



CHILD CUSTODY: A SAMPLE LETTER TO A CLIENT

BY GILBERT GUGNI & MATHEW WEAVER

Dear Client,

First, I just want to again say thank you for placing your trust and confidence in myself, this firm and my legal team to assist you through this very difficult and complex time in your life. Please feel free to contact me when you have any questions. When we first met we discussed many different aspects of your divorce, particularly issues relating to your minor child. We discussed the most important decisions that you will need to make. These decisions involve the custody, parenting time and support of your child. This letter is being sent to assist you in better understanding what is expected of you; to help provide realistic expectations; and to provide valuable knowledge to you so that you are empowered and able to make wise, informed and rational decisions. When it comes to your child, the last thing you need right now is to have more uncertainty, confusion and a sense of feeling lost in the "legal system". As such, this letter will address the following: A) procedural steps leading to a final Judgment rendered in this matter; B) "discovery" and the importance of collecting pertinent documentation early on; and C) the "Best Interest Factors" used to determine physical custody by the court, if you and your spouse are unable to reach an agreement as to the custody and parenting time of your child.

Before addressing these three topics, I want to stress the importance of open communication with me. Everything we discuss regarding your case is confidential and private. Unless you give us specific permission to discuss confidential and private matters with others (i.e. doctors, therapist, family), it remains confidential with us and will not be disclosed to anyone. By openly and honestly communicating with us, we can better analyze and assess your situation and make decisions early on that will help you achieve the desired result you are seeking. While reviewing the "Best Interest Factors" below, please take time to write down any areas of concern regarding yourself, your spouse and child so that we can discuss them the next time we meet.

A. Procedural Steps

Due to the heavy caseload in the court system, there is very little time the court can spend on each case. While the circumstances vary widely from case to case, absent special circumstances, the court must treat every case the same procedurally. As such, there is a set schedule ordered by the court to assist the parties and attorneys in resolving

their differences and/or narrowing the scope of the issues for the court's involvement in a timely manner. Early on you will receive from our office a copy of the Scheduling Order from the court that may include the following:

Early Intervention Conference/Status Conference. Depending on the county where your case has been filed, the court may schedule an Early Intervention Conference ("EIC") or a Status Conference. This is often a meeting with the Friend of the Court ("FOC") referee presiding over your case and assisting your assigned judge. At the EIC or Status Conference, the attorneys and parties will advise the referee of any outstanding issues that require the FOC and/or court's involvement. The referee will also advise the parties of the services offered through the FOC, and may schedule other matters. Usually a formal Scheduling Order will be entered which sets deadlines for the completion of discovery and mediation, as well as assigning a trial date for your case.

Mediation. Mediation is a voluntary form of alternative dispute resolution employed by the court. An experienced and trained family law attorney will meet with the parties and their attorneys to try and reach a settlement on all issues. In many counties mediation is mandatory. However, the decisions made at mediation are not binding unless the parties reach an agreement at mediation and sign the agreement. It is critical to be fully prepared for mediation as if we are going to trial. The forum is not as formal as a trial and the evidence will be presented through you as opposed to witnesses at a trial.

Settlement Conference. In many counties a Settlement Conference is the final step in the legal process before trial. Mediation has usually already been attempted by the parties and proven unsuccessful. The parties and attorneys will again appear before the court and the court will try to resolve any outstanding issues at that time. If the parties have resolved all of their differences at or before this conference, a settlement can be placed on the record (or Judgment entered). Most cases settle without the need for a trial. However, if there are remaining disputes that cannot be resolved and settled, the court will schedule a trial date.

Trial. A trial is your "evidentiary hearing" before the judge on all issues. It is at this time that we will present testimony and evidence to the court regarding the custody and parenting



of your child, if this has not been previously resolved. Many of the documents obtained through discovery and witnesses identified will be presented to support your position. At the conclusion of the trial, the court will issue its opinion that will result in a final Judgment.

You must attend each of the scheduled hearings outlined above unless advised by me that your attendance is not necessary.

B. Discovery and Document Collection

Throughout the pendency of your divorce action, both you and your spouse have the opportunity to collect information that is relevant and important in deciding the issues of custody and parenting time. We may obtain information from your spouse by submitting interrogatories or by the taking of depositions.

Interrogatories are written questions that are submitted to the opposing party to obtain information. In custody disputes, we often submit interrogatories to the other spouse asking a number of questions concerning that spouse's involvement with the minor child. Some of the questions that we often ask include the following:

- Do you consider yourself the primary guide/teacher of your child? If so, please state:
 - a. Describe, in detail, the physical skills you taught your child and how these skills were taught.
 - b. Describe the physical methods you use on a regular basis to discipline your child.
 - c. Describe any other methods you use to discipline your child.
 - d. Give the names, addresses and current telephone numbers of three (3) people, other than immediate family members or relatives, who have observed your disciplinary methods.
 - e. Give the names, addresses and current telephone numbers of the physicians consulted in the past three (3) years regarding the physical/mental health of your child.
- Have you discussed this custody action with your child? If so, please state:
 - a. The precise words you used to describe your spouse.
 - b. Whether or not you blamed your spouse for the custody action.
 - c. Whether or not you have discussed the custody action with another person, or persons, in the presence of the minor child and give that person's name(s), address(es), current telephone number(s) and their relationship to you.
 - d. Whether or not you have cried during discussions of the custody action with your child or with another person(s) in the presence of your child.

- e. Whether or not you have become angry during discussions of the custody action with your child or with another person(s) in the presence of your child.
 - f. Whether you have broken or thrown anything in anger during discussions of the custody action in the presence of your child.
 - g. Whether you have changed the locks on your residence to prevent your spouse from being with the child.
 - h. Whether you have had your phone number unlisted since the divorce action and if so, please give the date your telephone number became unlisted.
 - i. If you have changed locks on your residence and/or had your telephone number unlisted, state the means by which you have arranged communication between your child and your spouse.
 - j. How you have ensured continued communication between your child and the other parent's family since the commencement of this action to the date of these interrogatories.
 - k. If you have consulted a child psychologist regarding the custody action and have had the child interviewed by said psychologist, please state the name, address and telephone number and the date(s) consulted.
 - l. Whether you have struck or otherwise physically attacked your spouse in the presence of the child and describe the nature and consequence of any and all such action(s).
- Please set forth each and every reason you claim you are entitled to custody of the minor child and with respect to each reason, identify all circumstances to support such reason.
 - If you work out of the home, what days and hours do you work?
 - Do you feel your spouse is a good parent? What are his/her strengths? What are his/her weaknesses?

By obtaining the answers to these and other interrogatories under oath, we can determine your spouse's position on many of the relevant factors that will be involved in determining who should have custody of your child. Please also understand, however, that interrogatories may also be submitted to you, and that you may very well be required to answer similar questions. If interrogatories are submitted, we will forward them to you for your initial review. We will then work very closely with you in developing appropriate answers to those interrogatories, which accurately and succinctly outline your position in response thereto.

It may also be necessary to take depositions. A deposition is an opportunity for an attorney to question, under oath, before a court reporter, a party or witness that is involved



in a court proceeding. We may very well therefore, wish to take the deposition of your spouse. This will permit me to question your spouse concerning such issues as his/her involvement with your child and also his/her position regarding your involvement with the child. Depositions are often very important as it permits us to evaluate how effective your spouse will be as a witness if the matter proceeds to trial. Again, you may also be required to give a deposition. If that is necessary, we will work closely with you to prepare for the deposition, so that you will know in advance what we feel will be the subject matter of the questions that will be presented to you.

It may also be important for you to obtain documentation in support of your case. Such documentation could include medical records in your possession, notes from your spouse, notes from teachers, etc. It is essential that you should not delay in collecting such information since documents can become lost or destroyed by mistake or accident. Sometimes, documents are even intentionally destroyed.

We will also be calling upon you to assist us in developing a Witness List. Although the testimony of you and your spouse will probably be the most important testimony that is presented to the court, it is often required that other witnesses testify. This may include the testimony of relatives, health care providers, educators, etc. You should already be thinking about putting together a list of people who have personal knowledge of your parental involvement. This would include individuals who have actually been present and observed how you parent your child. This could include family members, teachers, coaches, neighbors, friends, counselors, priests/ministers, etc.

C. Best Interest Factors

The primary area of disagreement between parties that we will be most concerned with is about "physical" custody. "Physical" custody involves decisions about where the child will primarily reside, while "legal" custody involves the right to be informed in and make important decisions regarding your child, such as medical and educational. At this time we will be addressing custody as it relates to "physical" custody only. Legal custody, which is usually jointly awarded, will be discussed later in this letter.

If we are not able to resolve the issue of custody, and the matter proceeds to trial, the court will be required to determine who should be the primary physical custodian of your child. In doing so, the court will make a determination as to what is in the best interest of your child. In making its decision, the court must apply twelve elements, which we will refer to as the Child Custody Act Factors. Those factors, which are contained in the Child Custody Act, are as follows:

- The love, affection and other emotional ties existing

between the parties involved and the child.

- The capacity and disposition of the parties to give the child love, affection, and guidance and continuation of the educating and raising of the child in it's religion or creed, if any.
- The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- The permanence, as a family unit, of the existing or proposed custodial home or homes.
- The moral fitness of the parties involved.
- The mental and physical health of the parties involved.
- The home, school and community record of the child.
- The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
- The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.
- Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- Any other factor considered by the court to be relevant to a particular child custody dispute.

It is imperative that we carefully review each of these factors as they apply to your situation. If your case goes to trial, the judge will review each of these factors based upon the evidence presented, and either award the factor in your favor or your spouse's favor, or find that the factor is in neither party's favor. I would therefore like to briefly review with you some of the facts that we may wish to consider in support of each factor:

- a. **The love, affection and other emotional ties existing between the parties involved and the child.** In most cases, both parties love the child or they wouldn't be fighting for custody. However, it is still important to present to the court your opinion as to which parent is more closely bonded to the child. Of course, this opinion must be supported with sufficient facts. Thus, it



will be important to tell the court such things as which parent is primarily responsible for preparing the child's meals, washing his/her clothes, taking him/her to activities. It is also important to be able to present to the court how well you know your child. What are his/her likes and dislikes? What makes your child happy? What makes your child sad? How much time do you and your spouse each spend with your child? Please also understand that in a traditional family, usually one parent works outside of the home more than the other. Courts will not hold that against the working parent.

- b. **The capacity and disposition of the parties to give the child love, affection, and guidance and continuation of the educating and raising of the child in it's religion or creed, if any.** Many of the same facts to support factor (a) above will also be used to support factor (b). Additionally, it will be important for the court to know who generally takes the child to doctor appointments. Who cares for the child in the middle of the night when the child is sick? How do you discipline your child? Which parent spends more time with the child helping with his/her homework? Is your child being raised in a specific religion? If so, which parent takes the child to Church?
- c. **The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.** Again, there is a significant amount of overlap regarding the facts to be presented in support of factors (a) and (b). In addition, however, in determining factor (c), each parent's earning capacity will be presented to the court. If you are not working outside of the home, will you do so after the divorce is completed? If so, what daycare arrangements will be made for the child? Who will arrange for the daycare? Does your child have any special needs? If so, who is generally responsible for providing those special needs?
- d. **The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.** In many cases, the parties have lived together with the minor child up to the time of trial, when a divorce will be granted. In such instances, this factor will by necessity not be awarded to either party. However, if the parents have lived apart for any appreciable length of time, then it will be important to specifically describe the home in which the child has been living. It may also be important to establish if you will be keeping the marital home, and whether your spouse will be moving out. It could be deemed to your benefit if you could remain in the marital home and the child could continue living with you in the same environment. This will permit the child to continue not

only living in the same house, but also to remain in the same school district, keep his/her same friends, etc.

- e. **The permanence, as a family unit, of the existing or proposed custodial home or homes.** Again, there is a considerable amount of overlap necessary to support this factor, that was also presented to support factor (d). In addition, if your spouse will be moving from the marital home, where will his/her new home be located? What will the environment be in this new home? Are you or your spouse involved in a new romantic relationship? If so, are there any plans of remarriage? If remarriage is a possibility, how will this affect your child?
- f. **The moral fitness of the parties involved.** There are many facts that can establish the moral fitness of a party. This would include such things as alcohol or drug abuse; gambling problems; physical or sexual abuse of a child; spousal abuse; as well as criminal convictions. Often the issue of extramarital affairs comes up in evaluating this factor. Many people believe that because their spouse has been involved in an extramarital affair, this will be held against them in determining this factor. However, our Supreme Court has determined that this factor evaluates the parties' moral fitness only as it relates to how that party will function as a parent. Therefore, if it is determined that a spouse's extramarital affair did not have an adverse effect on his/her ability to raise the child, then it will not be held against that party.
- g. **The mental and physical health of the parties involved.** It is important to know the medical history, both physical and psychological, of both you and your spouse. It is therefore important for you to disclose to us any problems you may have had in the past relating to physical or psychological problems. Some of our clients in the past have been afraid that it will be held against them if they previously sought treatment for depression, anxiety, etc., by a psychiatrist or psychologist. This is generally not the case. Many people who go through bad marriages seek such treatment and are often prescribed anti-depressants, tranquilizers, etc. If that is your situation, please let us know immediately. Quite likely we will try to emphasize this as a positive in your case. We will argue that you recognized that you had a problem, which is quite likely very temporary, and sought an immediate solution to the problem by seeking appropriate treatment. Sometimes however, a parent may have a very serious mental condition which can have a long range effect on the parenting of the child. This must be brought to our attention immediately if it exists in your case.
- h. **The home, school and community record of the child.** It will be important to establish the complete



school record of your child. This would include not only the academic record, but also their attendance. Additionally, it will be important to establish the extracurricular activities of the child, which could include a myriad of after school activities including athletics. It will also be important to present to the court the involvement of each parent concerning the school and extracurricular activities.

- i. **The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.** If your child is deemed to be of a sufficient age to express who he/she would like to live with, then the court will make an inquiry of that child. The inquiry will however, be made in private, generally only in the presence of the judge and the court reporter. By law, the judge can only question your child as to his/her preference of where he/she wishes to live. The judge cannot go into other matters.

Many of our clients are under the misconception that when a child attains a certain age (commonly believed to be 12 years of age), then the child may categorically determine where he/she will live. This is definitely not the case. A child does not have the legal right to make this decision. However, it still must be emphasized that the older the child becomes, the more important the preference. For instance, many courts will give a tremendous amount of weight to a child who is 16 or 17 years of age when they indicate their preference. If, however, that child's preference is based upon inappropriate conduct by the other parent (e.g., promising gifts to persuade a child), then the court may likely reject that preference. This could occur in cases of parental alienation or when one parent basically promises the child that they can do anything they wish if they indicate their preference to live with that parent.

- j. **The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.** You must remember that a custody action is not an all-or-nothing proposition. Even if physical custody is awarded to you, your spouse will still be permitted an active involvement with your child. An appropriate parenting time schedule will thus need to be fashioned for the non-custodial parent. You should be thinking about what you feel an appropriate schedule would be. Ten or fifteen years ago it was quite common for the non-custodial parent to be awarded every other weekend (Friday evening to Sunday evening) and Wednesday evening for dinner. Additionally, the non-custodial parent would be awarded alternate holidays and two weeks in the Summer. Today however, courts are far more liberal in their parenting time awards for non-custodial parents. Most experts believe that it is important for children to have significant exposure to

both parents. It is therefore important for you to take the position that you are willing to facilitate and encourage a continuing and close relationship between your child and your spouse, even if awarded physical custody.

- k. **Domestic violence, regardless of whether the violence was directed against or witnessed by the child.** Have there been any incidents of domestic violence? This would include incidents that are reported to the police as well as those that have not. If incidents have been reported to the police, we will wish to have copies of the police reports. If the incident was not reported to the local police, then we will need a detailed summary of the occurrence. This should also include any witnesses to the incident. If the incident was witnessed by your child, we will wish to be advised of your impressions regarding the impact the incident has had upon your child.
- l. **Any other factor considered by the court to be relevant to a particular child custody dispute.** If there is any other matter that you feel is crucial to your case, but does not seem to fit one of the factors above, this still can be presented to the court. It is important that you discuss with us any other factor you feel is important to your case. We will then make a determination as to whether we feel it is pertinent to the presentation of your case.

It is imperative that we carefully review each of these factors as they apply to your situation, so that we can efficiently conduct discovery as to the relevant factors in a timely manner. The court will listen to all of the evidence that is presented to it regarding each of the factors. It will then determine, by weighing all of these factors, what is in the best interests of your child regarding the award of custody.

You should also understand that before the court will conduct an analysis of the Child Custody Act Factors, it must first determine if there is an "established custodial environment." A custodial environment is established over an appreciable time your child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life and parental comfort. This is very crucial if parties have been living apart for any length of time, or after physical custody has previously been awarded to one party or the other. If there is an established custodial environment with either parent, it will change the burden of what must be demonstrated to the court on the Child Custody Act Factors. Once the court has determined that a custodial environment has been established, if a change is requested, it must be shown by "clear and convincing evidence" that it is in the best interests of the child that custody be changed. If an "established custodial environment" has not been established, then the burden of proof is merely a preponderance of the evidence. This is better illustrated by visualizing the scales of justice. A preponderance of the



evidence simply means that the scales must be tipped very slightly in one party's favor in order to prevail. Clear and convincing evidence, on the other hand, would indicate that the scales must be tipped much higher on one party's side in order to prevail. The law requires this higher incidence of proof because it does not favor constant changing of custody of a child.

Sometimes psychological evaluations are conducted to assist the court in a custody dispute. This could be done pursuant to the agreement of the parties, or the court could order this on its own initiative. A psychological custody evaluation is done by a child psychologist who has the necessary skills and experience concerning these matters. The chosen psychologist may contribute an important service to the court by providing competent, objective, impartial information in assessing the best interests of the child. These evaluations are usually extremely thorough, and would include individual evaluations of the parents and children involved, as well as psychological testing. At the completion of the evaluation, the psychologist will make a recommendation regarding the issue of custody, after applying the facts of the case to each of the Child Custody Act Factors. Psychological evaluations are often very useful, but can be extremely expensive. However, the results of a psychological evaluation can often be extremely supportive of the party recommended by the psychologist to receive custody. One must always, therefore, be extremely cautious before voluntarily agreeing to a psychological evaluation.

Keep in mind, as a result of your pending divorce, the decisions relating to the custody (both legal and physical) and parenting arrangements of your child will require a restructuring of both parents' parental rights and responsibilities. Short of a complete agreement between you and your spouse regarding this restructuring, the court will be left with making these very difficult and complex decisions by application of the Child Custody Act Factors discussed above. That is why it is so critical for you to obtain and provide us as much information as possible. By presenting a clear picture early on, we can greatly assist you in the course of action that you should take regarding these important issues relating to your child. Remember, litigation which involves the custody of your child is extremely serious, and should only be entertained if you feel an appropriate agreement cannot otherwise be entered into with your spouse.

I would like to touch upon the issue of legal custody, which I briefly discussed earlier in this letter. Generally, courts prefer to award joint legal custody. However, it may not be awarded if there are significant problems of communication between you and your spouse which would make such an award impractical. As joint legal custodians, both parents are jointly authorized to decide, and are responsible for jointly deciding and providing for, the major decisions affecting the welfare of the child. Both parents must conduct themselves at all times with the best interests of the child foremost in their consideration and must communicate with one another on a regular basis to enhance and foster the child's best interests. Joint legal custody requires that the parents consult with one another and attempt to agree before major decisions are made affecting the child's health, education, welfare, enrichment activities, camp and travel. It does not require the parents to come to an agreement regarding routine matters when the child is with that respective parent. It also permits each of the parents who have joint legal custody to be regularly informed about school, extracurricular and other enrichment activities of the child, and to be provided an opportunity to attend all such activities.

In conclusion, I hope that this letter answers many of your questions and gives you a better understanding of the process surrounding custody litigation. I am a/so certain that after reading this letter you will have several new questions. Please take the time to write them down so that we may discuss them at a later date. There is still more information that I will need to pass on to you as we proceed through this process. I do not, however, want you to feel overwhelmed. You already have a great deal of stress in your life as a result of the divorce. However, by keeping you informed, we can prevent this process from being an additional stress in your life.

Please contact me upon receipt of this letter so that we can schedule our next appointment to formulate our plan as it relates to the issue of custody of your child.

Sincerely,

Your attorney

