

*An Elmhurst family lawyer and certified mediator, Laura M. Urbik Kern discusses parental rights and responsibilities during and after divorce.*

**Is it true that Illinois no longer uses the words “custody” and “visitation” when assigning parental rights and responsibilities during and after divorce?**

**Laura:** Yes, that's correct. The law changed January 1st of this year, which indicated that they would now be called parental rights and responsibilities. What that means is there are the parental rights, decision-making, which are four things: religion, education, medical, and extracurricular activities. All other decisions are made by the party who has the children at the time the decision needs to be made.

The other half of it is parenting time. Parenting time is what used to be called visitation. Parents don't visit their children, parents parent their children. We want to make it clear that when people are having time with their children, it's not supposed to be a vacation; it's supposed to be parenting time. It can be a vacation, but for the most part, they need to be the parents, not the visitor.

Same with the decisions. The decisions can be divided as one person having them all, both of them having equal, one of them having one, one having two, one having three – it depends. It all depends on the parents. The thing that parents most need to know about this new statute is to stop using the word custody. Custody doesn't mean anything in the divorce world other than decision-making and they live with both of their parents. There isn't an argument to be made that one person is primary. They're both primary in the children's lives, and the focus is on the kids.

**How does a divorcing couple decide whether the kids should live with one parent most of the time, all of the time, or split their time between both parents' homes equally?**

The statute lays out in Section 602.5 and 602.7 of the *Illinois Marriage and Dissolution Act* what the specific rules are about time. Most of the time, the court will look to see what the behavior has been of the parties in the two years prior to the divorce being filed or, if it's an infant, since the child's birth.

We're going to look at a number of different factors, care-taking factors, decision factors, all kinds of things like that to try to figure out what the best arrangement is in the kid's best interest. People tend to focus on what they want. It's not about them, it's about the kids. If we can get people on the same page for the kids, we're doing a good job. Also, there's a minimum of 35% to each parent that is required by the statute. Can it go less than that? In certain situations, but that's fact-driven. But most of the time, it has to be above 35%. I have to say that, in most cases, it just depends on the people's work schedules and the kids' schedules.

**If the children do split their time between the two homes, what are the most common types of living arrangements of children's living situations post-divorce?**

When people say 50/50, it's kind of elusive because what are you really talking about? Are you talking about waking hours, sleeping hours, camp? What are you talking about? That's the first thing that a good lawyer has to do, is try to figure out what is going on

and is it a case where the kids need to see both parents approximately the same amount of time? Does that mean parents have to alternate weeks? No. Does it mean parents have to alternate months? No. There are a million ways to do this. In mediation, you explore all those different types of ways. I think there's no right answer to that.

**What happens if one parent's home post-divorce really isn't set up to have the children? Should the child have as much time in both homes as possible?**

What we do is we try to structure it so the kids get to see both parents equally. However, maybe there isn't a way for the children to stay overnight with the other parent. What would happen then is it would be a graduate schedule where you'd start out with, for example, every Tuesday night, every Thursday night, and every other weekend during the day. Once the person gets an apartment or a house that's big enough to accommodate the kids, then the overnights kick in. We do this with small children too when it's going to be difficult for their parents to be away from their bonded parent for a long time. We have to set up specific schedules for that.

**How does the court decide who gets primary parenting time if both parents want it?**

The ideal situation is that the parents come up with the parenting plan on their own of what they want. In Illinois, a lot of people feel that child support is tied to parenting. In some ways it is, but in some ways it isn't. We have case law that says the non-primary parent will pay child support to the other. We have case law that says the primary parent will pay child support to the other. It really is one of those things where you kind of have to look at facts of the case and try to figure out if the parties are able to go to mediation and work it out.

In fact, in Illinois, we require that if they don't have an agreement for them to go for three hours of mediation, if they still don't have an agreement, then they have to go to the next step, which might be an attorney for the child, a Guardian ad Litem, or a psychologist. When you're starting down those roads, you're talking about a lot of money. I try to get people to think about what they're doing and save their money for their kids instead of mine.

**Can a divorcing couple create their own co-parenting plan, assuming they can agree on the details?**

Absolutely, they can. It's not a difficult thing to do if you sit down and use a calendar. That's how most mediators would do it. They would get a calendar and try to figure out, looking at the reality of the situation. Saying 50/50 is very different than enforcing 50/50, because if somebody get stuck at work or if somebody gets sick, there are a million things that can happen. I think it's really important that people think about those things when they're creating their plan. I think they can agree on the details but they may need some help.

**What if they can't agree on all those details? Who could help them and who could help them create that?**

Mediators, their attorneys... If neither attorney is being in agreement, then you can give the two plans to the judge and the judge can make a decision, based on the hearing, on which plan he's going to use (or a combination of those plans).

**Does this mean that a co-parenting actually needs to be approved by a judge?**

Absolutely. It's called an allocation judgment now; we don't call it co-parenting or anything else. It's a parental allocation of rights and responsibilities judgment.

**Can this parenting plan be modified after it has been approved? If so, under what circumstances can it be modified?**

It depends. If the parties want to do it as an agreed order, they can. If otherwise, the parties are going to have to wait. The issue of decision-making, you have to have it for two years before you can change it – unless there are certain circumstances that will change it. Family law is extremely fact-driven. What happens in one family isn't going to be the same thing that happens in another.

The other thing that can happen is someone can file a petition to modify the parenting time. That can be filed at any time as long as it's in the best interest of the children. Where before we used to have residential custodians and we used to fight about who's residential and all that, no longer does that occur. We only talk about who's making decisions and how much time they're going to have and whether it still meets the best interest of the children. If it doesn't, then you want to change it.

**If one spouse adopts the other spouse's biological child while they're married, does the adoptive parent have the same parental rights and responsibilities as the birth parent during and after divorce?**

Yes, they do. The problem can arise where one spouse is a second spouse and they have raised the child but they haven't adopted the child. They could have a very, very difficult time. They will have no decision-making, but they may have a difficult time even having parenting time.

**Can a parent give up their rights and responsibilities for their own child?**

In Illinois, we only have two vehicles to do that. One is going through an adoption, terminating your parental rights. Second is if you are involved in a juvenile court proceeding, DCSF is involved, and the child winds up being adjudicated and neglected or abused, it is possible then for the parent to give up their rights or have their rights terminated. Those are the only two ways in Illinois to get parental rights and responsibilities.

There is another vehicle called guardianship, but that's a whole different aspect of everything. Most of the time, if I'm talking to grandparents or other people, I want to look at the statute that addresses parenting time and standing, which means that ability to come into court. You have the right to come into court, which not everybody does on a family law case.

**What is the criteria for assessing best interest in Illinois?**

The statute lists a number of different things that the court would take into consideration when they're assessing best interest. Part of it, they will look at the wishes of the parents and the wishes of the child, depending on how old they are. By the way, the wishes of the child never controls; they don't get the control.

The amount of time that parents spent performing caretaking functions for the 24-month filing prior to the petition, you have to look up what caretaking functions are. They're like taking him to school, taking him to the doctor, making him food – all different types of caretaking functions are involved. They'll look at any prior agreement or course of conduct between the parents. They'll look at the inner action and inner relationship with a child with his parents or siblings or any other person. They'll look at the adjustment to his home, school, or community. They'll look at the mental and physical health of everybody. They'll look at the kid's needs, they'll look at the distance between the parents' houses, and the costs of transportation between them. Whether parenting time should be restricted, whether there's physical violence which is directed against the child or someone else in the house, the willingness and ability of each parent to place the needs of the kid ahead of their own is the key factor.

If you find two parents and one of them is totally unwilling to promote the relationship with the other parent and the other parent is a good parent, not an abuser, not a drug addict, then that can come into play big time, especially in a trial where the judge is judging the demeanour of the people.

Also, there is the occurrence of abuse against the child. Whether the parent is a sex offender, whether the parent is in the military, they have to have a special plan or any other factor that the court finds to be relevant, which the sky is the limit.

**At what age will the wishes of the child be seriously considered regarding parenting time?**

The court looks at each of the factors. None of the factors has greater weight than the other on paper. It's the facts that say which factors are of greater weight. A child that is over, like in high school, their opinion is going to be considered much more than someone who's five. It's not a matter of they make the decision. We never give that kind of power to kids. Kids always have to know that the parents are in charge and in control. The more the parents get along, the healthier those children are. The more they fight, the more damage people do to their kids. I really don't think people realize that, sometimes, it's not the divorce that causes broken children – it's the party's behavior.

**Can parenting rights and time be awarded to grandparents either temporarily or permanently if both parents are deemed unfit?**

That's a high threshold to first find them unfit. Yes, there's a new section in the statute that allows grandparents, stepparents, and siblings to come in and ask the court to have parenting time or, in that case, visitation because we want to distinguish it from parenting time. Those people are allowed to have visitation, and whether or not they get decision-making would depend on if the parents were both found unfit; if so, then the child would have to be adopted by someone.

**Even if it might be a temporary measure? Let's just say one of the parents has gone into a residential program for drug or alcohol abuse and is trying to get clean and sober but obviously can't take care of a child right now.**

You could do something called a standby guardianship, which gives guardianship to whomever the grandparent is until the mother or father can come out of it. You can enter an order where the parties are in agreement that the grandparents will have the kids until further order of court. There's a whole myriad of different things that you can do. But if both parents were declared unfit by the court, there'd have to be an adoption.

**If there's a lot of conflict between the parents, can they still share equal parenting rights and responsibilities for their children?**

What we have to do is we have to separate the party's relationship from the party's relationship with the children. The hardest part of a divorce lawyer's job is to get the people to visualize that we're not dealing with their husband or wife anymore, we're dealing with their relationship with the kid and what they want out of that relationship. It is important that they understand at the get-go that that's our goal. We try to educate parents on the danger of their behavior and abuses to the kids and all the different ways of conflict resolution. I really think that's why we're called attorney and counselors.

**If a child is living by choice with a parent full-time but the court granted equal parenting rights and responsibilities and time to both parents, should the de facto full-time parent apply to change the agreement to reflect this reality? If so, how would such a change affect both parents?**

At first, it wouldn't be able to get done outside a court unless they had an agreement and if they had an agreement that would be filed with the court. If they did not have an agreement and they were both supposed to have time with the child and the child is refusing to go to the parent's, that's a different issue than the parent is telling the kid he doesn't have to go.

This is very fact-driven, and the court is not going to allow either parent to manipulate a child to get them to go with what they want them to go. For instance, a parent could say, "You know what? I don't want to pay child support, so maybe I'll have the kid live with me and I'll ask them for child support." Well, the other side of it, if the kid has no relationship with the other parent, that's going to damage them in the future. You have to be really, really careful about what you allow to go on and what you don't allow to go on and whether you go to court to fix it or not.

**What kind of decisions do the parents still have to make together?**

They have to decide with the schools, whether they're going to be public or private. The court cannot send a child to private without the parent's consent or force them to pay for it. There's school, there's whether the kid needs IEPs. Does the kid need a tutor? All those things roll into the education decisions. On the religion front, we look at did the parties practice religion during the course of the marriage, and if they did, we should keep that going. If they didn't, we should say whether they'll be raised in the Christian

faith, raised in no faith – whatever it is. We don't even have to address religion if we don't want to.

As far as medical decisions are concerned, obviously dental, medical, psychological, psychiatric – all of those are major decisions to make. Whether or not to put a kid on drugs for ADD is a big thing that people fight about a lot. Extracurricular activities usually boil down to timing, how much time is going to be taken away from the other parent. But if you look at this and you say, “Okay, if we were still married, would we be taking our kids to the soccer games? Of course we would. So, why wouldn't we do it now? It's that kind of stuff that you try to put the focus back on the kids and say this is what my kid needs. We should make this decision in the best interest of the kid and not based on money, time, or anything else.

**At what point, if the child is distressed enough, would you change the parenting arrangements?**

The first thing I would do, if it was my client that had the child, is encourage them to get the child into counseling immediately to find out what's going on. Second of all, I would then encourage them to include the other parent in the counseling with the kid so you can find out where the issue is. A lot of times, the issue isn't that they don't want to go, it's just that they want to be with their friends, which is understandable. Maybe you can work out a deal with the kid where on your weekend he/she spends Friday night with their friends and then Saturday night that's your night with her or him. There are a million ways to work on that. But I think before you go to court, because court is so expensive, you should try to work this out through other dispute resolutions such as collaborative law or mediation.

**Is a parent able to do the same things with their child as they did when the family was intact? Do they need the permission of the other parent?**

That can be addressed in their parental allocation judgment. A good lawyer will add possibilities into that judgment, such as if they're going to go out of town or out of the state. They have to give notice and they have to give a certain amount of time. They have to make those plans so far in advance. Who has the passport? There's a bunch of stuff that goes with that. When the client comes in, you want to make sure that they bring anything to your attention that might be different.

As an example, I have a client that's from India. Her husband's from Pakistan, which is unusual to have an Indian marry a Pakistani person. But in this case, it's two separate countries. They both want to go back to their country. They're both terrified that the other parent isn't going to return the kid. So, in those kinds of situations, the first thing you're going to do is look at a treaty called the Hague Convention, and we're going to see which countries are in that. If they're in that, we can get the kid back, and if they're not, it's going to be hell to get the kid back. We want to be really, really on top of the facts of each case.

**What happens if one parent wants to move away and take the children?**

First of all, if a parent wants to move away, we consider that to be a substantial change in circumstances, which allows us to file a petition for relocation – that's what it's

called. Either parent can file that petition. They have to give notice at least 60 days before. They have to have all kinds of things in the notice about what they're doing, why they're doing it, and everything else. That can be found in the *Illinois Marriage and Dissolution of Marriage Act*, section 609.2. There are 11 different factors, and if a parent moves more than 25 miles away, they have to go through this process.

Another parent can object. The other parent can say, "You know what, I don't want you to move and here's the reason why, or the parties could sit down and work out a new parenting plan based on the new situation of where everyone's going to live. The judge is also going to look at the best interest factors to see whether or not it is in the child's best interest to relocate.

**Assuming that a relocation does take place, I'm guessing that they would have to figure out a new kind of parenting time – maybe one parent gets the whole winter vacation and summer vacation if it's no longer practicable to go between the homes on a weekly basis.**

That's correct. That's what we would do. We would work out a new parenting plan. A lot of times when people move out of state or very far away, we have to factor in transportation expenses, who's going to pay those, how much are they going to be, and is it feasible for that other parent to be able to see the child given the distance. Maybe they don't have any money and they can't pay for a plane ticket. The other parent has the wherewithal to pay for the ticket, so maybe we're going to make them pay for the plane ticket to get the other parent there. Again, it's always fact-driven.