures a parent can take to either prevent parental alienation or to stop it if they think the other parent is going down this road?**

**Dugan:** They can ask for a change in custody due to parental alienation. Then the court will have a professional child custody evaluator do an assessment of the parents and of the child or children. If this is really going on, the court will probably change custody with a component of counselling or reintegration with the other parent.

**If one state awarded a parent sole custody of the children, can the other parent file for custody in another state if they relocate?**

**Dugan:** The activity has to take place where the child is, and the states offer full faith and credit to another state's determination. If New Mexico says that custody belongs with the mother in New Mexico, then the father can't just pick up and file in Nevada. You have to go back to the court of original jurisdiction, which is New Mexico, and file there.

**Can you actually get a divorce without resolving all of your custody issues?**

**Dugan:** Yes. There will be two parts to your divorce. If you are able to resolve all the issues with property and spousal support, the court can have a temporary order entered for custody, child support, and visitation and can award the divorce. In the actual marital settlement agreement, it will say that this is a temporary arrangement pending a full child custody evaluation. We try to insert some kind of date so it doesn't drag on forever. The court can grant a divorce and keep the child custody part separate under a temporary order.

**At what age is a child able to choose which parent they wish to live with?**

**Dugan:** The court may allow the child to have a reasonable say in which parent they want to live with by the age of 14. It is very hard to force anybody who is 14-years-old to do something that they really don't want to do, so the courts will listen if they prefer to stay with one party.

**Are siblings ever split up between the parents in custody arrangements?**

**Dugan:** I've only seen that where there has been an agreement between the parties themselves. The courts will not split up the children. The children depend on each other and splitting them up would mean they are not only losing their mother or their father in some way, but also losing their sibling in the same proceeding. If the parties decide to split up the children and they stipulate how it is going to be done, the court generally won't intervene. However, the court itself will not, and has never to my knowledge, split up the children.

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