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TEXAS LEGAL ZONE

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COMMON CHILD CUSTODY QUESTIONS EXPLAINED

Introduction

Today, there are many common misconceptions concerning custody of the children when parents decide to part ways. Many believe that the judge will automatically award custody of the children to the mother, making her the so-called "primary parent." This article is intended to address a few common misconceptions and to provide some valuable information regarding Texas courts and the applicable law when deciding these delicate issues.

The Basics

First and foremost, we must address a few of the basics of child custody in Texas. Texas courts use the word "conservatorship" rather than "custody" when referring to the rights and duties

associated with being a parent. When determining conservatorship, Texas courts do not appoint a so-called "primary parent." Rather, courts generally appoint parents as joint managing conservators, meaning that both parents share the rights and duties associated with being a parent. Although Texas law does not recognize the appointment of a "primary parent," the term "primary managing conservator" is



commonly used to refer to the parent who has possession of the children for a majority of the time, receives child support, and has the ability to make important decisions for the children.

The Power to Make Decisions

One parent is almost always granted the exclusive right to choose where the children's primary residence will be located. This right is most often limited by a "residency restriction," meaning that the children's residence must be located within a certain geographic area. The children's residence is normally limited to the county in which the divorce was granted, as well as counties that border or are "contiguous" to that county. For in-

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DON'T LET DEBT RUIN YOU: HOW TO PROTECT YOURSELF

Division of Debt Incident to Divorce

When a decision to end a marriage is made, all debts incurred by the parties during their marriage should be divided before the divorce is finalized. Normally, all debt incurred during marriage is considered community debt by the Texas court and both parties are normally responsible for repayment. Your first thought may be to divide the debt equally between the parties so that each person is responsible for payment of fifty percent. Or, maybe one spouse agrees to take all of the debt in exchange for being awarded more of the marital assets. Although dividing the debt in this manner may appear harmless at first glance, it could prove quite costly.

A Tragic Example

You may be wondering why this is so important. What exactly is the harm

in dividing the debt between the parties and allowing them to go their separate ways? There is no guarantee that harm will come from dividing the debt in this manner. In fact, it is possible that both parties will pay the debt and live happily ever after. However, there is great risk associated with dividing the debt in this manner. Please consider the following scenario:

John and Jane Doe have been married for ten years. John is a teacher and Jane is a doctor. They have \$50,000.00 in credit card debt and \$100,000.00 in their joint savings account. John and Jane agree to award Jane all of the credit card debt. To offset the \$50,000.00 of debt that is awarded to Jane, Jane will receive \$75,000.00 of the funds in their joint savings account. This leaves John with only \$25,000.00. In a

perfect world, Jane will pay off the joint credit card debt from the funds she receives from the divorce settlement, leaving her with the same amount of money as John. However, Jane decides to use the funds to buy a house, instead. Jane continues to make the minimum payments for five years until she loses her job. She is no longer able to make the minimum payments on the credit card debt. She files for bankruptcy. The house that she purchased with the funds from the divorce settlement is protected by the homestead exemption. The creditors soon seek payment from John, who has no other choice but to pay the debt or see his credit destroyed. Now, John is stuck paying the parties' joint credit card debt while Jane enjoys her new home.

As you can see, dividing the

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COMMON CHILD CUSTODY QUESTIONS EXPLAINED (CONT'D)

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stance, if your divorce was granted in Denton County, the children's residence may be restricted to Denton County and counties contiguous to Denton County. This is actually a larger geographical area than many people realize. After all, there are five counties that are contiguous to Denton County, including Wise County, Collin County, Dallas County, Tarrant County, and Cook County.

The parent who is granted the exclusive right to designate the children's primary residence may also be granted the exclusive right to make decisions regarding the children's education and the exclusive right to receive child support. However, this is not always the case. If parties are willing and able to come to an agreement, they have the freedom to make decisions regarding how the parties will share these rights. For instance, instead of awarding one parent the exclusive right to designate the children's primary residence, parents can agree to restrict the children's residence to a much smaller geographic area. Parents can also agree to make joint decisions regarding other important rights, such as the right to make decisions regarding the children's education and the right to consent to invasive medical procedures.

The Parenting Plan

The Standard Possession Order is the visitation schedule that is most commonly ordered by Texas courts in divorce and child conservatorship proceedings. Under the Standard Possession Order, one parent will typically have possession of the children on the first, third, and fifth weekends of the month (Friday at 6PM to Sunday at 6 PM), a couple of hours on Thursday nights each week during the school year, some extended possession time in the summer, and alternating holidays and spring breaks. The other parent will have possession of the children at all other times, unless the parties agree otherwise. Although the Standard Possession Order is ordered regularly, the court has alternatives.

It is not uncommon for a court to order what is referred to as the "Expanded Standard Possession Order." The Expanded Standard Possession Order enables the "non-primary" parent to have possession

of the children for twice as many overnight visits than is typical under the Standard Possession Order.

Remember, parents have the option to present an agreed parenting plan to the court. Texas courts normally approve an agreed parenting plan. When parents are willing and able to agree on a parenting plan that is in the best interest of their children, the possibilities are endless.

An Inability to Agree

Many years ago, Texas courts generally ruled in accordance with the well-accepted principle that children should live primarily with their mother in the event of a divorce. Today, it is not uncommon for mothers to work full time while fathers stay home and take care of the children or work from home. It is also very common for both parents to work outside of the home and to share the responsibilities of taking care of the children and the household. In an ever-changing society, in which traditional gender roles are no longer strictly adhered to, child conservatorship laws have evolved. So what does this mean for parents who are in the midst of a custody battle? Courts now have a defined list of factors to consider when determining conservatorship of the children.



According to the Texas Family Code, the best interest of the child is always the primary consideration in determining issues of conservatorship and possession of and access to the children. In determining the best interest of the child, the court may consider factors such as the desires of the child, the emotional and physical needs of the child, the emotional and physical danger to the child, the parenting abilities of each person seeking

custody, the stability of the home, the current routine concerning possession and child rearing, and the acts of a parent that may indicate that the parent-child relationship is not a proper one, among others.

This means that courts will likely evaluate which parent has been raising the children most of the time as well as how well that job has been done. For example, who takes the children to and from school? Which parent responds when a child is sick at school? Who cooks meals for the children and tucks them in at night? Who takes the children to the doctor and attends parent-teacher conferences? This being said, if one parent stays home with the children and is their primary caregiver while the other parent works outside of the home, that parent is in a good position to be named what is commonly referred to as the "primary managing conservator." Keep in mind, however, the court is still looking to what is in the best interests of the children when making this decision.

The truth may be that both parents work outside of the home and share these responsibilities. In these situations, the courts will look to a wide array of factors to determine what is in the children's best interest. The outcome may be more difficult to predict.

Conclusion

Many parents who are going through this process quickly realize that making decisions for their children together is much better than leaving the decisions to a judge who does not personally know the parties, the children, or the situation. After all, who do you feel is in the better position to make decisions that are in the best interest of your children; you and the child's other parent, or the judge? Many parents feel that they are in the better position to make these decisions and choose to take such decisions out of the judge's hands.

If you are in the midst of a battle for your children or fear that you soon may be, you should seek the help of an experienced family law attorney. An experienced family law attorney can help you develop a strategy to achieve your goals and to protect your relationship with your children.

DON'T LET DEBT RUIN YOU: HOW TO PROTECT YOURSELF (CONT'D)

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debt inappropriately can have a drastic impact on your life, even years after the divorce is finalized. The key point to remember here is that dividing the debt in the divorce decree controls the rights of you and your spouse, but it does not limit the rights of creditors. If your name is attached to the debt, the creditor can come after you for payment, regardless of the terms in your divorce decree.

This is a tragic example of something that occurs with alarming regularity. While this example is simple, the reality of debt division is more complex, encompassing many issues. Before you make decisions concerning the division of debt, it is important to have all the facts. It is always advisable to consult with a family law attorney prior to finalizing your divorce.

The Indemnification Clause

Many divorce decrees contain what's called an "Indemnification Clause," which allows one spouse to go back to

court and seek reimbursement and damages from the other spouse in the event that the debts were not paid as ordered in the divorce decree. As described above, this does not limit the rights of creditors but it provides the possibility for you to recover from your spouse if he or she doesn't pay the debt awarded to him or her in the decree.



It is important to remember that the indemnification clause only provides the possibility of recovery; it does not guarantee recovery. For example, if your now ex-spouse files for bankruptcy, it is probable that you will no longer be able to recover from them, forcing you to bear the burden of the debt entirely on your own. Depending on the type of bankruptcy which your ex-spouse files, the entire debt owed to you pursuant to the decree may be discharged. At that point, you are the only recourse for disgruntled creditors and your spouse may be off the hook for any obligation he or she was ordered to pay in the decree.

Conclusion

If you find yourself going through the divorce process, be careful when determining how to divide the debt between you and your spouse. There are ways to minimize your financial risk as a result of the divorce, but you must plan accordingly.

THE TRUTH ABOUT ADULTERY IN TEXAS

In Texas, a divorce can be granted without alleging fault. This is commonly referred to as a "no-fault" divorce and accounts for the vast majority of divorces granted in Texas. However, adultery is one of a number of grounds listed by the Texas Family Code as a basis for finding a spouse at fault for the dissolution of a marriage. Regardless of fault in a divorce proceeding, Texas courts should divide the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage. While the property division must be equitable, it does not have to be equal.

In a divorce, one of the few ramifications for adultery recognized by Texas law is a possible disproportionate distribution of

the community estate to the innocent party. Adultery is one of many factors listed by the Texas Family Code that may be considered by the court in deciding whether to award a disproportionate share of community property to one spouse. However, the courts are not required to award the innocent party a larger percentage of marital assets even if adultery is found.

In addition to a disproportionate distribution of the marital estate, Texas courts may also consider adultery in determining the amount and duration of spousal maintenance. However, it is important to understand that adultery is not a factor in determining whether a spouse is eligible for spousal maintenance. There are certain requirements outlined by the Texas Family

Code that must be met before a spouse is eligible to receive spousal maintenance. Only after a court determines that a spouse is eligible, can the court consider adultery in determining the duration and amount of the spousal maintenance.

You may be wondering why a court might refuse to award a disproportionate share of the marital estate or increase the amount of spousal maintenance when one spouse committed adultery. Remember, adultery is only one factor that the court may consider. The goal of the family courts in Texas is to divide the marital property in a manner that is just and right. In other words, the judge assigned to your case has a great deal of discretion in this matter.

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