

## CHILD CUSTODY, PARENTING & SUPPORT

By

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### A. Custody Arrangements

The Rules Governing the Courts of the State of New Jersey ("Rules") encourage parents to determine their own parenting plan by giving the parties plenty of time to work on it (up to 74 days from the last responsive pleading) and bringing the matter to Court only after the parties fail to agree upon a plan. See Rule 5:8-5(a). Rule 5:8-5 also sets out the requirements for the contents of a parenting plan:

**Contents of Plan.** The Custody and Parenting Time/Visitation Plan shall include but shall not be limited to the following factors:

- (1) Address of the parties.
- (2) Employment of the parties.
- (3) Type of custody requested with the reasons for selecting the type of custody.
  - (a) Joint legal custody with one parent having primary residential care.
  - (b) Joint physical custody.
  - (c) Sole custody to one parent, parenting time/visitation to the other.
  - (d) Other custodial arrangement.
- (4) Specific schedule as to parenting time/visitation including, but not limited to, weeknights, weekends, vacations, legal holidays, religious holidays, school vacations, birthdays and special occasions (family outings, extracurricular activities and religious services).
- (5) Access to medical school records.
- (6) Impact if there is to be a contemplated change of residence by a parent.
- (7) Participation in making decisions regarding the child(ren).
- (8) Any other pertinent information.

The Court will evaluate a plan containing all of the required information against a standard that places the best interest of the child as its primary concern. *Wilke v. Culp*, 195 N.J. 487, 483 (App. Div. 1984) cert. den. 99 N.J. 243 (1985). To make such a judgment the Court must engage in meticulous fact finding<sup>[2]</sup> and refrain from bias. Once common, the "tender years doctrine", a presumption that small children of tender years should remain with their mother, has eroded<sup>[3]</sup> as Court focus on the best interests of the child.<sup>[4]</sup>

## I. Traditional Custody

In examining whether a custody arrangement was traditional or non-traditional, the Court in *Pascale v. Pascale* 140 N.J. 583, 590 (1995), felt that it had to discard the term “joint custody” as unhelpful and misleading because it is used too broadly. Instead the Court focused on the elements of joint custody, legal custody and physical custody. *Pascale*, 140 N.J. 595-596. The Court in *Beck v. Beck*, 86 N.J. 480, 487 (1980) defined legal custody as, “the authority and responsibility for making 'major' decisions regarding the child's welfare,” and indicated that it could be held jointly by both parents. The *Pascale* Court further clarified saying that, “joint legal custody provides rights and responsibilities to custodial parents, but it also confers rights with less significant responsibilities to non-custodial parents.” *Pascale*, 140 N.J. at 596.

On the other hand, joint physical custody is defined as “joint responsibility for minor day-to-day decisions”<sup>[5]</sup> and the exertion of continuous physical custody by both parents over a child for significant periods of time, *Beck*, 86 N.J. at 487. The *Pascale* Court describes a variety of what it considers to be joint physical custody arrangements, such as a schedule where each parent exerts physical custody over the children three days per week and rotates the fourth day or a schedule of alternating weeks. The Court concluded, stating that, “joint physical custody means that the child lives day in and day out with both parents on a rotating basis. Numerous ‘parenting times’ with a child do not constitute joint physical custody; to constitute joint custody, each parent must exert joint legal and physical custody over the child.” *Pascale*, 140 N.J. at 597.

In *Pascale*, the parties’ parenting plan called for the father to spend from 5:30 pm to 8:30 pm on Wednesdays and Thursdays with the children during the school year and overnight on those two evenings in the summer. Every weekend each of the parents would have the children for a full 24 hour period, including an overnight. The Court found that this resulted in an arrangement where the mother was primarily responsible for the day to day care of the children about 80% of the time. Based its analysis of legal and physical custody as well as the parties’ parenting plan, the *Pascale* Court determined that the parties’ parenting schedule was a traditional parenting schedule, thus requiring them to use the Guidelines to determine support.

## II. Creative Custody

In a “non-traditional” custody arrangement, the parties are not subject to the Child Support Guidelines. *Pascale*, 140 N.J. at 590. The *Pascale* Court found that a custody arrangement where the children would spend 50% of their time in the custody of each parent on a regular rotating basis was a non-traditional arrangement. *Pascale*, 140 N.J. at 597. As discussed above the Court described what it considered to be non-traditional arrangements – three days per week with each parent and alternating the fourth day, alternating weeks with each parent, or even alternating years. *Pascale*, 140 N.J. at 597. The focus of the Courts in reviewing all custody arrangements is the best interests of the children and meeting this standard is the paramount concern of the courts:<sup>[6]</sup>

A truly joint custody arrangement will only work in a limited number of cases because such a plan must meet the test set out in *Beck*, 86 N.J. at 497 – 499: 1) at the time the parties seek joint physical custody, the children must have existing relationships with their parents that would benefit from joint custody; 2) both parents must be fit, “that is, physically and psychologically capable of fulfilling the role of parent;”<sup>[7]</sup> 3) both parents must be willing to accept joint physical custody<sup>[8]</sup>; and 4) both parents must exhibit the ability to cooperate in a manner that will allow them to successfully raise their child with a minimum of conflict. The parents must be willing and able to put their differences and hurts aside and act selflessly in the best interest of their children.

Short of as true joint physical custody arrangement, Courts will allow and enforce almost any plan that serves the best interests of the children and is workable for the parents. In *Mallamo v. Mallamo*, 280 N.J. Super 8, 9 (App. Div. 1995) the Appellate Division affirmed the trial Court's custody schedule which appeared to allow the father to have visitation with his two children at different times rather than both children at the same time. Courts have also approved custody arrangements that allow visitation for surrogate mothers<sup>[9]</sup>, grandparents<sup>[10]</sup>, and adult siblings<sup>[11][12]</sup> so long as it is in the best interests of the child. The Court has found that, at least in theory, even step-parents<sup>[13]</sup> may have rights to parenting time as part of a custody plan. In rare instances, the court will approve split custody plans in which each parent has custody of one or more of the children. However, Courts seldom implement this extreme measure as Courts and parents are very reluctant to separate siblings.

### **III. Alternatives**

Third party custody, though seldom granted, is an alternative to parental custody. In *Hoy v. Willis* 165 N.J. Super 265 (App. Div. 1978), the Court refused to transfer custody of a 6 year old boy from his foster mother, a paternal aunt, to his natural mother. The mother voluntarily placed the child with the aunt when the boy was 18 months old. It was at a time when the mother was experiencing psychological problems and was intermittently hospitalized for mental breakdown and depression. By the time the mother was prepared to resume custody, the Court found that the child had developed a strong bond with the aunt and thought of her as his psychological mother. The only expert testimony offered at trial indicated that removing the child would cause trauma, "a marked regression in behavior, depression, anxiety and anger requiring professional therapy."<sup>[14]</sup> Consequently, the Court ordered custody to the aunt.

Another uncommon alternative to some form of joint custody is to grant custody solely to one parent instead of some arrangement involving both. Courts are dedicated to the proposition that it is in the best interest of the child to have a relationship with both parent. Toward that end they have considered parenting plans involving regular visits to incarcerated parents in prison. *Fusco v. Fusco*, 186 N.J. Super 321 (App. Div. 1982). In order for a parent to be denied custody the Court must find that the parent is unfit or unsuitable. In *Parivash v. Yousef*, 94 N.J. Super 403 (App. Div. 1967), the Court granted sole custody of a child to the father after the mother absconded to Iran with their other child. However, the Court also ordered the father to pay support for the child in Iran. In *S. v. A.* 118 N.J. Super 69 (Ch. Div. 1972), the father was awarded sole custody of the parties' children when the Court found the mother to be unfit because she was an alcoholic, had psychological problems, and had tendency to leave the marital residence, and the children for extended period without warning.

### **B. Visitation Issues**

Visitation, now more commonly referred to as parenting time, is strongly encouraged and protected by the Courts. Every child has the right to an opportunity to know, love, and respect his or her parents and in order to do so the child must be afforded parenting time with both parents, including a non-custodial parent. *Barron v. Barron*, 194 N.J. Super 297 (Ch. Div. 1982). Similarly, parents have a constitutional right to enjoy a relationship with their children. *Adoption of a Child by P.S.*, 315 N.J. Super 91, 107 (App. Div. 1998). In fact, as discussed above, Court will deny parenting only in extreme circumstances in which it is clear that the child will be physically or emotionally harmed or the parent is unfit. *Wilke*, 195 N.J. at 491.

The Court's analysis for parenting time is virtually the same as it is for determining custody in that the best interests of the child are the Court's paramount concern. *Sheehan v. Sheehan*, 51 N.J. Super 276 (App. Div. 1958) and *Daly v. Daly*, 21 N.J. 599 (1956). As with custody, Courts are willing to accept virtually any parent plan the parties propose so long as it is in the best interests of the children. However, once a Court accepts a plan it is serious about enforcing it. Failure to abide by Court sanctioned parenting plans can result in contempt charges<sup>[15]</sup> and worse. In fact, in *Lathdrop v. Lathdrop*, 57 N.J. Super 532 (App. Div. 1959) the Appellate Division upheld the trial court's sentence of suspended jail time and probation for mother's unilateral decision to withhold parenting time as well as an increase in the length of probation to five years following a second incident when the father did not get to see his children.

### **C. Modifying Existing Custody and Parenting Terms**

Custody orders can be modified. The party requesting a modification of a custody decree has the burden of demonstrating a change of circumstances significant enough to warrant the requested modification<sup>[16]</sup> and that the proposed change is in the best interest of the child; that the change will promote the "safety, happiness, physical, mental and moral welfare of child." *Mastropole v. Mastropole*, 181 N.J. Super 130, 136 (App. Div. 1981).

In order to evaluate an application to alter custody the judge must have information about the circumstances of the parties that led to the previous custody award. This is necessary "for the twofold purpose of 1) acquainting the court with the facts which existed at the time that the original judgment was entered, so that he may ascertain what motivated the original judgment and determine whether there has been any change in circumstances, and 2) aiding the court in evaluating the bona fides of the person who seeks a modification upon the grounds of change in his status of fitness. Such evidence has a vital and essential bearing upon the welfare of the child." *Mastropole*, 181 N.J. Super at 136. The courts will also consider the children's preferences and will learn these through Court appointed evaluators or by interviewing the children *in camera*.

### **D. Determining and Calculating Child Support**

"Child support after divorce is necessary to ensure that a child's basic needs are provided by his parents, who might otherwise neglect their responsibilities to maintain the child." *Pascale* 140 N.J. at 590.

#### **I. Child Support Guidelines.**

"In establishing the necessary level of child support, New Jersey courts look to the Child Support Guidelines." *Pascale*, 140 N.J. at 593. The current New Jersey Child Support Guidelines ("Guidelines") went into effect on September 1, 1997. These Guidelines are a major overhaul of the guidelines previously in force. Among the improvements are an increase in the income tables from \$1,000 per week (\$52,000 per year) to \$2,900 per week (\$150,800 per year), and credits for time spent with the supported child(ren), for the marginal costs of providing housing and transportation to meet the needs of timesharing and parenting requirements.

Rule 5:6A requires the Guidelines set forth in Appendix IX of the Rules to be applied to all applications to set or modify child support. The Guidelines may be modified by the Court only if good cause is demonstrated by the parties. Rule 5:6A defines good cause as: "a) the considerations set forth in Appendix IX-A, or the presence of other relevant factors which

may make the guidelines inapplicable or subject to modification, and b) the fact that an injustice would result from the application of the Guidelines. In all cases, the determination of good cause shall be within the sound discretion of the court.”

Appendix IX is broken up into sections that walk the user through the process of determining Guideline support. Appendix IX-A sets forth Considerations in the Use of Child Support Guidelines; a primer for the use and applicability of the Guidelines. Appendix IX-A states that the Guidelines should be used in all “traditional” custody arrangements. (See section A(I) supra) Appendix IX-B gives line by line rules for completing the mandatory child support worksheet in a format not unlike the workbook that accompanies 1040 tax forms. Appendix IX-C (sole parenting), Appendix IX-D (shared parenting), and Appendix IX-E (net child care expenses) are the worksheets used to help the parties calculate child support. Note that the Guidelines calculate child support on a weekly basis and all entries on the worksheet must reflect this. The Rule 5: 6A requires that the appropriate worksheet(s) must be submitted to the Court and become a permanent part of every Family Division case file involving child support:

A completed child support guidelines worksheet in the form prescribed in Appendix IX of these Rules shall be filed with any order or judgment that includes child support that is submitted for the approval of the court. If a proposed child support award differs from the award calculated under the child support guidelines, the worksheet shall state the reason for the deviation and the amount of the award calculated under the child support guidelines.

Appendix IX-F is the Schedule of Child Support Awards, a chart that determines the amount of child support necessary based on the weekly net income of the parties and the number of children in the family. This Schedule starts at an income level of \$170 per week or \$8,840 per year and ends at \$2,900 per week or \$150,800 per year. Appendix IX-G essentially presents the same information on Appendix IX-F in percentages. Appendix IX-H gives the tax withholding tables associated with Guideline support.

The parent’s actual income may not be the income used for calculating child support. The Guidelines specifically allow income imputation<sup>[17]</sup> particularly when one of the parties is under or unemployed. *Gertchner v. Gertchner*, 262 N.J. Super 176 (Ch. Div. 1992). Income one parent receives from another in the form of support, maintenance or alimony may not be included as part of the Guideline computation. *Koelble v. Koelble*, 261 N.J. Super 190 (App. Div. 1992). However, if one parent receives support from a new spouse, not the supported child’s other parent, that support may be included in the child support calculation, *Ribner v. Ribner*, 290 N.J. Super 66 (App. Div. 1996), but not to the point where the determination of a parent’s income is calculated by combining with the new spouse’s income, *Hudson v. Hudson*, 315 N.J. Super 577 (App. Div. 1998).

It is also important to note that support is not dependent on parenting time. Even if a one spouse with holds parenting time, the other spouse must pay child support on time in full. Similarly, failure to pay child support does not give the custodial spouse the right to deny access to the children. *Hallberg v. Hallberg*, 113 N.J. Super 205 (App. Div. 1971).

## **II. Support Beyond the Guidelines**

The Court establishes child support awards for families with incomes above or below Scheduled levels. At the end of the schedules it gives specific directions to avoid projecting the schedule above the \$2,900 level. This was also the ruling in *Connell v. Connell* 313 N.J.

Super 426, 431 (App. Div.1998). The Rules require that at such levels the Court must apply the factors in N.J.S.A. 2A:34-23 which states in pertinent part:

a. In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court in those cases not governed by court rule shall consider, but not be limited to, the following factors:

- (1) Needs of the child;
- (2) Standard of living and economic circumstances of each parent;
- (3) All sources of income and assets of each parent;
- (4) Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;
- (5) Need and capacity of the child for education, including higher education;
- (6) Age and health of the child and each parent;
- (7) Income, assets and earning ability of the child;
- (8) Responsibility of the parents for the court-ordered support of others;
- (9) Reasonable debts and liabilities of each child and parent; and
- (10) Any other factors the court may deem relevant.

Courts have interpreted these factors in cases where income for one or both parties exceeds the Guideline levels. To determine appropriate support the Court must weigh both the needs of the child as well as the standard of living the parents set during the marriage or that they enjoy post-divorce. In *Loro v. Colliano*, 354 N.J. Super 212, 221 (App. Div. 2002) the Court indicated that:

We have generally recognized that where the parties have the financial wherewithal to provide for their children, the children are entitled to the benefit of financial advantages available to them. We have characterized such circumstances as reflecting a parent's "good fortune" and have held that children are entitled to have their needs accord with the current standard of living of both parents, which may reflect an increase in parental good fortune.

It continued, saying that when dealing with the special circumstances of high- income earning parent(s) who have the ability to pay child support beyond Guideline levels:

the dominant guideline for consideration is the reasonable needs of the children, which must be addressed in the context of the standard of living of the parties. The needs of the children must be the centerpiece of any relevant analysis. Other economic-dependent factors are of less significance, as the high earner's concession of ability to pay has essentially limited the consideration of such economic-dependent issues. However, any

consideration of needs must factor in the age and health of the children, as well as the other assets or income of the children, including any debts. *Loro*, 354 N.J. Super at 222

This means that, "children are entitled to not only bare necessities, but a supporting parent has the obligation to share with his children the benefit of his financial achievement." *Loro*, 354 N.J. Super at 222. This may include clean and comfortable housing, a reliable vehicle and other items which may have the effect of benefiting the custodial parent<sup>[18]</sup>, but "the fact that defendant might be incidentally benefited by the better housing, food, vacations or other attributes of the child's lifestyle is of no moment." *Hughes v. Hughes*, 311 N.J. Super 15, 30 (Ch. Div. 1998). At the same time the Court cautions that while "a child may benefit from a parent's good fortune and a custodial parent may be the incidental beneficiary of such good fortune, ... a custodial parent cannot through the guise of the incidental benefits of child support gain a benefit beyond that which is merely incidental to a benefit being conferred on the child." *Loro*, 354 N.J. Super at 226.

It also is important to remember that child support calculations, within or outside the Guidelines, are based on the parties' current earnings. This is different than a calculation for equitable distribution where the total assets of the marital estate come into play. Instead, "child support will be based on income rather than on net worth." *Loro* 354 N.J. Super at 223.

### **III. Modifying Support**

Rule 5:6B provides for regular cost-of-living adjustments to child support Orders. Either party may request a modification due to altered circumstances, because custody and parenting matters are generally no considered final. *Wilke v. Culp*, 196 N.J. Super 487, 494 (App. Div. 1984)

#### **1. Cost of Living Adjustment**

Rule 5:6B provides for cost of living adjustments to child support every two years and sets out the mechanism for doing it. It states:

All orders and judgments that include child support entered, modified, or enforced after the effective date of this rule shall provide that the child support amount will be adjusted every two years to reflect the cost of living. The cost-of-living adjustment shall be based on the average change in the Consumer Price Index for the metropolitan statistical areas that encompass New Jersey and shall be compounded. Before a cost-of-living adjustment is applied, the parties shall be provided with notice of the proposed adjustment and an opportunity to contest the adjustment within 30 days of the mailing of the notice. An obligor may contest the adjustment if the obligor's income has not increased at a rate at least equal to the rate of inflation as measured by the Consumer Price Index or if the order or judgment provides for an alternative periodic cost-of-living adjustment. Either party may contest the cost-of-living adjustment based on changed circumstances or may request that the Appendix IX child support guidelines be applied to adjust the amount of child support to be paid. The application of the child support guidelines shall take precedence over cost-of-living adjustments. A cost-of-living adjustment shall not impair the right of either parent to apply to the court for a modification of support provisions of the order or judgment based on changed circumstances. The forms and procedures to implement cost-of-living adjustments shall be prescribed by the Administrative Director of the Courts.

About two years following the enactment of this section in 1998, the legislature also relaxed Rule 4: 42-1 to allow the court administrator to automatically sign unopposed cost of living adjustment petitions on behalf of the Presiding Judge of the Family Part.

## **2. Change of Circumstance**

Other modification must be done with leave of Court. In fact, the moving party has the burden of making a prima facie case of changed circumstances warranting relief in order to obtain Court ordered discovery of the full financial circumstances of both parties. *Dorfman v. Dorfman*, 315 N.J. Super 511, 515(App. Div. 1998) and *Lepis v. Lepis*, 83 N.J. 139, 157-159 (1980). After the parties provide the discovery and the Court reviews it, the Court then determines if the circumstances justify alteration of the parties support obligations. If there are genuine issues of material fact, then the Court will hold a plenary hearing. *Dorfman*, 315 N.J. Super at 515.

Children entering college seems to be a trigger for support actions. In *Zazzo v. Zazzo*, 245 N.J. Super 124, (App. Div. 1990) the father sought to decrease his child support for the seven months of the year that one of the parties' children would be away at college. The father did not submit a current Case Information Statement with his motion, and based his argument on the needs of the children. If the Court granted the father's request, the mother would have to move to a more modest home as she would be unable to support herself and the children in their current home at the support level the father suggested. The Court found that this was inappropriate, saying, there is "nothing in the law or [the parties'] agreement that suggests the needs [the mother] shares with the children must be based on her \$24,000 income while the children's other needs should be judged by [the father's] presumably more than \$65,000 income." *Zazzo*, 245 N.J. Super at 131.

In *Kiken v. Kiken*, 149 N.J. 441, the mother sought to enforce a provision of the parties divorce agreement against descendant father's estate. Their agreement obligated the father to pay for the son's college expenses. The Court found that the parties' agreement did not terminate in death and therefore, the estate was bound by the provisions of the agreement related to the son's education costs. *Kiken*, 149 N.J. at 456. It also found that for the purposes of this action the substitution of the executor in the father's place was permissible. *Kiken*, 149 N.J. 565. In *Newburgh v. Arrigo*, 88 N.J. 529 the Court also found that a father's responsibility to provide for his son's education expenses were not extinguished by death.

Clearly the fact that, "both parents share the obligation to support their children, irrespective of their marital status, is well established in this state. Child support is the right of the child and the responsibility of both parents, not a chip won or lost by the custodial parent from the non-custodial parent during divorce." *Pascale*, 140 N.J. at 593.

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[2] *In re Baby M*, 109 N.J. 396 (1988)

[3] Though eroded, it has not entirely been abolished and Courts may consider the underlying principals in their custody decisions. *Id.* at 453

[4] *Id.*

[5] *Beck*, 86 N.J. at 487

[6] *Wilke v. Culp*, 195 N.J. 487, 483 (App. Div. 1984) cert. den. 99 N.J. 243 (1985); *Pogue v. Pogue*, 147 N.J. Super 61 (Ch. Div. 1977); and *Nehra v. Uhlar*, 168 N.J. Super 187, 196 (App. Div. 1979) cert. den. 81 N.J. 413 (1979).

[7] *Beck*, 86 N.J. at 497

[8] It should be noted that opposition to a joint custody plan does not mean that a court will not order it anyway when the court finds that joint custody is in the best interests of the children. *Id.* at 498.

[9] *Matter of Baby M*, 109 N.J. at 399.

[10] *Becker v. Becker*, 262 N.J. Super 311 (Ch. Div. 1992).

[11] *L. v. G.*, 203 N.J. Super 385 (Ch. Div. 1985).

[12] N.J.S.A. 9:2-7-1 specifically establishes that an independent relationship exists between child and grandparent and the child and an adult sibling and that grandparents and siblings have the right to apply for visitation with a child if they meet circumstances established in the statute.

[13] *Kipstein v. Zalewski*, 230 N.J. Super 567 (Ch. Div. 1988).

[14] *Hoy*, 165 N.J. Super at 270.

[15] *Schwartz v. Schwartz*, 68 N.J. Super 223 (App. Div. 1961).

[16] *Innes v. Innes* 117 N.J. 496, 503-502 (1990).

[17] *Halliwell v. Halliwell*, 326 N.J. Super 442, 448 (App. Div. 1999)

[18] *Loro*, 354 N.J. Super at 223