

DRAFTING PARENTING PLANS IN DV CASES

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PARENTING PLANS IN MONTANA

- In Montana parties who are dissolving their marriage and have children must file a **Parenting Plan with their Dissolution documents**
- Unmarried parties in need of a Parenting Plan must file a **Petition for Parenting Plan or Paternity** to start the action.
- **Jurisdictional Requirements:**
 - Child must live MT for 6 months prior to the start of the proceeding for MT to be considered the “home state
 - There are unique circumstances in which the party can apply for “emergency jurisdiction” (UCCJEA) if the child is here for <6 mos

Jurisdictional Issues Cont....

- The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), §§40-7-101, et seq., MCA, and the federal Parental Kidnaping Prevention Act (PKPA), 28 USC §1738A, both contain provisions allowing a state court, which would not otherwise have jurisdiction over the children, to assume jurisdiction on an emergency basis to protect them when a child, a sibling, or parent of a child has been subjected to domestic abuse. See §40-7-204, MCA, and 28 USC § 1738A (c) (2) (C).
- The Uniform Marriage and Divorce Act, §40-4-211, MCA, regarding jurisdiction over parenting proceedings, ties in with the UCCJEA, allowing a Montana district court to take jurisdiction in an emergency to protect a child because the child has been threatened with mistreatment or subjected to abuse. §40-4-211 (1) (c) (iii), MCA.

PARENTING PLANS IN MONTANA

- **Issues Settled in Parenting Plans:**
 - Parenting time
 - Parameters around parenting
 - Decision making authority
 - Child Support
 - Medical Support
 - etc....

BEST INTERESTS OF THE CHILD

- **Best Interests of the Child Standard:**
 - MCA 40-4-212 is looked at *very closely* in parenting plans by courts especially in contested cases
 - Factors under this statute include:
 - domestic violence
 - substance abuse by either parent
 - sibling relationships
 - child's connections to the community
 - developmental needs of the child,
 - wishes of the child and parents
 - mental and physical health of the parties

Best Interests Standard Cont...

- Best interest of the child under this section also includes a presumption that it is good for children to have time with both parents. In applying this presumption, the court is to consider:
- MCA 40-4-212 (1) whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests. In making that determination, the court shall consider evidence of physical abuse or threat of physical abuse by one parent against the other parent or the child, including but not limited to whether a parent or other person residing in the parent's household has been convicted of any of the crimes enumerated in 40-4-219 (8) (b).



DRAFTING YOUR PARENTING PLAN

PARENTING TIME

- Restricting Contact if necessary for safety, etc...
limited visitation, supervised visits, stair stepping plans, etc...
- Exchanging the children (safe place, specifically lay out details on time, location, who can be present, allocating cost).
- Residential and holiday schedules
 - Be as specific as possible in laying out for enforcement

WHY NOT SHARED PARENTING?

- Not a good fit for every case...
- The American Bar Association Commission on Domestic Violence has recommended that co-parenting be **avoided** in domestic violence cases.
- Lisa C. Jordan, et al., American Bar Association Commission on Domestic Violence, *The Domestic Violence Civil Law Manual* 3 at 13 (2001) (internal citations omitted).

CONCERNS OVER PARENTING

- Mental illness
- Domestic violence
- Child Abuse/Neglect
- Substance abuse
- Special needs of child or parent
- Decision making abilities-be very clear in parenting plan

ADDRESSING CONCERNS

- **Services to Address Concerns over Parenting:**
 - Guardian Ad Litem
 - Parenting Evaluations
 - Psychological Evaluations
 - Chemical Dependency Evaluations and Treatment
 - Batterers Intervention Therapy
 - Counseling
 - Supervised Visitation and Exchange Centers

COMMUNICATION

- Communication
 - Between parenting parties
 - Better to be restricted to written communication and phone calls for emergencies.
 - Our Family Wizard
 - Between the children and parenting parties
 - Set parameters to help avoid abuse
 - Follow language from existing Orders of Protection and No Contact Orders

CHILD AND MEDICAL SUPPORT

- **Child Support:**

- What changes when there's DV?
 - Factors considered
 - CSED involvement versus District Court
 - Establishing and enforcing child support often becomes very contentious in cases involving DV
- What are the solutions?

- **Medical Support:**

- What changes when there's DV?
- What are the solutions?



WHEN A CASE BECOMES CONTESTED

CONTESTED CASES

- Alternative Dispute Resolution
- Court
- Use of Experts
- Reports and Evaluations
- Witnesses

Alternative Dispute Resolution

- *In Hendershott v. Westphal*, 2011 MT 73, ¶ 26, 360 Mont. 66, 253 P.3d 806, the Montana Supreme Court held that alternative dispute resolution may not be mandated in domestic violence cases. *Id.* at ¶ 32.
- The Montana Legislature addressed the absolute bar of *Hendershott* by amending §§ 40-4-219, 301, 302 and 307, MCA, to allow victims of domestic violence to opt in to mediations provided that the mediator has training to handle DV cases, etc....
- Weigh out with client if this the the best option and is it safe? There are many schools of thought around this and each case is different.

CONTESTED COURT CASES

- Use of experts and professionals is important but can be costly.
- Guardian Ad Litem can be extremely helpful but often recommendations stand despite your client's objections.
- Teachers, daycare providers and other witnesses who see the children on a frequent basis as well as see the parents interacting with the children can be helpful.
- Court can be very stressful especially to a survivor of domestic violence. You can help work to ensure your client feels safe in the process.

CO-OCCURRING CASES

- Child and Family Services case (DN Matter).
- Orders of Protection (MCA 40-15-401 and 402) and Civil No Contact Orders.
- Criminal Cases (Partner and Family Member Assault “PFMA”).



Post Parenting Plan Issues

VIOLATION AND ENFORCEMENT

- **Violating the Parenting Plan**
 - What legal means does the other parent have to get the child returned?
 - Parental interference issues and contempt
 - Easier to enforce when you have a clear parenting plan
- **Modification of parenting plans**
 - Must have a significant change in circumstances
 - Considered vexatious if within 6 months of child support order
 - Whether child is 14 years old and what the 14+ child wants one factor that is considered

IN CONCLUSION

- **Safety** is paramount in family law cases involving domestic violence.
- The Parenting Plan should be **clearly written** and detailed in order to avoid confusion and minimize violations.
- **Consultation** with experts is often extremely helpful in these cases.
- Please consider talking a **pro bono** family law case in which domestic violence is involved as no survivor should have to go into court unrepresented.

IN CONCLUSION CONT...

- Cooperative co-parenting, frequent transitions and “joint custody” are **often not workable** in DV cases.
- Strive to **minimize contact** between the parties so as to help avoid further abuse.
- Work on developing a plan to help keep the children safe and **help protect the children** from parental conflict.
- Too much flexibility in a parenting plan where there is DV provides opportunity for **ongoing abuse** and manipulation.

QUESTIONS?

