

Family Matters: Dispelling the Custody Myth

More than anything, being a parent means being involved in your child's life — and being involved needn't hinge on who has custody.

By Darren Williams, BSc., LLb.

From time to time we deviate from our typical course on pure marine law issues and discuss legal issues that effect mariners generally, including family law matters. In months past the Legal Desk has addressed a mariner's rights and responsibilities in respect of child support and spousal support. In this month's Legal Desk I will address a common misunderstanding regarding the true meaning and effect of having, or fighting for, "custody" of a child. What I expect will make this article interesting for many is that it attempts to dispel the myth that having "custody," full or joint, of a child provides rights and privileges that would not otherwise exist.

I was motivated to write this article after several mariners had visited my office and made statements similar to these: "She is trying to take custody of my kids way from me — I will never get to see them", or "I can't lose custody, I don't care what it costs." I use the title "she" in the last sentence cautiously, as not to offend or stereotype, however, it is undeniable that the majority of cases involving custody disputes arise as a result of mothers seeking sole custody after a separation or divorce. Mariners, who are often away for weeks at a time or are not otherwise able to stay at home to take care of the children, are often on the receiving end of such a claim.

A Battle Worth Winning?

Given the common understanding of "sole custody," which may best be summarized as the *exclusive care and control of the child*, it is no mystery why the threat of losing custody of a child is often extremely stressful. Many mariners have spent countless hours, dollars and tears fighting for custody on the assumption that maintaining custody, even joint custody, was the only way of maintaining their role as the child's father, or mother. In fact, *custody* of a child is not the cure-all of parenting rights, and in many cases, fighting to maintain it may not be worth the financial and emotional cost. I say this because many of the benefits (and all of the important benefits) of having custody are available to a parent without having custody. Practically speaking, the benefits I speak of are regular and generous access to the children, and involvement in the health, educational and emotional development of the child. While many people, particularly mothers in my experience, take great security and a sense of control from being able to say "I have custody," I caution mariners not to fall into this trap — it is not truly necessary to have custody, even joint custody, in order to maintain a full and active role in your child's life or to have a say in decisions regarding their health or education. The primary law in British Columbia governing custody is the *Family Relations Act* (the "FRA"). This legislation is relatively easy to understand and is a good starting point for mariners seeking more detailed information on custody. The FRA does not contain a definition of "custody." Rather, the legal definition of custody has evolved to include rights over two primary areas of the child's life: *daily care and control*, and *rights in*

respect of the medical, educational and religious care of the child. Importantly, these areas are best represented by the notions of *Access to the child* and *Guardianship*.

Active Involvement

Access to the child is, in my opinion, the most critical thing to secure during the separation of a family. Without consistent (and there is an emphasis on *consistency*) and generous access to a child, it is easy to become disenchanted with your parenting responsibilities, particularly when you are facing spousal and child support obligations that are often unmanageable. This is where cutting away unnecessary objectives, like having custody, and focusing on truly important goals like maintaining consistent and generous access, will help a mariner weather a nasty separation.

Guardianship, essentially the right to be involved in the health, educational and emotional development of the child, is the second objective after access, the having of which makes the notion of “custody” virtually meaningless. I have come across many examples where a mariner may have regular access to a child, but are excluded from participating in decisions regarding their school or health simply because the mother doesn’t see fit to involve them. This has the effect of making many fathers feel removed from their children (more like a visitor than a parent), which is arguably not in the child’s best interest. To this end, sharing guardianship of a child is critical means of staying involved in the child’s life that does not require you to have “custody.”

A word of caution regarding guardianship. You can have, and then lose, guardianship without ever knowing it. The *Family Relations Act* provides that so long as two parents live together, whether or not they are married, they remain joint guardians of the child. The *Act* goes on to say that once a mother and father are no longer living together, the parent who usually has care and control of the child is sole guardian, unless the parents otherwise agree in writing or the Court orders to the contrary. It is therefore important to ensure that if you are contemplating a separation and you wish to remain a guardian of the child, that you have the written agreement of the parent who will be providing the primary care, or you apply to the Court for a joint-guardianship order.

Negotiating Your Parental Rights

Together, *access* and *guardianship* represent all that is needed in order for a mariner to remain an active and influential role in their child’s life, regardless of who has custody. This is not to say “custody” is worthless as a concept. In fact, it would be a mistake to simply discard the notion of “custody” and the ideas that the common understanding of it evoke. “Custody” can be an enormously powerful negotiating tool.

Almost all separations involving custody disputes range from being somewhat acrimonious, to downright hostile. It is no surprise we have developed the term “custody battle.” Like in any negotiation, you do not throw away a potentially useful position, whether you truly believe it is of value or not. While a mariner may realize there is little benefit to having “custody” that cannot be achieved by having *access* and *guardianship*, they should also not simply discard the objective of seeking joint custody. Parents, particularly mothers in my experience, draw a tremendous feeling of control from having “sole custody” of a child. Many have relished the ability to tell their friends they have “sole custody of the kids,” and savoured the resulting implication that the other parent was not worthy — it all plays into their story that they are blameless for the separation.

Do not buy into this mentality. So long as the other party believes “custody” is the holy-grail of parenting, then it will be useful to maintain custody as an asset (fictitious or not) and negotiate with it. For example, in negotiating a division of assets or spousal support payments, consenting to the other parent having sole custody (provided access and guardianship is maintained) in exchange for reduced payments can provide a break that will allow a non-custodial parent to get back on their own feet and continue to be an active parent. Do not view using “custody” as a negotiating tool as “bargaining with your children” — it is bargaining with a belief that the other party has chosen to believe in. A belief that, in my opinion, is in many ways a myth.[BAT]

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PULL-QUOTE:

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