

Q&A By John T. Syrtash, Associate, Garfin Zeidenberg LLP

Answers to pressing questions on Family Law.

Explaining ‘custody’ terms

Question: I am the primary parent of two young children. I am currently negotiating a separation agreement and I am confused about the term “custody.” If I settle for something less, like the term “primary care and control” or “residential parent” will it be harder for me to relocate with my children if I ever need to move away from Toronto at some time in the future? For instance, I might find a better job or wish to remarry. If I lose such a fight in court later, what do I do?

Answer: The term custody in itself will not be the determining factor. What matters to the courts are many factors. According to the Ontario Court of Appeal, it is not only what the agreement says, but which parent has actually provided the primary care role in reality. If the facts on the ground measure up to what the agreement says parent such as yourselves have traditionally been permitted to move with their children, if heard by the Court of Appeal level, the results in what are called “mobility rights” cases at the trial level in Ontario is anybody’s guess. The outcome before reaching the appellate level will depend slightly more on the facts of each case, less on principles of law and which judge hears the matter. Frankly, at the Ontario trial level there appears quite often to be no law or guideposts. And the trial judges or “motions judges” do not appear to be following the rules laid down by the Court of Appeal, even though that is what is supposed to happen. Some do and many others simply try each case on the facts before them based on the “best interest” tests. This has meant the following in a number of decisions: Notwithstanding that a parent is the primary or custodial parent, a child should not be separated from an access parent with whom a child is so sufficiently bonded that it would betray his or her best interests. And/or the primary parent may not have sufficient reason for moving. Such a primary caregiver or custodial parent in such cases has therefore been denied permission to move permanently with the child, irrespective of the principles laid down by Ontario’s Court of Appeal. So in that case, the best bet for such a parent is to appeal.

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