

Informational Hearing

State Custody Law

Overview

- Calvin's Story
- Current State Custody Law
- Judges Limitations
- Adverse Affects
- Past Research
- Opportunities for Improvement
- Prospective Results
- Next Steps

Calvin's Story

- 9 years old son
- Parents separated for 8 years
- Wants to have a voice
- Parents had court appointed and private mediation
- Custody evaluation
- 2 day court trial
- Through these first hand experiences I have had the opportunity to learn current State custody laws, areas where it is conflicting and where there is opportunity for improvement

if I had a pony I would ride it

all day long and be happy

It is the best I love

to play soccer with

I am thankful for my



We go to the down with him
I do every thing with him

I go to the beach with him

Second like the best ever

Second I love him more every

that's how much more every

that's how much more every

that's how much more every

he is a very good man

how much I love him

more. I can't explain

Current State Custody Law

- ORS 107.137
 - “...the court shall give primary consideration to the best interests and welfare of the child.” (1)
 - No preference in custody shall be given to the mother over the father for the sole reason that she is the mother, nor shall any preference be given to the father for the sole reason that he is the father. (1)
- ORS 107.169
 - The court shall not order joint custody, unless both parents agree to the terms and conditions of the order. (2)

* This is an example of Hobson’s Choice (3)

* Sole custody is ruled until child is an adult

Judges Limitations

- In the State of Oregon judges must rule sole custody in court if both parents cannot agree on joint custody
- Judges are not given the tools necessary to rule in the best interests and welfare of our children

* 14th Amendment to the U.S. Constitution, Section 1, states “...nor shall any State deprive any person of life, liberty, or property, without due process of law...” (4)

* 35 states plus the District of Columbia have statutes that explicitly authorize joint custody as a presumption or strong preference (5)

Adverse Affects

- Our Children
 - No voice
 - Skews the balance of both parents involvement in child's development and upbringing
 - No court record of the child
- The Parents
 - Legally disenfranchises one parent from all decision making authority
 - Increases litigation due to "all or nothing" or "zero sum game" scenario
 - Increases adversary, division and resentment
 - Increases percentage of absentee parents
 - Monetary Loss
- Judges
 - Do not have the needed arrows in the quiver to rule "in the best interests and welfare of the child"
 - The inability to tailor fit custody plans on a case by case basis

Past Research

- Oregon Task Force
 - Large basis of the findings were based on data from a 20-year longitudinal case study done by Jennifer McIntosh of the Australian Government Attorney General's Department (Post-Separation Parenting Arrangements...)
- * The sample groups were from another culture with a different legal system
- * USA is a more progressive society with equal rights
- * More women in the workforce and more men at home...times change

Opportunities for Improvement

One Size Does Not Fit All - Alternative Solutions

1. Joint Custody and appoint a Guardian Ad Litem
 - Privately or assigned through the courts
 - Child's needs will change/evolve through childhood
 - Record of child
2. Joint Custody and assign the tenets of custody
 1. Healthcare
 2. Religion
 3. Education
 4. Living (most children live in both homes through parenting plans)

* Example: Father is an educator and mother works in healthcare

Prospective Results

- Child has both parents continued involvement
- Custody structure can evolve with the child
- Neither parent is legally disenfranchised from their child without due process
- Preserves/resembles more of a family dynamic
- Less adversary between parents (knowing the courts can rule joint custody...less polarizing)
- Parents preserve monetary resources for child's future
- Judges are given the power needed to rule "in the best interests and welfare of the child"

Questions/Next Steps

Exhibits

1. ORS 107.137
2. ORS 107.169
3. Hobson's Choice
4. 14th Amendment to the U.S. Constitution,
Section 1
5. Alliance for Non-Custodial Parents Rights

①

2011 ORS § 107.137 Factors considered in determining custody of child

- (1) Except as provided in subsection (5) of this section, in determining custody of a minor child under ORS 107.105 (Provisions of judgment) or 107.135 (Vacation or modification of judgment), the court shall give primary consideration to the best interests and welfare of the child. In determining the best interests and welfare of the child, the court shall consider the following relevant factors:

- (a) The emotional ties between the child and other family members;
- (b) The interest of the parties in and attitude toward the child;
- (c) The desirability of continuing an existing relationship;
- (d) The abuse of one parent by the other;
- (e) The preference for the primary caregiver of the child, if the caregiver is deemed fit by the court; and
- (f) The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. However, the court may not consider such willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in a pattern of behavior of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.

- (2) The best interests and welfare of the child in a custody matter shall not be determined by isolating any one of the relevant factors referred to in subsection (1) of this section, or any other relevant factor, and relying on it to the exclusion of other factors. However, if a parent has committed abuse as defined in ORS 107.705 (Definitions for ORS 107.700 to 107.735), other than as described in subsection (5) of this section, there is a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody of the child to the parent who committed the abuse.

- (3) In determining custody of a minor child under ORS 107.105 (Provisions of judgment) or 107.135 (Vacation or modification of judgment), the court shall consider the conduct, marital status, income, social environment or life style

of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child.

(4) No preference in custody shall be given to the mother over the father for the sole reason that she is the mother, nor shall any preference be given to the father over the mother for the sole reason that he is the father.

(5) (a) The court determining custody of a minor child under ORS 107.105 (Provisions of judgment) or 107.135 (Vacation or modification of judgment) shall not award sole or joint custody of the child to a parent if:

(A) The court finds that the parent has been convicted of rape under ORS 163.365 (Rape in the second degree) or 163.375 (Rape in the first degree) or other comparable law of another jurisdiction; and

(B) The rape resulted in the conception of the child.

(b) A denial of custody under this subsection does not relieve the parent of any obligation to pay child support. [1975 c.722 §2; 1987 c.795 §14; 1997 c.707 §35; 1999 c.762 §2; 2011 c.438 §3]

...

Notes of Decisions

Specific acts of custodial parent misfeasance justifying custody change must be of sufficient number and nature to establish course of conduct or pattern of inadequate care having adverse effects. *Niedert and Niedert*, 28 Or App 309, 559 P2d 515 (1977), Sup Ct review denied

Where erroneous order transferring custody was not stayed, parent right to appeal order outweighs instability caused by retransfer of custody if appeal succeeds. *Niedert and Niedert*, 28 Or App 309, 559 P2d 515 (1977), Sup Ct review denied

Where court takes unusual action of awarding temporary custody at time of dissolution decree, standard at time of awarding permanent custody is best interest of child, not change of circumstances. *Deffenbaugh and Deffenbaugh*, 286 Or 759, 596 P2d 966 (1979)

Prohibition on giving preference to mother over father does not prevent consideration of which parent was primary caregiver. *Van Dyke and Van Dyke*, 48 Or App 965, 618 P2d 465 (1980), Sup Ct review denied

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2011 ORS § 107.169¹ Joint custody of child • modification

- (1) As used in this chapter, joint custody means an arrangement by which parents share rights and responsibilities for major decisions concerning the child, including, but not limited to, the child's residence, education, health care and religious training. An order providing for joint custody may specify one sole power to make decisions about specific matters while both parents retain equal rights and responsibilities for other decisions.

- (2) The existence of an order of joint custody shall not, by itself, determine the responsibility of each parent to provide for the support of the child.

- (3) The court shall not order joint custody, unless both parents agree to the terms and conditions of the order.

- (4) When parents have agreed to joint custody in an order or a judgment, the court may not overrule that agreement by ordering sole custody to one parent

- (5) Modification of a joint custody order shall require showing of changed circumstances and a showing that the modification is in the best interests of the child such as would support modification of a sole custody order. Inability or unwillingness to continue to cooperate shall constitute a change of circumstances sufficient to modify a joint custody order.

- (6) (a) The inability of a parent to comply with the terms and conditions of a joint custody order due to the parent's temporary absence does not constitute a change of circumstances if the parent's temporary absence is caused by the parent being:

- (A) Called into active state duty as defined in ORS 398.002 (Definitions) for this chapter and ORS 396.120, 396.145, 399.205 and 399.515);
or
(B) Called into active federal service under Title 10 of the United States Code as a member of the Oregon National Guard.

(b)



Hobson's choice

From Wikipedia, the free encyclopedia

A **Hobson's choice** is a free choice in which only one option is offered. As a person may refuse to take that option, the choice is therefore between taking the option or not; "take it or leave it". The phrase is said to originate with Thomas Hobson (1544–1631), a livery stable owner in Cambridge, England. To rotate the use of his horses, he offered customers the choice of either taking the horse in the stall nearest the door or taking none at all.

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Thomas Hobson

According to a plaque underneath a painting of Hobson donated to Cambridge Guildhall, Hobson had an extensive stable of some 40 horses. This gave the appearance to his customers of having their choice of mounts when in fact there was only one: Hobson required his customers to choose the horse in the stall closest to the door. This was to prevent the best horses always being chosen, which would have caused those horses to become overused.

An ultimatum game is a form of Hobson's choice.

Early appearances in writing

According to the *Oxford English Dictionary*, the first known written usage of this phrase is in *The rustick's alarm to the Rabbies*, written by Samuel Fisher in 1660:

"If in this Case there be no other (as the Proverb is) then Hobson's choice...which is, chuse whether you will have this or none."

It also appears in Joseph Addison's paper *The Spectator* (14 October 1712); and in Thomas Ward's 1688 poem "England's Reformation", not published until after Ward's death. Ward wrote:

"Where to elect there is but one, / 'Tis Hobson's choice—take that, or none."

4

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in rebellion or insurrection against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.



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Joint Custody Laws In The U.S.

Thirty-five states plus the District of Columbia have statutes that explicitly authorize joint custody as a presumption or strong preference. The following are some of the best relevant statutes from States which provide a presumption. Click on the links to take you to the relevant statute text.

DELAWARE: Title 13, Chapter 7, Subchapter 1, 701. Rights and responsibilities of parents; guardian appointment.

DISTRICT OF COLUMBIA: D.C. Code 16-911. Allimony pendente lite; suit money; enforcement; custody of children. (a)(5) and 16-914. Retention of jurisdiction as to allimony and custody of children. (a)(2)

FLORIDA: Title VI, Chapter 61, 61.13. Custody and support of children; visitation rights; power of court in making orders.

IDAHO: Title 32, Chapter 7, 32-717B. Joint custody.

LOUISIANA: Civil Code, Section 3.

MONTANA: Title 40, Chapter 4, Part 2. Support, Custody, Visitation, and Related Provisions

NEW MEXICO: Chapter 40, 40-4-9.1 Joint custody; standards for determination; parenting plan.

TEXAS: 153.131 Presumption that Parent to be Appointed Managing Conservator

ALASKA: Title 25, Chapter 20

CALIFORNIA: Family Code Section

KANSAS: Chapter 60, Article 16

MICHIGAN: Chapter 722 Sec. 6a. (1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall on the record the reasons for granting or denying a request.

MINNESOTA: Chapter 518

MISSISSIPPI: Title 93, Chapter 5

NEW HAMPSHIRE: Title XLIII, Chapter 458

GEORGIA: Court of Appeals of Georgia, Case No. A93A0698, 7/2/93 IN the INTEREST of A.R.B., a child

KENTUCKY: Chalupa v. Chalupa, Kentucky Court of Appeals, No. 90-CA-001145-MR. (May 1, 1992).

DELAWARE: Title 13, Chapter 7, Subchapter 1, 701. Rights and responsibilities of