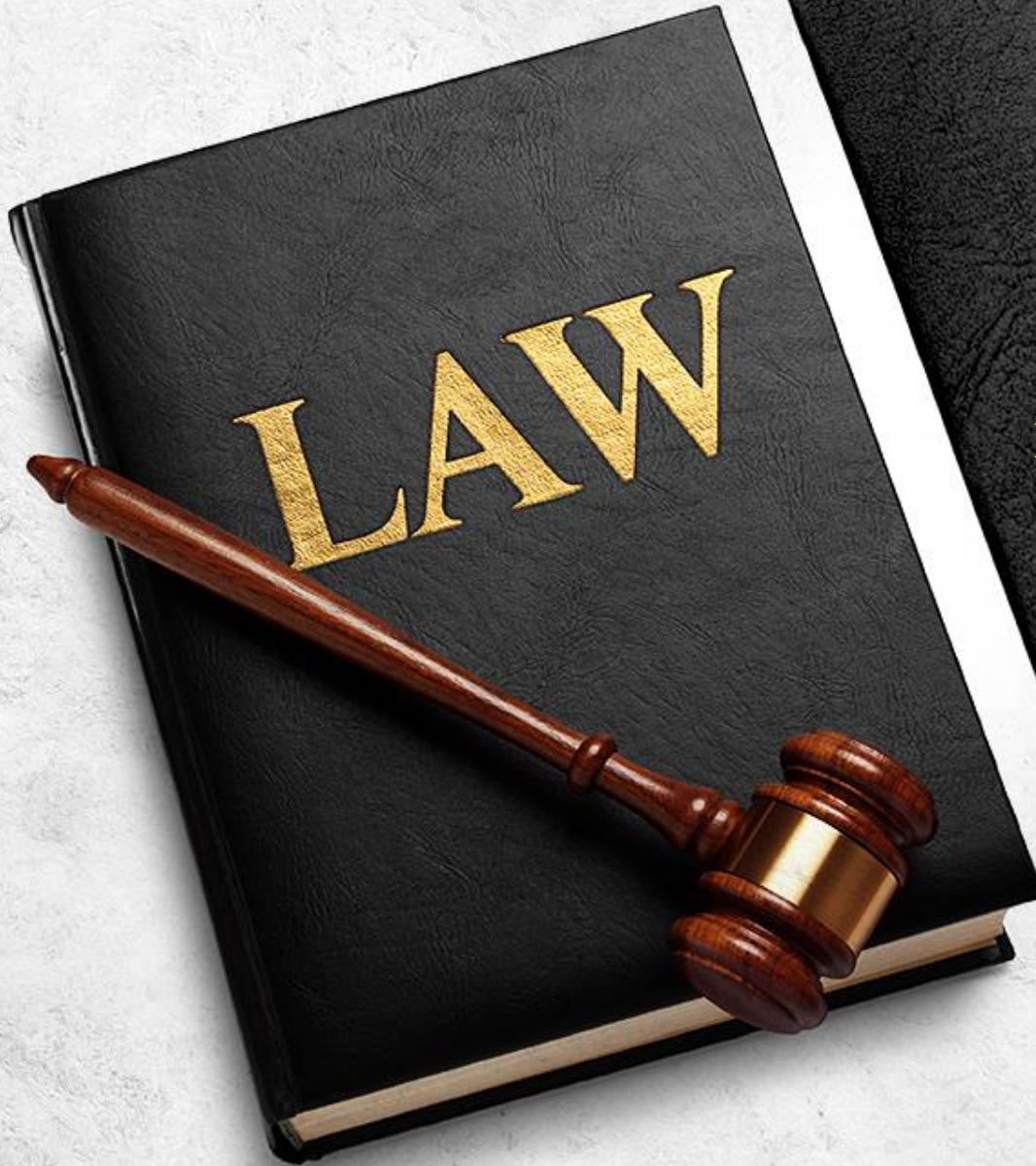


# Domestic Law

## Lecture 15

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# Legal vs. Physical Custody

- When a married couple with minor children gets divorced, the court determines a child custody arrangement that must be strictly adhered to.
- In doing so, the court actually determines two types of child custody: physical custody and legal custody.
- Physical custody refers to a parent's right to have their children reside with them and responsibility for their routine daily care and control.
- Legal custody, on the other hand, refers to which parent has the power to make important life decisions regarding the children.
- A parent with legal custody is able to make decisions about a child's education, religion, and health.
- A parent may be awarded both forms of custody, one form of custody but not the other, or a court can decide to deny a parent both physical custody and legal custody.
- Further, parents can share both forms of custody, as well.



# Legal vs. Physical Custody

- In determining both physical and legal custody, a court may decide to grant one parent sole custody of the marital children or may opt to grant joint custody to both parents.
- Sole custody is exactly what it sounds like: in the case of sole legal custody, one parent is given all of the control in determining important life decisions for the children.
- A parent with sole physical custody has the right to have their children reside with them only and has complete control over the children's day-to-day life routine.



# Legal vs. Physical Custody

- Joint custody is a little trickier.
- When parents are granted joint legal custody, that means they must work together to make important decisions regarding their child's life; neither parent possesses the superior right to make such decisions.
- If they disagree, a well-drawn agreement will provide what procedures the parents must follow in order to solve such conflicts.
- When parents share joint physical custody, that means their children maintain a residence at each of their homes.
- The amount of time spent at each parent's home varies based on the needs of the children and each specific family situation.



# Awarding Child Custody After a Divorce

- Factors that a court may consider in determining custody
  - Which parent has historically been the “primary care giver”
  - The age of the child;
  - The physical and mental health of the child;
  - The parent's fitness to care for the child, including the parent's emotional stability;
  - The financial situation of the parents; and
  - The input of the child (after a certain age)
    - In some states, age is less important than the “intelligence and emotional maturity” of the child



# Awarding Child Custody After a Divorce

- Factors that a court will NOT (generally) consider in determining custody
  - Gender (women do not get a presumption of custody).
  - Sexual orientation or sexual activity of the parent, unless it has an adverse effect on the child.
  - Race of the parent.
  - Physical handicap (unless it will adversely affect the child).
  - Religious practices of a parent, unless they will adversely affect the child.



# Custody Arrangements

- The presumption in any divorce proceeding will favor some level of joint custody between parents who are getting divorced.
- Joint custody includes:
  - Joint Legal Custody: Both parents have an equal say in making decisions regarding the raising of the child (e.g., choosing schools, etc.)
  - Joint Physical Custody: Doesn't necessarily mean equal living time with each parent; just that the child spends time with each parent.



# Custody Arrangements

- Parents are presumed to be competent to raise their children.
- Only a clear showing otherwise will cause a court to deny custody to a parent or order sole custody to the other parent.
- Parent vs. Non-Parent
  - The Supreme Court, in Troxel v. Granville held that the right to raise one's child as one sees fit is part of the fundamental right to privacy inherent in the Constitution.
  - Therefore, a custodial parent can prevent a non-parent from any visitation and state law is powerless to do anything about this.
  - Narrow exceptions have been created for relatives with whom the child has lived for a significant period of time (e.g., the previously custodial grandparent)





# *Ex parte Devine*

## 398 So.2d 686 (Ala. 1981)

- **Facts**

- Appellant Christopher Devine and appellee Alice Beth Clark Devine were married in 1966 and separated in Alabama in 1979.
- They had two sons, Mathew and Timothy.
- Mrs. Devine taught high school until 1975, when she commenced employment with the U.S. Army as an Education Specialist.
- Appellant was a member of the faculty and head of the Guidance Counseling Department at Jacksonville State University.
- At the time of the custody hearing the older son had just completed the first grade at the University and the younger son was enrolled at the University's Nursery Laboratory School.
- The trial court awarded custody of both boys to the mother based on the "tender years" presumption.



# *Ex parte Devine*

398 So.2d 686 (Ala. 1981)

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- **Issue**

- Did the trial court's reliance on the tender years presumption deprive the father of his constitutional entitlement to the equal protection of the law?



# *Ex parte Devine*

398 So.2d 686 (Ala. 1981)

- **Holding**

- Yes. The “tender years” presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.
- At the conclusion of the case, there did not exist a clear preponderance of the evidence for either party regarding child custody.
- However, the court based its decision on the Alabama presumption that when dealing with children of tender years, the natural mother is presumed, in absence of evidence to the contrary, to be the proper person to be vested with custody of such children.
- At common law, the father had a virtual absolute right to the custody of the minor children.
- This right was dependent on the recognized laws of nature and in accordance with the presumption that the father could best provide for the necessities of his children.



# *Ex parte Devine*

## 398 So.2d 686 (Ala. 1981)

- **Holding**

- The wife was without any rights to the care and custody of her minor children.
- In the 19th century, the court's of England began to qualify the paternal preference rule by conditioning a father's absolute custodial rights upon his fitness as a parent.
- In the United States the origin of the tender years presumption occurred in 1830, in the belief that it would violate the laws of nature to snatch an infant from the care of its mother.
- At the present time the tender years presumption is a rebuttable factual presumption based upon the inherent suitability of the mother to care for and nurture young children.
- To rebut the presumption the father must present clear and convincing evidence of the mother's positive unfitness.
- It substantively requires courts to award custody of young children to the mother when the parents are equally fit, and procedurally imposes an evidentiary burden on the father to prove the positive unfitness of the mother.



# *Ex parte Devine*

398 So.2d 686 (Ala. 1981)

- **Holding**

- The United States Supreme Court has held that any statutory scheme imposing obligations on husbands but not on wives establishes a classification based upon sex subject to scrutiny under the Fourteenth Amendment.
- The same must be true for imposition of evidentiary burdens on fathers, but not on mothers.



# Visitation

- Visitation is generally determined by the “best interest of the child” standard; other than the parent’s fundamental right to raise his or her own child discussed above.
- Typically, since the presumption is that two parents are good for children, some form of visitation is allowed to the non-custodial parent.
- Will a court order visitation in spite of child’s reluctance?
  - Depends on
    - Age of child
    - Reason for reluctance
  - Courts will sometimes order “reunification” sessions between parent and child with licensed therapist to resolve
  - Generally, courts do not want children “calling the shots”
- Parents have a legal duty to comply with visitation and acts to thwart visitation can result in
  - Contempt of court
  - Awarding greater custody to the other parent



# Relocation of Custodial Parent

- What happens when a custodial parent wants (or is forced to) move away from the other parent?
- The court must consider and balance three important and competing rights:
  - The relocating parent's constitutional right to travel
  - The non-relocating parent's right to the care and control of the child
  - The child's best interest
- In making these tough decisions, a court will look at a variety of factors including:
  - Whether the relocation is being made in good faith
  - The benefits available to the child if relocated (e.g., quality of schools, proximity of extended family members, etc.)
  - Likelihood that the relocation may permanently and substantially damage child's relationship with non-relocating parent



# Quick Quiz





# Jurisdiction in Custody Disputes

- State Law: Uniform Child Custody Jurisdiction Act (UCCJA)
  - Adopted in all states.
  - Allows jurisdiction in custody disputes even in states where no personal jurisdiction applies over both parents.
- The jurisdiction is based on various factors:
  - Home state of the child.
  - Best interest of the child (based on where the parents are, where his or her friends are, etc.)
  - If the child has been abandoned there.
- Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)
  - Helps remedy conflicts between state laws and state courts.
- Federal Law: Parental Kidnapping Prevention Act
  - Directs states to follow the mandates of other state's courts regarding custody (based on the full faith and credit clause).



# End Of Class Review Quiz

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**THE  
BIG  
QUIZ**



# The End

