

Sole Custody of Children

The “sole custody” label is a fairly new one in custody disputes in that, until the 1980s, courts rarely considered any option other than awarding one parent custody of the children while granting the other limited amounts of time to “visit” with the children. American law has evolved from bright-line rules regarding the placement of children with their fathers, to the Tender Years Doctrine requiring that small children remain with their mothers, to the “best interests of the child” approach, which evaluates the needs and welfare of the children on a case-by-case basis. More recently, the fields of law and psychology have both begun trending toward joint or shared custody arrangements, under the theory that children benefit from a close relationship with and extensive involvement by both parents. Sole custody is still considered appropriate by most courts, however, when the parents have a history of domestic violence or intense conflict with one another, when one parent suffers from mental health issues or addiction, or when a parent, for whatever reason, cannot provide a safe, stable environment for the children.

Colonial American law viewed children, much like livestock or servants, as a valuable production good and an important component in an economy dependant upon manual labor. Fathers had absolute rights to the custody and control of their children. Rooted in English common law, a father’s relationship to his legitimate children was defined as a right to their custody and to the value of their labor and services, in exchange for his duty to provide for their necessities and educate or train them in a trade or profession. If a woman’s husband died, she had no guarantee that her children would remain with her. A father could appoint a third party as guardian for the children in his will, with little recourse available to the mother. In the very rare instance of a divorce, fathers in the colonies and in the early years of the United States automatically received custody of all children born into the marriage, and could exclude the mother entirely from the children’s lives. Impoverished fathers could, however, lose custody of their children to the government, which could then apprentice a child to a master who could afford to support the child in an indentured servitude arrangement.

At that time, illegitimate children were treated differently than children born into a marriage. The mother of an illegitimate child was considered the child’s only custodian. Because a child born outside of marriage had no legal father, the law considered an illegitimate child *nullius filius* – the child of no one. A biological father would have no rights to his illegitimate child, and likewise owed no duty of support to the child. In addition, an illegitimate child could not inherit from his father or his father’s family.

The view that fathers essentially owned their children, almost without regard to any wrongdoing by the father in the marriage or in the parent-child relationship, and were presumed the appropriate custodians of their children, gradually gave way to the opposite presumption. In the mid to late nineteenth century, society and the law began to focus increasingly on the welfare of the children, rather than on the rights of the father.

The transition, however, was gradual and often resulted in a determination that the children’s welfare was best-served by remaining with the parent who could provide for them financially. Of course, given the rarity with which women worked outside the home, that parent would have almost always been the father. For example, in 1894, the Slater children of Williamsburg, Virginia, had to return to their father, who the court described as “a sober and successful business man, providing for the wants of his family,

but given to outbursts of temper when thwarted by his wife.”¹ Mrs. Slater, for reasons not wholly explained in the court’s opinion except to say that the parties did not get along and that Mr. Slater had a “suspicious character,” left the marital home with their three children, ages six, four, and two, and moved in with her parents. In its analysis, the court noted that although fathers were generally entitled to custody, courts had come to value the welfare of the children over the rights of the father. Despite the fact that the evidence indicated that Mrs. Slater was a loving and devoted mother, the court ruled in Mr. Slater’s favor, stating:

[T]he only question is whether the interests of these infants will best be subserved by committing these children to the care and custody of their father, who is their natural guardian, and who, if he is not shown to be an extremely affectionate person, is shown to be a thoughtful and provident person, solicitous for the personal and spiritual welfare of the family, and able to provide for them, or by leaving them in the custody of their mother, who is herself dependent on her parents for her support. Upon this point we think there can be but one answer, and that in favor of committing them to their father.

The legal presumption known as the Tender Years Doctrine, which originated in England, gained popularity in the late nineteenth century, and was based on the notion that children under the age of seven should remain in the care of their mother. Mothers, because of their femininity and their station in society as homemakers, were considered more nurturing and better-suited to care for small children. Granted, the father may have demanded the return of the children to him when they had passed the age of “tender years.” The Tender Years Doctrine became law in most states, and a maternal presumption in custody cases remained until the mid-1970s, when several courts determined that the doctrine violated the Equal Protection Clause of United States Constitution, by impermissibly discriminating against men. Because of this and the increasing number of women in the workforce, the focus shifted from the status of either parent to the interests of the children.

The current standard adhered to in all fifty states considers the best interests of the child as the primary concern in determining custody. The best interests standard often requires the court to analyze a list of statutory factors, such as each parent’s likelihood to support the child’s relationship with the other parent, the mental and physical health of the parents and the child, each parent’s ability to understand and meet the child’s physical and psychological needs, any collateral family relationships (such as half-siblings or grandparents) which are integral to the child’s life, and in some cases, the preferences of the child.

Married parents are presumed to have equal rights to their children until a court order deems otherwise. In contrast, an unmarried mother is presumed the sole custodian of her child. This means that if the mother opposes contact between the child and the father, he must look to the court for a remedy, typically by means of a suit for determination of paternity and a petition for custody or visitation. If the father does not express an interest in a relationship with the child, the mother may still seek an order of

¹ Slater v. Slater, 90 Va. 845, 20 S.E.780 (1894).

paternity and an award of sole custody. This often occurs in conjunction with child support proceedings.

Though the trend in many states is toward encouraging parents to share time with and responsibility for their children, sole custody is still awarded frequently, for a variety of reasons. Most states view custody in two separate but related issues: Legal custody and physical custody. Legal custody refers to decision-making authority. A parent who has sole legal custody makes all decisions on behalf of the child on such important matters as education, religious training, and medical care. Parents who have joint legal custody consult one another on these issues and act as a co-parenting unit. Physical custody refers to the child's residence. Sole physical custody would generally mean that the child resides the vast majority of the time with one parent and has visitation with the other. Shared or joint physical custody, depending on the laws of a jurisdiction, could refer to anything ranging from an arrangement where the primary custodian has the child seventy-five percent of the time, to an equal fifty-fifty division of the child's time between the parents. A parent seeking sole legal and physical custody of a child asks the court for the primary responsibility for the child, as well as the vast majority of the child's time.

A noncustodial parent's visitation may take a number of forms. The most common would be an arrangement allowing the child to spend certain weekends or days with the noncustodial parent. If the court concludes that the noncustodial parent has harmed or endangered the child, or presents some type of threat to the child's physical or psychological well-being, then the court can order supervised visitation. Supervised visits may occur in public, in the presence of some third party identified by the court as an appropriate supervisor, or at the office of a therapist, with the goal of repairing the relationship between the parent and child. Courts require supervised visitation in only the most extreme cases, such as those involving a severely damaged relationship between the parent and child, a history of domestic violence by the noncustodial parent, abuse or neglect of the child, or a parent's inability to behave appropriately with the child.

Absent a court order to the contrary, a non-custodial parent with restricted visitation will retain certain rights, such as the right to view a child's school and medical records. A federal court in California ruled that a non-custodial father had a Constitutional right to notification that his daughter was being temporarily transferred by the Department of Social Services from the care of her mother, who had sole custody, to the maternal grandparents, due to an investigation into alleged abuse of the child by the mother's boyfriend.²

Reasons for granting sole custody to one parent when both petition for custody of the child could include the noncustodial parent's decision to engage in behaviors detrimental to the child or which interfere with the child's relationship to the other parent. For example, the Hague Convention and the Uniform Child Custody Jurisdiction and Enforcement Act, adopted by most states, address issues of parental abduction, jurisdiction-hopping, and relocation with a child in an effort to prevent contact between the child and the other parent. Absent very compelling reasons to distance the child from the other parent, such conduct will often result in the offending parent losing custody. In other instances, parents' inability to communicate civilly with one another can form the

² James v. Rowlands, 606F.3d 646 (2010).

basis for an award of sole custody, as shared or joint custody requires parents to cooperate with one another.

A parent's mental health issues or instability could also warrant an award of sole custody to the other parent. In a case illustrative of several errors in judgment that can result in a parent losing custody, the New York Supreme Court affirmed an order granting sole custody to the father where the mother was hospitalized and received in-patient treatment on more than one occasion due to her alcoholism, threats of suicide, cutting her wrists, and overdosing on painkillers. In addition, the mother, when she had custody of the child, had failed to keep the father informed of important information about the child's place of residence and had discussed the court proceedings with the child at length. The court emphasized the mother's inability to communicate with the father, and her delusion that his actions with regard to gaining custody of their daughter were motivated purely by spite and hatred for her.³

Even in states where custody statutes identify factors the court must consider in custody cases, judges have a significant amount of discretion. In proceedings where each parent seeks sole custody, judges tend toward granting custody to the parent who the evidence indicates will prioritize the needs of the child ahead of his or her own agenda, who can provide a stable and appropriate environment, who does not involve the child in disputes with the other parent, and who exhibits a willingness to foster a loving relationship between the child and the noncustodial parent. All of these considerations directly tie into the fundamental principle that the court's custody decision must serve the best interests of the children.

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³ Poremba v. Poremba, 93 A.D.3d 1115, 940 N.Y.S.2d 707 (2012).

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