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March 1999

State statutes affecting parenting time and parental rights

The Men's Health Network (MHN) receives numerous inquiries about parenting time statues in the various states. Since Texas appears to be the leader in defining parenting time and legal rights among divorced and unwed parents, we focus on that state's response to children's need for a continuing relationship with both parents. It should be noted that two Texas Supreme Court decisions and recent changes in the Texas Family Code (TFC) have given unwed fathers the same rights as married fathers. As one can see from the following comments, Texas and a number of other states are taking children's need for two parents rather seriously.

Possession of or access to a child (parenting time or "visitation"), Texas: (1)
Access guidelines first passed the Texas Legislature in 1989 when that state's legislators decided that children needed consistent, dependable relationships with both parents. These guidelines are a "rebuttable presumption" and have since been modified to expand the time that noncustodial parents (a term not used in Texas) have with their children. As a result of legislation passed in 1997, the House committee chair estimates that the minimum time a judge can order is now approximately 42%.

There are different provisions for parents that live within 100 miles of each other,(2) and for those that live over 100 miles apart.(3) Note that a "weekend" is defined by Friday's date. As example, the last weekend "visitation" period in October 1997 was October 31-November 1-2-3 as Friday of that weekend was October 31. The first such weekend in November 1997 was November 7-8-9-10 since the first Friday was November 7th.(4)

Initially, judges and some elements of the legal community opposed the idea of presumptive access guidelines, but almost all now realize that the guidelines have brought county-to-county consistency, eliminated petty courtroom arguments, and have insured that a child will have a consistent, predictable relationship with both parents following separation of the parents. These guidelines enjoy the same acceptance as the financial child support guidelines, which, we hope, is a growing recognition of children's need for emotional as well as financial support. Supportive appellate court decisions have reinforced that acceptance.

Perhaps most importantly, the mechanics of the system work. This system works for government, the judiciary, parents, and for children. There are several important aspects that make this so:

1) They are a rebuttable presumption (Sec. 153.252), so they are not just "guidelines", they are the law and appellate decisions have supported them as an absolute minimum.

2) For parents with unusual work schedules (shift workers, traveling salespersons, etc.), the court must arrange the timeshare arrangement so that the "visiting" parent has no less time than that allowed by the minimum schedule.

3) Legal possession of the children will ideally change at school or day care. At the NCP's[5] option, his or her time begins when school or daycare ends on Friday and his or her time ends when school or daycare begins on Monday. If Friday is a school holiday, then the time of possession begins at the same time on Thursday. If Monday is a school holiday, then the time of possession ends at the same time on Tuesday.

4) The NCP has every Wednesday overnight with the child, beginning at the time school is out on Wednesday and ending when school begins on Thursday, allowing the child to have a more normal arrangement with the NCP. This eliminates the hurried rush back to the CP's home at 8 p.m.

   Some NCPs and CPs ask the court to move the Wednesday "visitation" to Thursday but this is strictly up to the court. This move gives the CP more free time on the 1st-3rd-5th weekends, from Thursday morning, when the child is taken to school or day care, until Monday afternoon, when the child is picked up from school or day care.

5) Exchanges at day care or school minimize contact between parents and limit any opportunity for confrontations, even just the occasional sharp verbal exchange or sour facial expressions that so silently disturb children.

   This arrangement has many advantages, including the NCP's involvement with school or day care and the limited face-to-face contact between separated or divorced spouses (and their future significant others or spouses). No more new wife fussing when her husband goes to his last wife's house to retrieve the children; no more new husband confronting the children's father when he comes to the door to retrieve his children.

6) Summer access periods provide flexibility and also a default period if the parents fail to consult each other. Most parents plan summer access during the default period. Minimum access time in the summer is a block of 30 days (42 days if the parents live over 100 miles from each other). Normal 1st-3rd-5th access periods apply to the reminder of the summer.

7. Grandparent access is provided for in the TFC. The statute reads, "The court shall order reasonable access to a grandchild by a grandparent if ..." and then provides rather reasonable standards for the court to use.[6]

There are two shortcomings to the guidelines as presently written:

1) Note that the statutes do not apply to children under age three. When these guidelines were enacted, the legislature felt that children under age three needed more time with each parent, and that the courts would consider what mental health experts have said about child development. Unfortunately, some activists with a different agenda have prevailed in a few courts. On the other hand, most courts assume that the three and over guidelines also apply as a minimum to children under age three.

Some of the most respected child development specialists in the country have rendered opinions on this subject, including Michael Lamb, Ph.D.,[7] Chief, Section of Social and Emotional Development, National Institute of Child Health and Human Development, Department of Health and Human Services, and Richard Warshak, Ph.D.,[8] Professor of Psychology, University of Texas Southwestern Medical Center. Furthermore, Robert Fay, M.D., nationally respected pediatrician, recommends no less than 50-50, or at least 60-40 time for toddlers even if the parents never lived together.[9]

2 There is no provision for telephone access. Ideally, language giving each parent the right to telephonic communication with the child at least once a week would be best. This is particularly important for younger children (for whom a week seems like a month) and for children whose parents have moved a substantial distance from each other. This is not a NCP or CP issue as it will allow the child to speak to the "other" parent when they are separated from that parent. This is the same right that older children, who exercise telephone privileges with some degree of self determination, enjoy. Language might read:

> "the parent not in possession of the child shall have the right to telephonic communication with the child between the hours of 7 p.m. and 8 p.m. on Tuesday and Thursday, and the parent in possession of the child shall make the child available during those times."

Texas has adopted one more provision which encourages a child's access to the NCP. A parent who decides to move out of the county following separation or divorce incurs all the increased costs of "visitation."[10] This provision encourages parents to consider the needs of their children when contemplating a move, and has worked quite well.

<u>Enforcement of possession of or access to a child:</u>
Texas provides for some rather strong "visitation" enforcement mechanisms, some of which are copies of successful programs in other states.

1) Felony conviction for denial of access to a child. Section 25.03 of the Texas Criminal Code (entitled "Interference With Child Custody") provides that a felony is committed if a parent is denied a court-ordered right to have possession of the child.

2) Civil liability for denying access to a child. Chapter 42 of the TFC provides a civil remedy, allowing the aggrieved parent to file a civil suit against all parties who denied him/her court-ordered access or assisted with that denial.

3) Civil Rules of Court. Section 308(a), used exclusively for the collection of financial child support prior to the 1989 passage of the minimum "visitation" guidelines, provides for the appointment of an attorney to enforce possession of or access to a child, and the offending party must pay the attorney's fees.

4) Employment denial. Parents who have been found by a court to have denied possession of or access to a child cannot be employed in many child care related fields, including working for Child Protective Services or in a licensed facility.[11]

5) Friend of the Court. The TFC provides that a Friend of the Court (FOC) may be appointed to work out any difficulties in the post-divorce family, including access and financial child support problems.

6) "Make-up" time. Recently passed legislation provides for 1 for 1 "make-up" time for denial of possession of or access to a child.(12) This statute is based on Michigan's successful make-up program.

Other states, Illinois for example, provide some interesting solutions. Illinois allows a law enforcement officer to write a "walk-away" ticket for denial of "visitation" -- thus requiring the offending parent to appear in court to explain her/his actions. Rhode Island law provides that a change of custody is rebuttably presumed to be in the best interest of the child if the court finds for the third time that the custodial parent is guilty of "visitation" interference.(13)

Legal rights, divorced parents, Texas:
Legislation passed in the 1990s provide for equal or almost equal rights between parents who are divorced, separated, or never married and who have a custody order of some sort. This includes allowing the child to attend your religious services, attending the child's school activities, and taking the child to a physician for routine exams.(14) Texas statutes in this regard follow the philosophy that children need the benefit of both parents' skills and understanding of their needs.

Legal rights, unwed parents, Texas:
Two Texas Supreme Court Decisions(15) and subsequent changes in the TFC have given unwed fathers the same legal rights as unwed mothers. An unwed father in Texas need only "... (receive) the child in his home and openly (hold) the child out as his biological child ...."(16) to have equal footing with the mother. Common practice among law enforcement officers and many judges is to use whose name is on the birth certificate as the deciding factor. If a man claiming to be the father is not listed on the birth certificate, common practice is for him to file with a court to establish his rights as the father of the child.

Should you have any questions about this document, please feel free to contact:

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ENDNOTES:

1. The term "visitation" and "visiting" are not used in the Texas Family Code, but are used here because of their acceptance by other states and their widespread use in the literature.
2. Provides for 1st, 3rd, and 5th weekends and every Wednesday overnight.

3. The NCP may choose the 1st, 3rd, and 5th weekends or only one weekend during the month. The NCP has possession every spring vacation.
4. Since Texas provides for 1st, 3rd, and 5th weekend possession from the time that school is out on Friday until the time that school begins on Monday, in October 1997 the NCP would have possession on the following weekends:

October 3-4-5-6 (1st weekend)
October 17-18-19-20 (3rd weekend) and
October 31-November 1-2-3 (5th weekend)

In November 1997, the NCP would have possession on the following weekends:

November 7-8-9-10 (1st weekend) and
November 21-22-23-24 (3rd weekend)

5. We use the common terms "custodial parents" (CP) and "noncustodial parents" (NCP) in this analysis but those terms are not used in Texas statutes, and only marginally apply due to the amount of time each parent is given with the child. These terms are used even though the parents may share custody (joint managing conservatorship). In this analysis, "NCP" refers to the parent with the least amount of time with the children, the "visiting" parent. Texas statutes provide for a rebuttable presumption of "joint managing conservatorship" (JMC) but one parent will usually be awarded more time with the children. ("Section 151.131(b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child.") The language used if the presumption is rebutted is "managing conservator" and "possessory conservator." We use "CP" here to refer to the JMC with most time or for the "managing conservator." "NCP" in this analysis refers to the JMC with less time or to the "possessory conservator."
6. § 153.433. For instance, the parents must have been divorced or living apart for the three months prior to the filing of the petition asking for grandparent access.
7. "In situations of divorce and separation, furthermore, children benefit greatly from being permitted overnight periods with each parent because such visitation permits the child and parent to interact in a diverse array of contexts. ... There is ample evidence that children who are able to maintain and/or consolidate relationships with both of their parents following separation and/or divorcee are much less likely to be harmed psychologically than infants or children who have experienced divorce but have been denied the opportunity to maintain relationships with both parents." (emphasis added) Michael E. Lamb, Ph.D. to Eric Anderson, Children's Rights Coalition, Texas Supreme Court Advisory Committee on Child Support and Visitation, November 3, 1994.
8. "Children do best when they have opportunities to establish rich close relationships with both parents. Such relationships are best achieved when the children experience each parent participating in all aspects of daily life including getting up in the morning, preparing of the day, preparing for day care, dropping off at daycare, picking up from daycare, feeding, bathing, preparing for bed, playing, putting to bed, soothing when the child awakes in the middle of the night, etc. Such a broad range of involvement can best be reached with overnight contact. This will benefit not only the establishment of that relationship, but the child's long-term adjustment." (emphasis added) Richard Warshak, Ph.D. to Eric Anderson, Children's Rights Coalition, Texas Supreme Court Advisory Committee on Child Support and Visitation, November 4, 1994.
9. "Joint Custody of Infants and Toddlers" Fay, Robert. Medical Aspects of Human Sexuality. Vol 19, No. 8
10. Texas Family Code, "§ 156.303(b). The payment of increased costs by the party whose residence is changed is rebuttably presumed to be in the best interest of the child."
11. § 40.069 of the Human Resources Code, "Required Affidavit for Applicants for Employment." "An applicant ... must execute and submit the following affidavit ... I swear or affirm under penalty of perjury that I do not now and I have not at any time, either as an adult or as a juvenile: ... ('been convicted of ... admitted ... had a judgement rendered against me ...') 15. Removing children from a state or concealing children in violation of a court order. ... 17. Any type of child abduction ..."
12. § 157.169. "... The additional periods of possession or access: (10) must be of the same type and duration of the possession or access that was denied. ..."
13. This was Rhode Island law several years ago and may have been changed since our records were updated.
14. Many states provide that the "visiting" parent can take a child to a physician only in cases of an emergency.
15. "In the interest of Unnamed Baby McLean" (1986), involving a child born out of wedlock being placed for adoption (the father and his quest for fatherhood were twice featured on the CBS television show "60 Minutes") and "In the interest of J.W.T." (1992), involving a married woman giving birth to a child sired by someone other than her husband. "In the interest of J.W.T." is an almost identical case to that of "Michael H.", a California father, who lost before the U.S. Supreme Court in a 1989 controversial 5-4 decision.
16. § 151.002(a)(5).