

BEST STATE PRACTICES - CHILD CUSTODY - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3008 ([Appendix A](#)) directs a study of the issues of fairness, equity, and the best interests of children as they relate to issues of child custody and visitation. By Legislative Council directive, the scope of this study is limited to a study of the best state practices relating to child custody.

NORTH DAKOTA LAW REGARDING CHILD CUSTODY AND VISITATION ORDERS

Child Custody

Child custody determinations are based on North Dakota statutes. North Dakota Century Code (NDCC) Section 14-09-04 provides that the mother and father of a legitimate unmarried minor child are entitled equally to custody of the child. Under Section 14-09-05, when maternity and paternity of an illegitimate child are positively established, the custody rights are equal as between the mother and father and must serve the best interests of the child.

Child custody often becomes an issue when a mother and father live separate and apart from each other. North Dakota Century Code Section 14-09-06 provides:

The husband and father and wife and mother have equal rights with regard to the care, custody, education, and control of the children of the marriage, while such husband and wife live separate and apart from each other, and when they so live in a state of separation without being divorced, the district court or judge thereof, upon application of either, may grant a writ of habeas corpus to inquire into the custody of any minor unmarried child of the marriage, and may award the custody of such child to either for such time and under such regulations as the case may require. The decision of the court or judge must be guided by the rules provided by law for awarding the custody of a minor or the appointment of a general guardian.

According to NDCC Section 14-09-06.1, child custody determinations must promote the best interests and welfare of the child. Regardless of whether the parents are married, the factors contained in Section 14-09-06.2(1) must be considered in determining the best interests and welfare of a child. This subsection provides:

1. For the purpose of custody, the best interests and welfare of the child is determined by the court's consideration and evaluation of all factors affecting the best interests

and welfare of the child. These factors include all of the following when applicable:

- a. The love, affection, and other emotional ties existing between the parents and child.
- b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
- c. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
- d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.
- e. The permanence, as a family unit, of the existing or proposed custodial home.
- f. The moral fitness of the parents.
- g. The mental and physical health of the parents.
- h. The home, school, and community record of the child.
- i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- j. Evidence of domestic violence. In awarding custody or granting rights of visitation, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child. This presumption may be overcome only by clear and convincing

evidence that the best interests of the child require that parent's participation as a custodial parent. The court shall cite specific findings of fact to show that the custody or visitation arrangement best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, custody may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards custody to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent custody. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01. A court may consider, but is not bound by, a finding of domestic violence in another proceeding under chapter 14-07.1.

- k. The interaction and inter-relationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.
- l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.
- m. Any other factors considered by the court to be relevant to a particular child custody dispute.

Visitation

Because of their interrelated nature, visitation is frequently considered at the same time custody is determined. North Dakota Century Code Section 14-05-22 addresses visitation issues in divorce proceedings, providing:

1. In an action for divorce, the court, before or after judgment, may give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may vacate or modify the same at any time. Any award or change of custody must be made in accordance with the provisions of chapter 14-09.
2. After making an award of custody, the court shall, upon request of the noncustodial parent, grant such rights of visitation as will enable the child and the noncustodial parent to maintain a parent-child relationship that will be beneficial to the child, unless the court finds, after a hearing, that visitation is likely to endanger the child's physical or emotional health.
3. If the court finds that a parent has perpetrated domestic violence and that parent does not have custody, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, the court shall allow only supervised child visitation with that parent unless there is a showing by clear and convincing evidence that unsupervised visitation would not endanger the child's physical or emotional health.
4. If any court finds that a parent has sexually abused the parent's child, the court shall prohibit all visitation and contact between the abusive parent and the child until the court finds that the abusive parent has successfully completed a treatment program designed for such sexual abusers, and that supervised visitation is in the child's best interest. Contact between the abusive parent and the child may be allowed only in a therapeutic setting, facilitated by a therapist as part of a sexual abuse treatment program, and only when the therapist for the abusive parent and the therapist for the abused child agree that it serves a therapeutic purpose and is in the best interests of the child.
5. In any custody or visitation proceeding in which a parent is found to have perpetrated domestic violence, and there exists one incident of domestic violence which

resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, all court costs, attorney's fees, evaluation fees, and expert witness fees must be paid by the perpetrator of the domestic violence unless those costs would place an undue financial hardship on that parent.

North Dakota case law indicates a trial court may consider the parents' attitudes regarding visitation when the court determines child custody. For example, when the trial court found a mother had a hostile attitude toward visitations between a child and father but, in contrast, the father had expressed a willingness to foster and encourage regular visitations between the mother and child, the court gave this factor significant weight in deciding to place the child in the father's custody; it was appropriate for the court to do so, because visitation between a child and a noncustodial parent is presumed to be in the best interests of the child and hostility of a custodial parent toward such visitations could be detrimental to the child's best interests *Schmidkunz v. Schmidkunz*, 529 N.W.2d 857 (N.D. 1995); see also *McAdams v. McAdams*, 530 N.W.2d 647 (N.D. 1995) (split custody is proper when one parent prevents visitation by the noncustodial parent because the split custody award furthers the child's best interests in maintaining a stable relationship with the noncustodial parent).

Although the North Dakota Supreme Court has determined that visitation with the noncustodial parent is presumed to be in the best interests of a child, the primary purpose of visitation is to promote the best interests of the child and not the wishes or desires of the parents *Reinecke v. Griffeth*, 533 N.W.2d 695 (N.D. 1995). Denial of visitation rights should be the exception and not the rule; the exception should be only when it is in the best interests of the child. The court also has determined that a showing by a preponderance of the evidence authorizes the finding that "visitation is likely to endanger the child's physical or emotional health," which justifies curtailment of visitation *Healy v. Healy*, 397 N.W.2d 71 (N.D. 1986).

In 1999 the Legislative Assembly considered legislation that addressed parental custody and visitation rights and duties. The legislation, codified as NDCC Section 14-09-28, provides:

1. Each parent of a child has the following custody and visitation rights and duties:
 - a. Right to access and obtain copies of the child's educational, medical, dental, religious, insurance, and other records or information.
 - b. Right to attend educational conferences concerning the child. This right does not require any

school to hold a separate conference with each parent.

- c. Right to reasonable access to the child by written, telephonic, and electronic means.
 - d. Duty to inform the other parent as soon as reasonably possible of a serious accident or serious illness for which the child receives health care treatment. The parent shall provide to the other parent a description of the serious accident or serious illness, the time of the serious accident or serious illness, and the name and location of the treating health care provider.
 - e. Duty to immediately inform the other parent of a change in residential telephone number and address.
 - f. Duty to keep the other parent informed of the name and address of the school the child attends.
2. The court shall include in an order establishing or modifying visitation the rights and duties listed in this section; however, the court may restrict or exclude any right or duty listed in this section if the order states the reason in support of the restriction or exclusion. The court shall consider any domestic violence protection orders relating to the parties when determining whether to restrict or exclude any right or duty listed in this section.

Enforcement of Custody and Visitation Orders

Enforcement of a child custody order or visitation order is essentially the same as enforcement of any court order. The enforcement tool available to a court is contempt proceedings. Additionally, NDCC Section 14-09-24 provides that in a child visitation proceeding, the court is required to award the noncustodial parent reasonable attorney's fees and costs if the court determines there has been willful and persistent denial of visitation rights by the custodial parent with respect to the minor child.

Modification

When the trial court makes an original award of custody between parents, the single issue to be decided is what is in the child's best interests. When the trial court considers a request to modify a custody award, however, the court must determine two issues: (1) whether, on the basis of facts that have arisen since the earlier order or on the basis of facts that were unknown to the court at the time of the earlier order, there has been a material change in the circumstances of the child or the parties since the

earlier custody award, and, if so, (2) whether the modification is necessary to serve the best interests of the child. The parent seeking to modify custody has the burden of showing both that a circumstance changed significantly and that this change so adversely affected the child that custody should be changed *Gould v. Miller*, 488 N.W.2d 42 (N.D. 1992).

The North Dakota Supreme Court has determined frustration of visitation does not in and of itself constitute a sufficient change in circumstances to warrant a change in custody. Before visitation problems justify changing custody, there must be a finding that the visitation problems worked against the child's best interests *Blotske v. Leidholm*, 487 N.W.2d 607 (N.D. 1992); see *Miller v. Miller*, 305 N.W.2d 666 (N.D. 1981) (custodial parent's frustration of noncustodial parent's visitation privileges in and of itself does not constitute a sufficient change of circumstances to warrant a change in custody). Additionally, NDCC Section 14-09-06.6 limits postjudgment custody modifications within two years after entry of a custody order unless modification is necessary to serve the best interests of the child and there is persistent and willful denial or interference with visitation, the child is in danger, or there has been a de facto change in custody.

North Dakota Century Code Section 14-09-07 limits when a custodial parent may change the residence of a child to another state. Modification proceedings frequently accompany legal proceedings initiated when a custodial parent seeks to change the residence of a child. Section 14-09-07 provides:

A parent entitled to the custody of a child may not change the residence of the child to another state except upon order of the court or with the consent of the noncustodial parent, if the noncustodial parent has been given visitation rights by the decree. A court order is not required if the noncustodial parent:

1. Has not exercised visitation rights for a period of one year; or
2. Has moved to another state and is more than fifty miles [80.47 kilometers] from the residence of the custodial parent.

Mediation

Although typically in child custody cases the determination of the best interests and welfare of a child is made by the court, NDCC Chapter 14-09.1 provides for voluntary mediation in custody determinations. Section 14-09.1-02 provides:

In any proceeding involving an order, modification of an order, or enforcement of an order for the custody, support, or visitation of a child in which the custody or visitation issue is contested, the court may order mediation at the parties' own expense. The court may not order mediation if the custody, support, or visitation issue involves

or may involve physical or sexual abuse of any party or the child of any party to the proceeding.

SUMMARY OF CHILD CUSTODY AND VISITATION LAWS OF OTHER STATES

State legislatures have tried to assist courts with making child custody decisions in a variety of ways. Some states have explored favoring or requiring the consideration of joint or shared custody in all cases as a means to assure continuing contact between a child and both parents. Other states have funded access and visitation programs to enable both parents to stay emotionally involved with their children. Attached as [Appendix B](#) is a map that indicates those states that have passed laws relating to a preference or presumption for joint custody. This map was prepared by the National Conference of State Legislatures. Attached as [Appendix C](#) is a table relating to the custody criteria used by each state. This table was prepared by the American Bar Association.

Following is a brief summary of the custody laws and procedures of a number of other states. It should be noted that in addition to statutory requirements for determining custody, all states have case law regarding custody and visitation which has developed over the years.

Alabama - Both parents have an equal right to the custody of their children. Under Alabama law, a court may consider an award of joint custody, whereby the parental rights of both parties remain intact, with one parent as the primary custodian of the children and the other as the secondary custodian. Under this arrangement, both parents remain involved in the decisionmaking responsibilities regarding the children, with each parent having "tie-breaking" authority regarding certain issues, such as education, health and dental care, religion, civic and cultural activities, and athletic involvement.

Arizona - There is no presumption in favor of joint custody. Joint custody may be granted if both parents agree, the parents submit a parenting plan, and the order is in the child's best interests. Evidence of domestic violence must be considered contrary to the best interests of the child. In determining the best interests of the child, the court can consider a number of factors, including the wishes of the child's parents; the wishes of the child; the interaction among the child and relatives; the child's adjustment to school, home, and community; the mental and physical health of the parties; which parent is more likely to involve the child in the life of the other parent; if either parent has been the primary caregiver; the nature and extent of coercion used by a parent in obtaining a written agreement regarding custody; whether either parent has complied with an order to attend domestic relations education. The noncustodial parent is entitled to reasonable visitation. The

visitation may not be restricted unless the court finds serious endangerment to the child.

Arkansas - The court is required to determine custody in accordance with the best interests of the child.

California - There is no presumption in favor of joint or sole custody. Custody must be awarded to both parents jointly or to either parent using the best interests of the child standard. If the parties agree to joint custody, then joint custody is presumed to be in the best interests of the child. In awarding custody, the court is required to consider which parent is more likely to foster a positive relationship between the child and the other parent.

Colorado - Joint custody, with one parent designated the residential custodian, may be awarded when the parties submit a parenting plan. If no plan is submitted, the court is required to determine custody in accordance with the best interests of the child.

Connecticut - If the parents agree to joint custody, then it is presumed that joint custody is in the best interests of the child, and the court must state its reasons for denial of joint custody. The court may award joint legal custody with primary physical custody to one parent.

District of Columbia - There is no presumption as to the form of legal custody. The court may order frequent and continuing contact between each party and the child. The court's order must be based on the best interests of the child. The court can consider the wishes of the parents, the wishes of the child, the interaction and interrelationship among all family members, the mental and physical health of all parties, the capacity of the parties to communicate, the demands of parental employment, the age and number of children, the parents' financial ability to support the custody arrangement, and the impact of governmental assistance.

Florida - Unless it is detrimental to the child, the court must order that parental responsibility for a minor child be shared by both parents. The court may grant to one party the ultimate responsibility over specific aspects of the child's welfare. The court must order sole parental responsibility with or without visitation to the other parent when it is in the best interests of the child. The court may order rotating custody.

Georgia - Using the best interests of the child standard, the court may award joint custody and may consider agreements of the parties. If a child is 14 years of age or older, the child has the right to select the parent with whom the child desires to live and that selection is controlling unless the parent is not fit. The court may consider family violence in making a decision. Visitation must be ordered unless there is a history of family violence.

Hawaii - Custody is determined according to the best interests of the child. If a child is of sufficient

age and capacity to reason, so as to form an intelligent preference, the child's wishes can be considered. Joint custody may be awarded in the discretion of the court. Visitation may be awarded to grandparents or any person interested in the welfare of the child.

Illinois - There is no presumption for or against joint custody. Custody is determined based on the best interests of the child, considering the parents' and the child's wishes.

Indiana - Joint custody may be awarded if it is in the child's best interests. The relevant factors for determining custody are the parents' and child's wishes, the interaction and relationship of the child with any person who may significantly affect his or her best interests, the mental and physical health of all individuals involved, and a pattern of domestic violence.

Iowa - If either party requests joint custody, there is a presumption of joint custody. If the court does not grant joint custody, it must clearly state its reasons why joint custody is not in the best interests of the child. Joint custody does not necessarily require joint physical care. Physical care must be awarded as is in the best interests of the child.

Kentucky - The court may grant joint custody to the child's parents if it is in the child's best interests. The court may not consider conduct of a custodian if the conduct does not affect his or her relationship to the child nor may it consider abandonment of the family residence if it was to avoid physical harm.

Louisiana - The court is required to award custody in accordance with the parents' agreement, unless the best interests of the child require otherwise. If there is no agreement or if the agreement is not in the best interests of the child, the court must award joint custody, unless custody by one parent is shown by clear and convincing evidence to serve the child's best interests. Factors for determining the child's best interests include a stable environment and the primary caretaker preference. The parent not awarded custody is entitled to reasonable visitation.

Maine - When the parties have agreed to shared parental rights and responsibilities, the court is required to make that award unless there is substantial evidence that it should not be ordered. In making an award of parental rights and responsibilities, the court applies the best interests of the child standard. The court may not apply a preference for one parent over the other on account of either parent's gender or the child's age and gender. The court may order grandparent or third-party visitation.

Maryland - The court may award joint custody or sole custody. The court may deny custody to a party if the court has reasonable grounds to believe that the party abused or neglected the child

and that there is a likelihood of further abuse or neglect.

Massachusetts - Each parent must submit to the court a shared custody implementation plan. The court may modify or grant the plan. The court may reject the plan and award sole custody to one parent.

Michigan - Custody is awarded based on the best interests of the child based on certain factors. There is a joint custody presumption if the parties agree to joint custody. The court may also award joint custody if one party requests joint custody and the court finds it to be in the best interests of the child. In deciding whether to grant joint custody, the court must consider all of the statutory factors plus whether the parents will be able to cooperate and whether the parents have agreed to joint custody.

Minnesota - If both parents request joint custody, there is a presumption that such an arrangement is in the best interests of the child, unless there has been spousal abuse. Sole custody can be awarded based on the best interests of the child. Additional visitation may be ordered for wrongful denial or interference with visitation orders.

Mississippi - Custody is determined based on the best interests of the child. Joint custody may be awarded if both parents request joint custody. If both parents request joint custody, there is a presumption that joint custody is in the best interests of the child. The court may order any of the following: joint physical custody to one or both parents, with legal custody to one or both parents; physical custody to both parents, with legal custody to one parent; physical custody to one parent, with legal custody to both parents; or custody to a third party if the parents have abandoned the child or are unfit.

Missouri - The court determines custody based on the best interests of the child. Custody can be joint legal, joint physical, sole legal, sole physical, or any combination. An award of joint custody is encouraged.

Montana - Each parent is required to submit, either jointly or separately, a proposed "parenting plan." Sole or joint parenting is awarded based on the best interests of the child.

Nebraska - The court makes a custody determination based on the best interests of the child, which include the relationship of the child to each parent; the desires and wishes of the child; the general health, welfare, and social behavior of the child; and credible evidence of any abuse in the household. Joint custody may be awarded when both parents agree to such an arrangement.

Nevada - Using the best interests of the child standard, the court awards custody in the following order of preference unless in a particular case the best interests of the child requires otherwise: to both parents jointly or to either parent; to a person or persons in whose home the child has been

living and where the child has had a wholesome and stable environment; to any person related within the third degree of consanguinity; or to any other person or persons whom the court finds suitable and able to provide proper care. In determining the best interests of the child, the court considers the wishes of the child if the child is of sufficient age and maturity; any nomination by a parent for a guardian; or whether either parent has engaged in domestic violence. A finding of domestic violence creates a rebuttable presumption that custody would not be appropriate by the perpetrator.

New Hampshire - Unless the child has been abused by one of the parents, joint legal custody is presumed to be in the best interests of the child. Custody is awarded based on preference of the child, education of the child, findings and recommendations of a neutral mediator, and other factors.

New Jersey - Sole or joint custody may be awarded based on the needs of the child. There is no preference for either parent and no preference for joint custody.

New York - Joint or sole custody is determined according to the best interests of the child. Neither parent is entitled to a preference.

North Carolina - Joint or sole child custody is determined according to the interests and welfare of the child. There is no presumption that either parent is better suited to have custody. The court considers all relevant factors, including acts of domestic violence and the safety of the child.

Ohio - If at least one parent requests shared parenting and files a plan that is in the child's best interests and approved by the court, the court may allocate parental rights and responsibilities of the child to both parents and issue a shared parenting order. Otherwise, the court, consistent with the child's best interests, allocates parental rights and responsibilities primarily to one parent.

Oregon - The court may order joint custody if the parents agree, but if one parent objects, the court cannot order joint custody. An order for joint custody may specify one home as the primary residence of the child and designate one parent to have sole power to make decisions regarding specific matters while both parents retain equal rights and responsibilities for other matters. When ordering sole custody, the court can consider the conduct, marital status, income, social environment, or lifestyle of either party only if it is shown that these factors are causing or may cause damage to the child. Any person who has established emotional ties creating a parent/child relationship with a child may petition for custody, placement, or visitation.

Texas - Joint or sole custody is determined according to the best interests of the child. The court considers the best interests of the child when

deciding upon the terms and conditions of the rights of the parent with visitation.

Utah - The court considers the best interests of the child along with the past conduct and demonstrated moral standards of the parties. There is a presumption that a spouse who has been abandoned is entitled to custody. State law contains advisory guidelines for visitation schedules, broken down by age of the child.

Wisconsin - The court is required to presume that joint legal custody is in the best interests of the child. The court, however, may award sole legal custody if it finds that sole custody is in the child's best interests and both parties agree to sole legal custody with the same party; or the parties do not agree to sole legal custody with the same party, but at least one party requests sole legal custody and the court specifically finds any of the following: (1) one party is not capable of performing parental duties and responsibilities or does not wish to have an active role in raising the child; (2) one or more conditions exist at that time that would substantially interfere with the exercise of joint legal custody; or (3) the parties will not be able to cooperate in the future decisionmaking required under an award of joint legal custody. In making this finding, the court shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. In any action that legal custody or physical placement is contested, the court is required to request that any party seeking sole or joint legal custody, or periods of physical placement, to file a parenting plan with the court before any pretrial conference. Except for cause shown, a party required to file a parenting plan who does not timely file waives the right to object to the other party's parenting plan.

West Virginia - There is a presumption in favor of the parent who has been the primary caretaker of the child. There is no provision for joint custody.

Wyoming - The court is required to consider factors to determine custody that is in the best interests of the child. The court is required to order custody in well-defined terms to promote understanding and compliance by the parties. Custody must be crafted to promote the best interests of the child, and may include any combination of joint, shared, or sole custody. Unless otherwise ordered by the court, the noncustodial parent must have the same right of access as the parent awarded custody to any records relating to the child of the parties, including school records, activities, teachers, and teachers' conferences as well as medical and dental treatment providers and mental health records.

RECENT LEGISLATION AND MEASURES

Senate Bill No. 2064 (2007) provided that when a motion for a change of custody is filed during the time

a parent is in active duty service, the court may not enter an order modifying or amending a previous judgment or issue a new order that changes the child's placement that existed on the date the parent was called to active duty service. The bill provided that the court may issue a temporary custody order that is in the best interest of the child.

Initiated measure No. 3 (2006 general election) related to child custody and support and would have provided that in the event of a divorce or separation, each parent would be entitled to joint legal and physical custody unless first declared unfit based on clear and convincing evidence. Under the measure, parents would develop a joint parenting plan, with a court becoming involved only if the parents could not agree on a plan. The measure also provided that child support payments would be determined based on the parenting plan and could not be greater than the actual cost of providing for the basic needs of each child. The measure was disapproved by a vote of 91,225 to 118,048.

House Bill No. 1121 (2005) provided for the adoption the Uniform Parentage Act (2002). The bill established the procedure for the determination of parentage in the state. The bill also established a procedure for the execution of an acknowledgment of paternity, the denial of paternity, genetic testing, and paternity of a child of assisted reproduction.

SUGGESTED STUDY APPROACH

The committee, in its study of the best state practices relating to child custody, may wish to consider the following:

- Receive information and testimony from representatives of the State Bar Association of North Dakota, the judiciary, and other interested persons regarding issues and concerns about this state's child custody laws, the best practices of other states, and how the implementation of some of those best practices would work in North Dakota;
- Receive information from organizations, such as the National Conference of State Legislatures and the Council of State Governments, regarding the best practices of other states;
- Work closely with and receive information and recommendations from the task force formed by the State Bar Association of North Dakota regarding child custody laws and best state practices;
- Prepare bill drafts based on the testimony and recommendations and receive testimony from the task force, individuals, agencies, and others who may be impacted by the changes; and
- Develop final recommendations and prepare legislation necessary to implement the recommendations.