DONNELLAN & KNUSSMAN PLLC
ATTORNEYS AT LAW

CHILD CUSTODY SURVIVAL GUIDE

FOREWORD

This Child Custody Survival Guide will provide you insight into the landscape of litigation, custody evaluations, Attorneys for the Child, opposing counsel, and judges. It is our hope that this book will be helpful when navigating this unfamiliar territory and help alleviate any fears you may have.

This guide provides general information only about the family court system and issues that you may face in a custody matter. If you have questions or need assistance, we encourage you to make an appointment with **DONNELLAN & KNUSSMAN, PLLC** so that we may evaluate your unique situation and provide you with the quality advice you deserve.

Please call us at 518-278-4059 to schedule your free consultation.

WARNING AND DISCLAIMER

This guide is offered to clients and potential clients of **DONNELLAN & KNUSSMAN, PLLC** in an effort to provide information about the legal process in family court and/or matrimonial actions. It is based upon New York law. This guide is not intended to provide legal advice and does not create an attorney/client relationship between **DONNELLAN & KNUSSMAN, PLLC** and the reader. While the various jurisdictions have similar laws and processes related to child custody, this guide gives general information based upon New York family law only. If you have any questions or are seeking to retain an attorney to represent you in a custody matter, please call **DONNELLAN & KNUSSMAN, PLLC** for a free consultation with one of our attorneys. If your matter is not in New York State, please consult with an attorney licensed in your jurisdiction with significant experience in family law for specific legal advice regarding your child custody case.

If you read this guide and would like more information, visit our website at www.DKLawFirmNY.com or call **518-278-4059** to schedule a free consultation.

CONTENTS

INTRODUCTION

If you are in a custody dispute or think you may be headed there, you will find this guide to be a valuable resource.

Chapters 1 through 3 explain the basics: what custody really means and how it is determined, as well as when and how custody and parenting time can be changed. In discussing the various custody factors, this guide will give you tips about what specific kinds of information the Court will be looking for and what facts can help or hurt your case.

Chapter 4 addresses several special issues that may arise in child custody cases. This chapter will provide suggestions for addressing these special issues and explain what evidence and witnesses may be helpful in winning your case.

Chapter 5 discusses alternatives to litigation and why resolving your case outside the courtroom, with the help of a mediator or collaborative team, may produce a better result for your family than anything a judge could rule.

Chapter 6 of this guide is your courtroom survival guide. This chapter will tell you what every parent wishes their attorney would take the time to tell them in detail about court, including tips that can make or break your case. You will learn what to wear, what to expect, when to stand, and when to speak. You will learn the format of a custody trial and why you are always rushing to the courthouse and then having to wait. In addition, you will learn what to do and what not to do in order to survive cross-examination.

In **Chapter 7**, you will learn valuable suggestions for working with your attorney. You will also learn important considerations for working with an Attorney for the Child and other professionals involved in your case.

Chapter 8 outlines custody litigation strategies that will be helpful in attaining your goal. You will learn how to help your attorney present your best case to the Court.

Chapter 9 will distill the information in this guide to the short list - the 10 most important things to remember in your custody and parenting time case. After reading this guide, you will be empowered with insight and information about child custody so that you can walk confidently into the courtroom.

1 What is Child Custody?

In New York, there are two types of custody: legal custody and physical custody.

Legal custody has to do with having the authority to make major decisions affecting the child in question. It does not affect whether or how often a parent spends time with a child.

Physical custody has to do with where and with whom the child resides.

Parenting Time determines how and when a parent without physical custody of a child sees the child.

Legal Custody

Legal custody can be sole or joint.

Sole custody means that the parent with sole legal custody can make the major decisions impacting the child's life without input from the other parent.

When parents have joint legal custody, they are expected to discuss major decisions and try to reach consensus. New York Courts consider decisions regarding education, non-emergency medical care, and religious upbringing to be major decisions on which joint custodians should reach agreement.

Under New York law, there is no presumption or preference for joint legal custody or sole legal custody. It is up to the discretion of the judge who is deciding custody to determine whether to award joint or sole legal custody. Although there are a few judges who prefer to award sole legal custody, the majority of judges prefer to award joint legal custody, believing that two heads are better than one when it comes to the difficult task of raising a child. However, even these judges are faced with circumstances, such as domestic violence situations or parents who argue endlessly over everything, in which sole legal custody may be a more appropriate arrangement.

Physical Custody

Physical custody has to do with where and with whom a child resides. Physical custody can be primary physical custody (or sole physical custody), shared physical custody (or joint physical custody), or split physical custody. Additionally, some people prefer to use the term "parenting plan," rather than custody, to describe the physical custodial arrangement.

Primary physical custody means that the child lives primarily with one parent and has parenting time with the other parent. Shared physical custody means an arrangement by which both parents spend significant amounts of time with the child. The parents may have equal time with the child, but not necessarily. Shared custody may refer to many different sorts of arrangements under which each parent has the child for a good portion of the time. Parents often get hung-up on the concept of "50/50". It is important to recognize that your child is not a number and that each family dynamic is unique and may not be conducive to a truly equal parenting time arrangement. The Court will take this into consideration when issuing a custody arrangement.

Split custody refers to a scenario in which parents have more than one child together, and the custodial arrangement is not the same for each child. For instance, if the parents have two children and shared physical custody of one of the children, and one parent has primary physical custody of the other child, it would be considered split custody.

Courts typically do not like to split up siblings. Often when parents have a split custody arrangement, it is because the parents determined for themselves that split custody was best for their family rather than because a judge ordered it. However, there are situations when a court will order split custody. A Court may order split custody when an older and mature teenage child has a strong and compelling reason for preferring to live with a parent other than the one that the court determines is best for the younger children.

Parenting Time

Parenting time refers to the time that the parent without physical custody spends with the child. Typically, parenting time includes overnight and extended periods of time spent with the non-custodial parent in their home or the place of their choosing, but in special circumstances, parenting time may be required to be supervised or to take place in a therapeutic setting.

Therapeutic Parenting Time

Therapeutic parenting time is a form of family therapy in which the parent and child meet with a therapist to help repair or build the parties' relationship. It is often used when the parent/child relationship has broken down and cannot be repaired organically. Typically, the parent and child will work together towards specific goals while the therapist monitors and guides their progress. Courts do not usually order therapeutic parenting time unless it is in the best interest of the child. Therapeutic parenting time also creates obligations on the parties to schedule and attend these sessions, which may not be covered by insurance.

Supervised Parenting Time

Supervised parenting time is overseen by a professional or neutral party that is mutually agreeable. The third party may need to be in the same room or in close vicinity of the parties while the parenting time is occurring, depending on the specific agreement or court order. If a professional is required to supervise the parenting time, there may be a cost for this service.

2 HOW DO COURTS DECIDE CHILD CUSTODY AND PARENTING TIME?

In New York, as in most states, child custody and parenting time determinations are made based upon the idea of the "best interests of the child." The Court looks at specific factors with respect to the parents and the child in question. After analyzing the factors, the Court's task is to make a custody and parenting time determination which serves the best interests of the child. In New York State, these factors are as follows:

Child Custody and Parenting time Factors

1. The age and physical and/or mental condition of the child, giving due consideration to the child's changing developmental needs;
2. The age and physical and/or mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement in the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to, siblings, peers and extended family members;
5. The role that each parent has played and will play in the future, in the upbringing and care of the child;
6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied access to or parenting time with the child;
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
9. Any history of family abuse; and
10. Such other factors as the court deems necessary and proper to the determination.

In this chapter, we will discuss each of these factors in detail, including what evidence the court will be interested in when analyzing each factor.

Factor #1: The age and physical and/or mental condition of the child, giving due consideration to the child's changing developmental needs.

In analyzing this factor, the court is interested in the child's age, existing health issues, emotional or intellectual special needs, and specific developmental needs, now and in the foreseeable future.

You will need to be prepared to address these concerns in an organized manner by presenting **admissible evidence**. As much as you would like to present all of your information to the judge, Courts are only permitted to view, hear, and consider evidence which is considered admissible under the rules of evidence. Courts routinely strike from the record any evidence that is not in admissible form. Working closely with your attorney will help to ensure that any evidence that is presented in your case is in admissible form.

If your child is healthy and has no special needs, this factor will be easy to address.

If you have a child with special needs, you will need to be able to present your child's special needs to the court. It may be necessary to use an expert witness to testify about your child's special needs and how those needs are best met. If your child is an infant or a toddler, breastfeeding and attachment are also issues which may need to be addressed.

We will discuss the issue of custody and parenting time with a breastfeeding child in the ***Special Issues in Child Custody*** section of this guide. Attachment and separation anxiety are issues that may need to be addressed by an attachment expert. If your child is school-age, you may wish to present evidence regarding which custody and parenting time arrangement will best promote your child's academic and social success in school. With a teenager, you may choose to present evidence of your child's wishes, or how a proposed custody arrangement will impact their significant extracurricular activities. Factor #1 is about your child, your child's identity and personality, and your child's specific needs.

Factor #2: The age and physical and/or mental condition of each parent.

The court must consider the age and physical and/or mental condition of each parent. Generally, the age and physical conditions of the parents are not major issues. So long as each parent is capable of providing care for the child, the court is not going to award custody to the parent who is younger or more physically fit.

However, if the mental health of a parent is an issue, the Court will likely order a psychological evaluation of one or both parents. Additionally, expert witnesses may provide testimony about mental health issues. Be forewarned that although you may give testimony about behaviors that

you have witnessed on the part of your partner, you cannot diagnose them as being mentally ill. Only a qualified mental health evaluator or provider can make such a diagnosis. Attempts on your part to portray your partner as "crazy" could make you appear vindictive. If you are concerned about the mental health of your partner, you may want to consider requesting a psychological evaluation of them, but only after careful consultation with your attorney.

If you request a psychological evaluation of your partner, your partner will probably request one of you. Psychological testing is not foolproof. Your partner may come out with flying colors, even if they are not psychologically sound. On the other hand, you may come out as having some traits of concern simply by virtue of the stress and fear that the custody litigation is causing you. A biased evaluator or skewed test data can cause irreparable damage to your custody case.

The costs associated with psychological evaluations are generally shared by the parties, unless the evaluation is being conducted for one party as their sole witness. Doctor/patient confidentiality does not apply with a psychological evaluator. Anything you tell them can and will be used to make a determination of custody. You should be honest, admit your short-comings and share your observations with the doctor to enable them to make draw their own conclusions.

Formats differ with each doctor, but typically:

1. You and the other parent will meet individually, and sometimes together, with the doctor;
2. Your child/children will meet with the doctor individually and with each parent; and
3. Collateral sources such as grandparents or significant others may be contacted.

The observation may begin from the parking lot, so you should conduct yourself accordingly. Do not belittle or denigrate the other parent to your children or on a phone call when you could be overheard.

Unless the psychological evaluation is considered your witness, court ordered psychological reports are typically sealed and you will not be able to read them. Your attorney may be given a copy for their file but there is typically an order in place which precludes your attorney from showing you the report. Your attorney may only be able to give you a detailed synopsis of the report. If the expert is to testify at court, you may listen to that testimony and question why they came to the conclusions in their report.

A psychological evaluation may be a very useful tool in your arsenal if you or the other parent are suspected of having mental health issues.

Factor #3: The relationship existing between each parent and each child, giving due consideration to the positive involvement in the child's life, as well as the ability to accurately assess and meet the emotional, intellectual and physical needs of the child.

This factor addresses the quality of the relationship between each child and each parent. While courts are usually reluctant to make a custody determination which separates siblings from one another, it is not uncommon for children in a family to differ in the quality of their relationships with each respective parent. The quality of one child's relationship with a parent may impact a custody determination for all of the children in a family, especially if the relationship is profoundly positive or negative. When there is an unusually strong bond between a parent and one or more children, it is important that the court sees that the relationship is an appropriate parent/child relationship, not a peer-type friendship and not one in which the child is providing comfort and support to the parent.

When going through a divorce you should take care to not place your child in the role of confidant and emotional nurturer. Additionally, parents are particularly susceptible to being accused of being "enmeshed" with their children. Therefore, while you want to portray for the court the positive and unique qualities of your relationships with each of your children, you must take care to demonstrate that you observe appropriate parent/child boundaries in those relationships.

When courts do allow children to testify or to speak to the judge in chambers, the court is more likely to ask them about their relationship with each parent, rather than asking them directly which parent should have custody. In these situations, the court is usually more interested in hearing from the child about her relationship with each parent and how each parent is able to assess and meet the child's various needs, than with which parent the child wants to live. The court is tasked with making a decision based upon what the court determines to be in the best interest of the child, not necessarily on the wishes of the child. This is a factor for which a child may be able to give the court significant insight.

In order to demonstrate to the court that you are able to accurately assess and meet the child's emotional, intellectual and physical needs, you should be able to articulate to the court what you think those needs are, and how, as custodian of the child, you plan to meet those needs. You may also wish to call witnesses, such as teachers, counselors, and health care providers to testify about their assessment of what the child's needs are and their observations of your ability to accurately assess and meet those needs. If you have a special needs child, this factor may be of

particular significance in the case. The court will be interested in how well-equipped you are to deal with your child's particular needs and challenges.

Factor #4: The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members.

This factor focuses on the child's needs, particularly with respect to continuing the child's important relationships. You will want to provide evidence that shows that, in your custody, the child will be able to maintain their relationships with neighborhood and school friends, siblings (including step and half siblings), grandparents, aunts, uncles, cousins, and anyone else who has played an important role in your child's life. You may want to have a neighbor testify about his or her child's relationship with your child, or make a map of the neighborhood showing the proximity of all of the children with whom your child plays. You may wish to have your parents or siblings testify about the other parenttended family activities and traditions and their unique relationships with your child.

Factor #5: The role that each parent has played and will play in the future, in the upbringing and care of the child.

This is the factor under which the Court gives some consideration to which parent has been the primary caretaker of the children and which parent is best equipped to continue to do so in the future.

You should write a narrative for your attorney, outlining all of the things that you have done and continue to do for your child. It is very important to organize your information in such a way that your attorney can present it in court in an abbreviated manner without discounting its importance.

You should also make sure to let your attorney know the things that the other parent has done and continues to do, so that your attorney will not be caught by surprise in court. If you have an **Attorney for the Child** or **custody evaluator**, you should discuss with your attorney whether it is wise to provide this list to these individuals. However, if you are providing documentation to an Attorney for the Child or custody evaluator, you should self-edit more than you need to with your own attorney; be straight-forward, factual, and brief rather than providing a rambling narrative. These professionals do not represent you and their first priority may not be in line with your own position.

Focus on **your strengths**, rather than the other parent's weaknesses, and, above all, do not provide the Attorney for the Child or custody evaluator with a lengthy, written diatribe about the

faults and shortcomings of the other parent. To do so will probably make you, rather than the other parent, appear vindictive in the eyes of these professionals, who have a significant voice in your case.
You should be able to summarize in your testimony who takes care of the basics in child rearing, such as:

1. Who gets the children up, fed, and off to school/daycare in the morning?
2. Who makes the doctor/dentist/therapy appointments and takes the children to the appointments?
3. Who stays home when a child is sick?
4. Who finds and registers for summer camps, sports, and lessons?
5. Who helps with homework?
6. Who feeds the children dinner?
7. Who bathes them?
8. Who puts them to bed?
9. Who attends parent/teacher conferences?
10. Who ensures the children have clean clothes that fit when they have to be dressed for an occasion?
11. Who plans birthday parties and holiday activities for the children?
12. Who arranges play dates?

You will probably be your most important witness for this factor. Your attorney may choose to call lay witnesses, such as teachers, neighbors, and friends to corroborate your testimony about your involvement with your children. Other corroborating evidence can include school records, calendars, medical records, and daycare records, although you will need to work within the rules of evidence to get these records admitted into evidence in court. Your attorney will best be able to direct you with respect to the corroborating evidence. You may need to sign an authorization for release of records to allow your attorney access to this information.

Another method of organizing this information in a way that makes it easy for the court to comprehend is to make a chart of the child care activities and what percentage of responsibility each parent has for each activity. If you and the other parent have been living separately for some period of time, it may also be helpful to make a pie chart of the time the child has spent living with the two of you together and living with each parent separately.

Factor #6: The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied access to or parenting time with the child.

This is one of New York's two "friendly parent" factors. Many jurisdictions require courts to consider which parent is more likely to cooperate with the other parent and promote the relationship between the child and the other parent. Many judges will say that they consider the friendly parent factors to be the most important in making custody/parenting time decisions.

Parents often get tripped up on the friendly parent provisions. During the relationship, one parent may have taken on the responsibility of healthcare, child care, scheduling play dates, etc. This was likely never intended to deprive the other parent of their relationship with their child. Chances are, this was simply a family division of labor, and the other parent never asked about doctor and dentist appointments or PTA meetings. Post-separation, it would seem to make sense that the parents not change the manner in which they distributed the child-rearing tasks. However, this same approach to child-rearing responsibilities, post-separation, could result in an accusation that one parent is trying to alienate the child from the other parent and could make him or her appear to be an "unfriendly parent."

Additionally, in highly contested cases, a parent may set a "friendly parent trap." Remember, the court must consider whether a parent has unreasonably denied access to, or parenting time with, the child. In order to make you look as if you do not support their contact with the child or have unreasonably denied them access, the other parent may start making requests for contact like never before. If you have custody, they may suddenly begin asking for an extra night each week, or ask to return the child home at an unreasonable hour on a school night. If the other parent currently has custody, they may create a situation which makes it extremely inconvenient for you to exercise your parenting time. If you acquiesce to the unreasonable requests, such requests may continue or even increase until you are forced to say no. If you react negatively, they may attempt to use that reaction as proof that you do not support their contact with the child.

If the other parent begins putting you on the spot with requests, you should take some time to think out and/or discuss with your attorney how you should respond. It is fine to say that you need some time to look at your calendar and think about whether the idea is best for your child. Discuss the request with your attorney and decide whether it is better to give in and show how unremittingly reasonable you are, or whether you should take a deep breath and counter with a calm answer.

It is always a good idea, when turning down an unreasonable request, to give a reasonable counter-offer. If you can do so in writing, such as email, you will have a record of your efforts

to allow the other parent reasonable time with the child should you ever be accused of failing to support their contact with the child.

Even if the other parent had no interest in your child's school, health care, and extracurricular activities while you were together, once you enter the world of child custody litigation, you can expect that they will suddenly become fiercely interested. It is to your benefit, no matter how cumbersome it sounds, to share information about these things with them, and to do so in a timely manner. If you take the time to do this, and they still remain uninvolved, so be it. That fact will help you in your custody case. If they suddenly start showing up at every tooth cleaning appointment and camp physical, try not to lose your composure. They now have an attorney instructing them how to be a parent. Resist the temptation to say something sarcastic. If you do, you will undoubtedly hear the same words repeated in court. Try to take yourself out of the equation and focus on how happy your child must be to suddenly have both parents observing their every fluoride treatment and height and weight measurement.

If you are under a court order to provide specific parenting time, consult with an attorney before you ever withhold a court-ordered parenting time, even if you believe that you have excellent reasons, since withholding the parenting time can have dire consequences for your custody case. If there is an issue that you think justifies withholding parenting time, your attorney may be able to set an emergency hearing on the issue prior to the next scheduled parenting time.

Because the friendly parent provisions tend to work against the parent who has had the most responsibility for the child, it is very important to be wary of friendly parent traps and make efforts, within reason, to support and promote the parent/child relationship. It is also important to document your efforts via e-mail or by keeping them on a calendar.

Factor #7: The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child.

This is the other friendly parent factor. It is a disjointed one because the first part is concerned with whether each parent has maintained a relationship with the child, which does not necessarily have any bearing on the parents' ability to cooperate in and resolve disputes regarding the child.

For the first part, you simply need to present evidence that you have continued to keep a close relationship with the child and are willing to continue to do so. If your partner has been an absentee parent, whether or not you were together, you would want to present that evidence, as well.

Again, judges seem to place particular emphasis on the friendly parent provisions. Generally, judges have little tolerance for parents who are unable to reach compromises between themselves in the rearing of their child. While this makes sense, there are situations in which it is unrealistic and unfair to expect a parent to be able to resolve disputes with the other parent without outside intervention.

In cases of domestic violence, or where a parent is controlling or narcissistic, there is no level playing field in which real cooperation and dispute resolution can take place. What does take place is bullying and succumbing to a bully, which serves only the bully's interests and not the child's.

If there is a level playing field, by all means, cooperate and resolve disputes wherever possible. Keep a journal, log, or calendar in which you can document your efforts to cooperate. Save e-mail communications which demonstrate your efforts to compromise and resolve disputes. These can be important pieces of evidence for this factor. If there is not a level playing field, and you are not able to work together to resolve disputes, you will need to be able to justify this. If you are dealing with narcissistic or controlling behavior, you will need to submit evidence to show the judge this behavior and why it inhibits you from being able to resolve disputes.

Often, if you are trying to parent with a controller or narcissist, you should be able to find e-mails or other communications in which the other parent shows their true colors. These e-mails, in the other party's own words, are worth a thousand of your words in trying to explain their behavior to the court. Keep any abusive, controlling, or berating e-mails that they send to you. These are invaluable for use in cross-examining an abusive, controlling, or narcissistic parent who claims that you do not cooperate with them in resolving disputes.

Factor #8: The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference.
We are frequently asked how old a child has to be in order to be able to choose which parent they want to live with. The simple answer is 18 years old. As long as a child is a minor, it is up to the court if the parents cannot agree, not the child, to determine the child's best interest and make a custody decision accordingly. With that being said, judges vary on the issue of whether and under what circumstances they will allow children to give their input and on how much weight that input will be given. The Court will often say that the child may have a voice but not a vote.

If the child has an Attorney for the Child, who is an attorney appointed to represent the best interests of the child; your judge may not want to hear from the child. The judge may only want to hear what the Attorney for the Child has to say. The Attorney for the Child is supposed to

inform the court of the child's wishes, even if those wishes are contrary to what the Attorney for the Child recommends.

Most Courts are opposed to having children testify in open court. There are circumstances in which having a child testify is appropriate. The Judge may choose to have an exparte, informal conversation with the child in chambers rather than having the child testify in open court. In that case, the Attorney for the Child would probably be present, as well as a court reporter to record what is said in chambers. The child's parents and their attorneys would not be present. While this is the usual protocol that is followed, some judges do it differently. The court is supposed to make a determination that the child is of reasonable intelligence, understanding, age and experience to give the court input.

Often, courts decide that it is appropriate to speak to children around the age of 12. Typically, the older a child is the more weight the court will give to his/her preference. Most courts will acknowledge that once a child is old enough to drive, it does not make much sense to order that child to live in a home where he/she clearly does not wish to be, absent extraordinary circumstances.

Factor #9: Any history of family abuse.

Family Abuse is defined as any act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily injury and which is committed by a person against such person's family or household member. If the court finds such a history, the court may disregard Factor #6. The court is supposed to consider whether there is a history of family abuse when making child custody and parenting time determinations. If you are able to prove, to the court's satisfaction, that there is a history of abuse, then the court may disregard the factor which requires you to promote the relationship between the child and the other parent, since it is not reasonable to require a parent to support an abusive relationship.

You should be aware that when you raise the issue of family abuse, not only will the abuser likely deny that they are abusive, but they will likely also claim that you are making a "false allegation" of abuse with the intent of depriving them of a relationship with their child. As we will further explain, it is extremely important to proceed with caution when raising the issue of abuse. If possible, you should work with an attorney who has significant experience in dealing with issues of abuse in child custody cases. It is helpful to gather sufficient admissible evidence of the abuse so that you can counter any claim of false accusations.

Factor #10: Such other factors as the court deems necessary and proper to the determination.

This factor is the catch-all for other issues which may be important to the court in determining child custody. Under this factor, the court may consider any special factor circumstances in your case that the court deems relevant to making a custody and parenting time determination regarding your child. Some such circumstances will be discussed in depth in the ***Special Issues in Child Custody*** section of this guide. Once the court has heard evidence and argument, it will make a child custody and parenting time determination based upon the ten custody factors. The court must consider the factors, but is not required to specifically state what weight was given to each factor. Because of the number and breadth of the factors, the court has a great deal of discretion in making child custody determinations.

3 CHILD CUSTODY ORDERS AND MODIFICATION

Courts have continuing jurisdiction to modify court orders pertaining to children. In New York, an initial determination of child custody can be made in either Family Court or Supreme Court. In either court, the judge can make a temporary, or pendent-lite, child custody and parenting time order while the trial is pending.

Legally, this temporary custody determination is to create a stable situation for the child while the custody case is pending. Custody cases can drag on for months or even years, and the temporary order, to which the child becomes accustomed, can set a precedent which may be difficult to undo in the custody case. Typically, at the onset of a child custody and parenting time case, the Court will issue a temporary order, appoint an Attorney for the Child, require both parents to attempt mediation and attend a class on co-parenting, and set a trial date. After trial, the court will enter a final custody and parenting time order.

Once an Order has been entered, you have 30 days to appeal the Order, should you so choose. The appeal would be to question whether the Court erred in its decision. The appeal would review the record and evidence presented in the trial, and does not introduce new evidence. If the Appellate Division Court determines that the trial court erred, the Appellate Division may reverse the decision, remand the issue back to the trial court to try again, or even order a new trial. Appeals can be costly and are time intensive. Your attorney can ask an Appellate Court to stay (or suspend) a lower Court's Order, but you may have to abide by that Order while the appeal is pending.

Once you have your final custody and parenting time order, either party may file for a modification of custody and/or parenting time. The person wishing to modify the order must first prove that there has been a substantial or material change in circumstances since the time the last final order was entered and that the requested change in custody or parenting time is in the child's best interest using the child custody factors discussed in Chapter 2. Since the decision to file a modification petition is strategic, you should discuss this with your attorney prior to filing. The attorneys at **DONNELLAN & KNUSSMAN, PLLC** have significant experience in filing modification petitions. If you would like more information, please call **518-278-4059** for a free consultation with one of our attorneys.

4 SPECIAL ISSUES IN CHILD CUSTODY

Often, there are special issues in child custody cases which must be addressed. They may require the use of **expert witnesses**, who are people who have expertise in a particular area through education and/or training, who can help to educate the court about an issue and provide an expert opinion. If you have a special issue in your case, it is very important that you address the issue thoroughly and educate the court about your issue so that it is not disregarded. Your goal is to ensure that the Court does not make an uninformed decision regarding the issue.

Additionally, when you do have special issues in your custody or parenting time dispute, you should consider collaboration or mediation, which may allow you to more closely address the unique needs of your child and your family. In this chapter, we will discuss some of the special issues which arise in child custody and parenting time cases.

Breastfeeding

Do not make the mistake of assuming that a court will make custody and parenting time rulings around the fact that a child is nursing. Courts generally do not place primacy on the breastfeeding relationship.

Often, judges will believe that breastfeeding does not need to be an issue, since formula is available and plenty of parents bottle-feed. Or, judges may support breastfeeding but think that the mother can simply pump and store breast milk indefinitely, so the fact that the child is breastfeeding need not be considered. Additionally, courts may decide that a certain age is old enough for breastfeeding to cease. Some courts may even determine that breastfeeding after a certain age demonstrates that the mother is overly "enmeshed" with the child or is using breastfeeding as a way to undermine the child's bond with the other parent.

If you are involved in custody and parenting time litigation with a nursing infant or child that you are breastfeeding, you will need to educate the court about the benefits of breastfeeding:

1. The mechanics of breastfeeding, such as why you cannot simply pump a week's worth of breast milk and send your child off for a week;
2. The role of breastfeeding in the child's formation of attachments with both parents; and,
3. Weaning, such as how and when it may occur and the possible repercussions of abrupt weaning.

Ideally, you would have several expert witnesses to address each of these components of breastfeeding.

A **pediatrician** can address the physiological benefits of breastfeeding. The pediatrician may also be able to discuss the American Academy of Pediatrics Policy Statement on Breastfeeding and the Use of Human Milk, which is very supportive of extended, on-demand nursing.

A **lactation consultant** can address the mechanics of breastfeeding such as: how let-down occurs; the need for continuous physical contact between an infant and a mother in establishing breastfeeding; how long it is reasonable to expect that the child and its mother can be separated and still maintain breastfeeding; the limitations of pumping breast milk; and, to some extent, the possible effects of abrupt weaning. The lactation consultant will probably be the least costly of the expert witnesses that you will use, but may well be the most important. The Court is probably less familiar with the mechanical realities of nursing a child than the fact that breastfeeding is beneficial.

An **attachment expert** can address the role of breastfeeding in the child's formation of secure attachments, not only to their mother, but also to their father and to others. The attachment expert can also address the developmental benefits of breastfeeding beyond the time when the immunological and nutritional benefits become less important, and the possible repercussions of abrupt weaning. Finally, the attachment expert can discuss appropriate custody and parenting time schedules for very young children, whether or not the court supports breastfeeding.

If you are the non-breastfeeding parent, it will be important to be prepared to address each of these issues and/or to have your own experts to counter the mother's position.

While using expert witnesses can become quite expensive, they may be necessary if you are in litigation and the court needs to be educated on important issues.

Same Sex Relationships

The issue of same sex relationships in custody and parenting time determinations is currently in a period of flux throughout the United States. The important thing is to put on a full custody case and not focus solely on the issue of sexual orientation. You may want to utilize an expert witness who can talk about the fact that children raised in same-sex households fare quite well and are not "turned gay" by being raised by a gay parent. The Court's primary goal will always be the same, regardless of the parents' sexual orientations; that is what is in the best interests of the children.

Homeschooling

Many parents choose to home school their children. Homeschooling is legal in every state, and in New York the requirements for compliance with the law are minimal. Homeschooling becomes an issue in custody and parenting time cases when one parent wants the child to be homeschooled and the other does not.

Parents with joint legal custody are supposed to try to reach consensus on educational issues. A parent with sole legal custody may make education decisions unilaterally. However, if the other parent feels that the custodial parent is making poor decisions for the child, the non-custodial parent may petition the court for a change in legal custody, or even physical custody, upon a showing of a material change in circumstances since the last custody order.

If you are in a custody dispute and must defend your decision to home school your children, you will need to be able to show the court that your children are doing well, academically, socially, and developmentally, in the home school environment. You may wish to utilize an expert witness to talk about the benefits of homeschooling and/or about homeschooling and socialization. There are many homeschooling organizations available which may assist you in gathering information and identifying potential expert witnesses.

Academically: Standardized testing is a well accepted method of measuring your children's academic process. If your children succeed on standardized tests, it should not be difficult to show that homeschooling is working academically. If your method of homeschooling is one in which standardized testing cannot adequately show how your children are learning, you may want to put together a portfolio or video displaying your method of homeschooling and what your children are learning. You may wish to have an educational assessment performed by an educational psychologist. Whatever method you choose, you will need to be able to show children's academic progress in your home school.

Socially: Many opponents of homeschooling cite lack of socialization as their reason to object to homeschooling. There have been many studies which show that homeschooled children are socialized equally well or better than their public and private school peers. In order to address any concerns that the court may have about children's socialization in the home school environment, you will need to be able to demonstrate to the court what activities, home school groups, field trips, etc. in which your children are involved and which give them an opportunity to interact with peers and engage with different types of people. You may also want to show a written schedule of your children's weekly or monthly activities and make a video or photo album showing your children engaged in activities with other children.

Developmentally: The court will want to know that your child's developmental needs are being met in the home school environment. Depending on your child's age, this may mean that your child is getting exercise and fresh air, that your child has a daily routine, or that your child is able to shower, dress, and perform household chores, independently. You may want to prepare an exhibit showing your child's routine, chores around the house, and any other matters that you determine are currently important to your child's development.

Abuse

Abuse is probably the most difficult child custody issue. Unfortunately, abusive relationships tend to cause the highest rate of custody and parenting time litigation. If you have been a victim of domestic violence, or if you are a parent trying to protect your child from abuse, you must tread very carefully. Do not ever assume that you will get custody because the other parent was abusive to either you or your child. Most abuse is very difficult to prove, and you will likely be accused of trying to undermine your child's relationship with the other parent for reporting the abuse. The attorneys at **DONNELLAN & KNUSSMAN, PLLC** have significant experience in abuse cases. Be sure to fully explain your situation to them so that, together, you can form the best strategy.

The following is a series of tips to assist you in navigating the world of the court system, addressing how to avoid the traps that your abusive former partner will set in order to try to make you look like the crazy or unstable person they want others to believe you are.

1. **Forget Fair:**

   That's right, forget fair. None of what is happening in your life is fair, and the Court will not even the score. Never assume that the judge is going to hear you tell your story or stand up for you. You can be sure that your adversary and their attorney will tell a very different story to the judge. The judge will not magically know which story is the truth. In the courtroom, it is not about truth, it is about evidence. Do not get caught up with each and every time something happens in your case that is not fair. Save your physical and emotional strength to focus on your strategy.

   Sometimes unfair can benefit you in the long run. Most batterers are narcissistic. Given enough rope, they often hang themselves. Making things right in the system is a different battle than protecting your children. Do not try to fight both battles at the same time - protect your children first. Protecting your children is more important than being right about anything. Even if you do not agree with the rules, sometimes you have to play by them in order to win.

2. Be aware of the effects of Post-Traumatic Stress Disorder:

Protective parents often find themselves in the midst of custody litigation following their own escape from ongoing abuse and control at the hands of the abusive parent. Due to the years of abuse, the protective parent is often suffering from post-traumatic stress disorder (PTSD) while simultaneously dealing with attorneys, custody evaluators, and attorneys for the child, all while sitting in the courtroom.

The very fact that the protective parent is suffering from post-traumatic stress disorder can play right into the picture that the abusive parent wishes to paint. Because of PTSD, a protective parent is often worn thin and frazzled; physically, emotionally, and cognitively disorganized. They are at the end of their rope and may appear to others to be crazy, just as the batterer repeatedly claims. Because the batterer is so persistent, the protective parent has often exhausted their usual allies, including family and friends, and has often been through a few attorneys before the case is resolved. Financial, emotional, and sometimes legal support are depleted and few "believers" remain.

A batterer has often conditioned their victim to appear as if they are overreacting. The abuse, even post-divorce litigation abuse, can be so subtle and insidious that its messages and effects are seen and felt only by the victim. They are inherent in the relationship. When the victim tries to point out the abusive tactics to persons outside the relationship, the victim appears to be overreacting to very minor and/or reasonable action on the part of the abuser. When the abuser then states that the protective parent is hysterical and over-reacts to everything, the abuser is believed.

Because the protective parent has lost faith in a system which has failed to protect his/her child and has allowed the batterer to have ongoing opportunities to further abuse him/her through litigation, the protective parent often appears angry and frustrated at the court system. The people at the top of the very system which is the subject of his/her anger and frustration are now charged with evaluating the reasonableness of this anger.

In contrast to the post-traumatic protective parent, the batterer will usually appear calm, friendly, and helpful. The batterer will usually be in control of their words, their gestures, and their expressions.

3. Take back the power:

The traumatic bonding which occurs between hostages and their keepers also occurs between abusers and their intimate partners. Abusers create a dependence on them and become larger than life and omnipotent in the eyes of their partner or former partner. They can elicit emotions from their partner at will - empathy, anger, guilt, and feelings of powerlessness.

It is helpful to understand how batterers operate. They use coercion, power, and control. They have a sense of entitlement with, and ownership of, their partner/former partner and children. They use manipulations, set ups, and mind games. Abusers project what they are and what they do onto the subjects of their abuse, and they actually see themselves as victims. They are masters of, denial, blame shifting and minimization of their own bad behaviors. They will use "gas lighting", a technique of manipulating their victim and his/her surroundings so that the victim begins to think that maybe the abuser is right, maybe the victim is crazy.

Abusers will do anything to wear down their partner's self worth. They know that they can elicit an emotionally charged reaction from their partner, and they depend upon this. Your awareness of this cycle, coupled with your awareness of your own reactions to the behavior, can change the cycle. Remember, their scheme relies upon your reacting strongly and emotionally to their actions.

4. Do the unexpected:

Not responding the way an abuser anticipates takes away their power. If they push a hot button, respond with logic and emotional indifference. Go along with their ludicrous demand, or offer a reasonable alternative instead. They will become flustered. Practice being non-reactive. Instead of reacting, keep a fact log of the dates, times, and incidences of their immature and selfish behaviors. That way, rather than making you look crazy; their actions make them appear unstable. They want to keep you in a constant state of crisis. Remember, what is most immediate is often not the same as what is most important. Stay focused on your long term strategy. Every action does not require a response.

5. Abusers' biggest weapons are also their Achilles' heels:

Batterers' inherent sense of entitlement and omnipotence can lead to carelessness. If they feel that they are above rules and court orders, give them some rope, rather than exhausting yourself in an effort to reign them in. They may just hang themselves. Also, they are so accustomed to being able to manipulate your behavior that they will be lost if they are no longer able to do so. Their calm, cool and collected demeanor is completely inappropriate for a parent who is listening to evidence that their child is acting out, disclosing abuse, etc.

If they were not the perpetrator, they would normally have some emotional reaction to hearing these allegations and would want to find out if the child is being actually abused by anyone. They would want investigations to occur and would be cooperating with authorities.

Relocation

Relocation with children, either out of the state where the other parent is living, or a significant distance within the same state, is very difficult to do. The parent proposing the move has to prove that the move is in the best interest of the child, independent of any benefit that the proposed move may confer on the custodial parent. A parent who is attempting to relocate with a child should thoroughly research the area of the proposed move. They should be able to show pictures of the home to which they wish to move, the neighborhood, the school that the child would attend, and any church, daycare, or other place of importance to the child after the move.

They should be able to show the quality of life and education available to the child after the move. If the child is engaged in sports or other activities, the parent proposing the move should research the resources for those sports or activities in the place where they want to move. Perhaps most importantly, the parent wishing to move should have a parenting time proposal for the non-custodial parent which offers enough time so that the move does not significantly interfere with the relationship between the non-custodial parent and the child. This will probably mean that most of the summer and holiday vacation time is spent with the non-custodial parent. The custodial parent should also have a proposal for how transportation will work for parenting time. This proposal will minimize the impact of the move on the non-custodial parent's ability to spend time with the child.

The parent should also be able to show how the child will be able to spend time with extended family members and other important people in the child's life after the move. It is crucial that the parent wanting to move can identify and prove that the move will somehow independently benefit the child.

New York courts typically do not allow relocation because it creates a hindrance to the other parent's rights and relationship with the child. Both sides must be prepared to explain to the Court the impact that relocation will have on their respective relationships with the children.

Special Needs Children

Custody and parenting time determinations for special needs children can be very difficult, especially when the parents are not in agreement as to the severity of the child's needs and the proper course of treatment or other methods of addressing the child's special needs. It may be

necessary to have your child's specialist in court to testify about your child's special needs. It may also be necessary to have your child's physical therapist, speech therapist, or occupational therapist and special education teacher, as well as any other professionals with whom your child works, present to testify about your child's needs and the scheduling concerns which may affect custody and parenting time. It may also be necessary to bring in an expert on your child's condition to talk about recommendations and prognoses. Finally, you may want to make a "day in the life" video to show the day-to-day realities of parenting a child with your child's special needs and how well you and your child work together to meet those needs.

5 ALTERNATIVES TO LITIGATION

Mediation

Mediation, under the right circumstances, can produce a resolution to your custody and parenting time dispute. This resolution may be more closely tailored to the specific needs of your child and your family than anything a judge can decide. Mediation is also far less expensive than litigation. Finally, mediation can resolve a dispute in such a way that it does not completely destroy any chance of friendship or alliance between you and your child's other parent. These relationships will almost certainly be destroyed by an ugly custody battle.

Mediation is not appropriate in cases involving domestic violence, child abuse, substance abuse or other serious and complex issues. In mediation, you do not have your own advocate. The mediator's job is **not** to make the outcome fair; it is to provide information, help facilitate communication and keep you focused on the issues so that you and the other parent can reach a resolution. The mediator is supposed to screen for cases wherein mediation would be inappropriate, but this process is not failsafe.

If you think that mediation is appropriate for your situation, by all means, give it a try. If it does not work, you can always litigate. **DONNELLAN & KNUSSMAN, PLLC** has a trained, experienced mediator on site. You may call **518-278-4059** for a free consultation. It is important to note that if you hire an attorney or firm to mediate, and the mediation falls apart, neither you nor the other parent may use this same attorney or firm in the litigation process.

Collaboration

Collaborative practice is another alternative of dispute resolution and one that can serve parents and children well in the context of child custody. In collaborative practice, you and your partner enter into an agreement with your team of professionals in which you commit to resolving your differences without taking one another to court or using threats to take one another to court. You agree that you are going to treat one another with respect and focus on your respective interests to come up with a resolution that best serves your particular family. The resolution is reached through a series of collaborative meetings with the professionals involved in the process. They take place in the office of one of the professionals, in an environment which is far less formal and far more comfortable than a court setting. Collaborative Practice is a transparent process wherein there is no game-playing, trickery, or possibility of loopholes.

Your team of professionals includes your attorneys and, depending on the model of collaborative practice that your attorneys use, may also include a collaborative coach for each parent, a child specialist, and a financial specialist. The collaborative coach is a mental health professional who assists you through the collaborative process, both outside of the collaborative meetings when emotionally charged issues arise, and during the collaborative meetings when discussions become difficult for you and you need a time-out or assistance communicating your thoughts and feelings. The child specialist is a child psychologist who may meet with your children and who gives suggestions to help you reach a resolution geared to the particular developmental and emotional needs of your children.

If you have financial issues that need to be addressed, you may use a financial specialist to review your finances and make suggestions. If you are able to use the collaborative process, you will likely end up with a parenting resolution which uniquely fits the needs and interests of your family. You will almost certainly end up with a better co-parenting relationship with your child's other parent than you would if you litigated your dispute.

Collaborative Practice affords you the privacy you and your family deserve, so that you do not have to air your dirty laundry in a court room full of complete strangers. Collaborative Practice allows you and the other parent to make decisions that best suit your family's needs unlike Court where a Judge who does not know you or your family will make these decisions.

The attorneys at **DONNELLAN & KNUSSMAN, PLLC** are trained as collaborative professionals and are able to assist you with your collaborative matter. Call **518-278-4059** to schedule a free initial consultation with one of our experienced collaborative attorneys.

6 COURT 101

The Makeover

Even though you shouldn't have to, and even while the world is falling down around you, looking like what the judge expects a parent to look will help you tremendously. This makeover not only includes your wardrobe, but your mannerisms and the way that you communicate with the judge and other important people in your case.

The most superficial change that can affect the outcome of your case is your wardrobe. Your goal is to appear neat, clean, well groomed and respectful of the Court. Your outfit should not distract the Court from your case. Even though it has nothing to do with the merits of your case, the judge will be watching you throughout the case, and your appearance will affect the judge's opinion of your credibility and ability to function as a parent.

Always be courteous and polite to everyone in the process. If someone needs to play bad cop, let that be your attorney. The clerk and the bailiff are as important as the judge. Judges often ask their clerks and bailiffs about the behavior of parties when the judge is not in the courtroom. Likewise, if you behave badly in front of the secretary or receptionist of an evaluator or Attorney for the Child, you can be sure it will have an impact on that professional's opinion of you.

The Attorney for the Child, custody evaluator, and other professionals have immense power in your case. Do not argue with them, even if they are wrong. Put your best foot forward. If they do something wrong or make a mistake, tell your attorney and let your attorney handle it. Remember, you must always be the good cop; your attorney can be the bad cop. It is important to remember that the opposing attorney is generally not a bad person. You may certainly disagree with him/her, or correct him/her, but do not argue or make it a personal battle with the attorney.

What to Expect

Trials usually follow a basic format. The attorney for the moving party, or the party who is asking the court to make a ruling, first gives an opening argument. The opening argument is a summary of what the party is asking for, and what the evidence is going to show to support the court ruling in that party's favor.

The responding party will then give an opening argument, stating what that party is asking the court to do and setting forth what the evidence will show in support of that party's request. Next, the parties, in this same order, each present their evidence through witnesses and exhibits.

Each party will then have the opportunity to present any rebuttal evidence that the party may have, which answers or disproves the other party's evidence.

Next, the attorney for each party will give a closing argument, tying together the evidence that has been presented by both sides into an argument to persuade the court to rule in their favor.

Because the moving party has the burden of proof, meaning that it is their responsibility to prove to the court that the court should make a change from the status quo, they get the last word. Either before or after closing arguments, the Attorney for the Child will give an argument that includes his/her recommendations to the court, and what those recommendations are based upon.

The judge may make a ruling at that time, or may tell the parties that he/she wants to further consider the evidence and make a ruling, either orally or in writing, on another date. Sometimes the format gets thrown off track a bit. A trial may be continued because somebody is ill or may start late because the judge's earlier docket runs overtime. Do not be surprised if you and your witnesses are stuck sitting around and waiting at the courthouse. Witnesses, especially experts, may be called out of turn in an effort to accommodate their availability. Often, custody and parenting time trials are not finished in one day, and you will need to find another date that the court and all attorneys have available to finish the trial. This date could be several months from the original date. Your attorney will be accustomed to these things happening, as they are normal occurrences for a trial lawyer. They may be stressful for you, but you should be prepared for these possibilities. If you begin with the expectation that your trial may not start and end as planned, you are less likely to become frustrated if these things occur.

Court Room Etiquette

1. If you are allowed to take your cell phone into the courthouse, make sure that it is turned off when you enter the court room.
2. When the judge enters the room, or any time the judge stands, everyone stands.
3. Do not speak unless you are asked a question.
4. Refer to the judge as Your Honor.
5. Stand up when you speak to the judge.
6. **NEVER MAKE FACES IN COURT, WE MEAN NEVER.**

We cannot emphasize this last point enough. You will hear ridiculous things in court. You will be made out to be a horrible person. Your adversary will tell lies. Their witnesses will tell lies. It does not matter. If your face is contorted and your eyes are rolling while these lies are being said about you, it will make the lies more convincing. If you remain calm and poised while the lies are being told, the lies are far less credible. The judge will see you on the witness stand, but will also watch your demeanor while the attorneys make their arguments and the other witnesses testify. Some judges will dismiss actions based upon the demeanor and conduct of the moving party while the other party is speaking. Do not give the Court any reason to be distracted from the issues at hand. Do not make faces!

Many judges are convinced that they can read what is "really going on" in a case by watching the faces, gestures, and demeanor of the parties while the case is unfolding.

Likewise, if the opposing party or someone else is lying on the witness stand, do not exclaim, "They're lying!" or begin gesticulating or scribbling notes to your attorney wildly. If you and your attorney have prepared together sufficiently, your attorney will already know that these are lies. Your attorney needs to be listening to what is being said on the witness stand in order to effectively cross-examine the witness. Furthermore, it makes you look like the crazy person that the witness has just finished saying that you are. If someone is lying, and you are not confident that your attorney is aware of the lie, calmly and quietly write a note and discreetly pass it to your attorney.

Remember, the judge does not have a crystal ball that reveals the truth. The outcome of your case does not depend on the truth, but on the evidence that is presented in court. Your presentation in court and your testimony are part of that evidence.

Always tell the truth, but don't spill your guts. While it may be cathartic to open up the floodgates and let it all come gushing out, litigation is not the appropriate forum for that catharsis. You need to speak in such a way that the evaluators, Attorney for the Child, and judge are ready, willing, and able to hear you.

First and foremost, tell the truth. There may be some parts of your story that do not cover you in glory. You are human. We all have done a thing or two that we would rather not have to talk about. Besides the fact that lying under oath is wrong and illegal, it is far better to appear to be a credible person than a liar. The truth, with explanation, is always better than a lie or half-truth.

When you are testifying, organize your thoughts before speaking. If you need a moment to gather your thoughts before you begin, it is absolutely fine to take a moment to do so before you begin answering a question.

When you are on the witness stand, make sure you are answering the question that is being asked. Not every detail needs to be presented in court, and diluting the important points with superfluous details can detract from the evidence that will have the most profound impact on your outcome. Give facts and not conclusions. It is the province of the court to make conclusions. Your job is to present the facts in a way which leads the judge to reach the correct conclusion herself/himself.

Some judges will give a witness leeway with a narrative response. Others will simply strike your testimony, which means that it will not be considered. Follow the advice of your attorney as they have more experience than you with the judges and will be familiar with the Court's preferences and idiosyncrasies.

Finally, remember that the judge's attention may drift. Give the important details, but be focused and succinct. Your attorney can assist you during your testimony should you forget the information you are testifying about.

When speaking with evaluators, attorneys for the child, and other potential witnesses, **do not assume** that you can trust people just because they are supposed to be helping you or your children. Talk to your attorney before speaking to anyone about your case. Do not attempt to publicize your case without first discussing it with your attorney. Remember that you are only guaranteed confidentiality when you are speaking to your attorney outside the presence of anyone except your attorney and his/her agents. You have no privilege of confidentiality with the Attorney for the Child, your child's therapist, or an evaluator. Also, be aware of the possibility that you may be taped.

In addition, there may be a tracking device on your vehicle, your house may be bugged, and there may be spy software on your computer. It may be wise to change your passwords as your e-mails may be monitored. Paradoxically, it is important not to tell people other than your attorney if you think that you are being taped or spied upon, as it will make you sound paranoid.

Surviving Cross-Examination

When you testify, your attorney will ask you a series of open ended questions. This is called **direct examination**. Your attorney cannot ask you "yes" or "no" questions, or **leading questions**, on direct examination. They will have to ask you who, what, where, when, why, and

"what, if any..." questions. In response to these questions, you will tell your story. You should work with your attorney ahead of time to familiarize yourself with what questions to expect and to organize your thoughts. You will be more likely to retain the judge's attention by presenting only relevant information in a cohesive manner.

After you give your direct testimony, the opposing attorney has the right to **cross-examine** you. The attorney can ask you about any subject matter brought up in direct examination and can do so by asking leading questions. This is the opposing attorney's opportunity to try to trip you up and fluster you. The three most important things that you can do to survive cross-examination are:

1. Listen carefully,
2. Only answer the question you are asked, and
3. Do not lose your temper.

Listen carefully:

When the opposing attorney asks you a question, and you answer the question, you are presumed to be answering the question that is being asked. Often, cross-examination questions begin with "Isn't it true that..." You absolutely must make sure to listen to the words that the attorney uses before agreeing or admitting to what you are being asked. It is okay to take a moment to think about what was asked before you answer.

Only answer the question you are being asked:

If your attorney asks you if you know what time it is, what will you answer? If you give the time, you are answering too much. You were asked if you knew what time it was. The answer should have been "yes" or "no".

It is the opposing attorney's job to elicit testimony from you on cross-examination. Do not do the opposing counsel's job for them. You will probably be asked yes or no questions, and most of your answers should just be "yes" or "no". Sometimes, it is appropriate to clarify your answer or clarify a variation between the way the question was asked and your answer, but you do not want to spew unnecessary details when answering cross-examination questions. If your attorney objects to a question that is asked, do not answer until the judge has decided whether or not you need to answer the question.

After cross-examination, your attorney will have an opportunity to ask you more questions to clarify your testimony on cross-examination. This is called **redirect**. If your attorney thinks that one or more of your answers on cross examination needed clarification or further explanation, they will ask you about that answer on redirect.

Do not lose your temper:

The opposing attorney will likely try to fluster you or make you lose your temper during cross-examination. They will likely use a harsh tone with you, speak loudly, and be rude. You may become angry, and your instinct will tell you to fight back by being nasty and sarcastic in your answers. Resist the urge. Custody cases are won or lost by a parent's demeanor on the witness stand. While the rest of the case may be he said/she said, the judges often feel that they are getting a firsthand view of the "real truth" by watching the parents' behaviors on the stand. **It is absolutely necessary that you remain calm.** Keeping your cool makes the attorney who is attacking you look bad, and it may make the judge sympathetic towards you.

After you are cross-examined by the opposing attorney, and before your attorney has the opportunity to ask you questions on redirect, the Attorney for the Child (if you have one) will have an opportunity to ask you questions. The judge may then ask you a few questions, as well. Pay close attention to any questions that the judge asks you, as you can usually get a good idea of what the judge thinks is important in your case by the questions he/she asks. Try to answer the judge's questions as thoroughly and respectfully as possible.

7 WORKING WITH AN ATTORNEY AND OTHER PROFESSIONALS IN YOUR CASE

Working With Your Attorney

You absolutely must have an attorney who "gets it," who understands your situation and does not second guess the gravity of your case. Your attorney must comprehend what he/she is facing. Attorneys often hate difficult custody cases because they are always hard fought, they never seem to end, and the money almost always runs out before the case does. Even if your attorney has the biggest heart in the world, they have staff and overhead expenses to pay, not to mention that they are probably in business so that they can pay their own personal bills; and time working is time away from their own family.

Make sure your attorney is up for the fight, and make sure your attorney is being paid. You have the right to expect your attorney to work and fight hard for you, and your attorney has the right to expect to be paid for their services.

It is important for you to have someone in your corner other than your attorney. Having a friend, family member, or therapist to provide you emotional support is an absolute necessity. Your attorney will burn out too early if you rely on her/him as your main source of emotional support. Also, many really great attorneys are not necessarily the best at providing emotional support.

Teamwork

You should acknowledge that your case is more important to you than it is to your attorney. Even if your attorney has his/her heart and soul in your case, it is your life and your child. You and your attorney should be on the same page, even if that requires occasional meetings with your attorney just to check in and make sure you both agree and see the same things with the case. You should plan your communication in advance, or it may not happen as it should.

Trial lawyers spend most of their time outside of the office, and it can be difficult to get them on the phone. Set a series of appointments with your attorney well before your trial date. If you are having a difficult time reaching your attorney by phone, call the office and schedule a telephone appointment. Ask if your question is one that can be answered by a paralegal. Also, faxes and e-mails can be more effective means of communication than telephone calls, but do not turn into the boy who cried wolf. If you e-mail your attorney daily, your e-mails will not get the immediate attention that they receive if you only send them when there is an important, time sensitive issue.

If you feel that your attorney may not be on the same page as you, get the kinks worked out well before trial day. If you become dissatisfied with your attorney, do not fire them impulsively. Make a consultation with one or more reputable attorneys to get a second opinion. Often, there are minor miscommunications that can be resolved in a short meeting. If so, stay with your attorney. It will be far more expensive to bring a new attorney up to speed, and your new attorney may not become as invested in your case as your original attorney. Also, many judges see it as a weakness in a party's personality or case if that person has switched attorneys.

If, however, you have lost faith in your attorney, hire a new attorney in whom you do have faith. You need to trust that your attorney is doing his/her best for you, and you need to be able to work together as a team.

The Attorney for the Child

Speak to your attorney before meeting with the Attorney for the Child. Remember that, unlike with your attorney, you have no privilege of confidentiality with the Attorney for the Child. Anything that you say to them can be repeated to the other side. Anything that you give to them can be shown to the other side. You will have to use finesse in talking about your child's other parent. You will need to give the Attorney for the Child pertinent information about their parenting skills and any concerns that you have, but DO NOT go into the meeting with the Attorney for the Child bashing the other parent. If you do, you will be seen as someone who cannot co-parent or facilitate your child's relationship with the other parent.

So while you do need to share any concerns you have about the other parent, you should do so in a matter of fact way and not dwell on it. You should spend more of your time and energy focusing on the positives of your own parenting of your child. Remember that the Attorney for the Child's recommendation to the judge carries a great deal of weight. This is an important person with power in your case. It is not worth getting into an argument with the Attorney for the Child over minor details, whether or not you think they are doing a good job, or like or dislike their treatment of you.

Address any concerns about these things with your attorney, and let your attorney handle it. Unfortunately, there is a bit of a popularity contest going on between you and the other parent for the Attorney for the Child's recommendation. Although it should not be that way, you need to acknowledge it and govern yourself accordingly.

Custody Evaluators and Other Forensic Evaluators

Speak with your attorney before meeting with custody evaluators or other forensic evaluators. Much like with the Attorney for the Child, you do not have confidentiality with evaluators. Also, you must use the same finesse that you used with the Attorney for the Child to relay your concerns about the other parent without bashing them. Evaluators are very much on the lookout for a parent who seems vindictive or overly negative about the other parent. Finally, if you have concerns about the way the evaluator is doing their job, address these concerns with your attorney, not directly with the evaluator.

8 PREPARING FOR COURT

1. Most of the work in a trial is done before you ever go to court. You must be proactive. Talk to everyone involved after being advised by your attorney. Evaluators, attorneys for the child, social workers and therapists will have mostly formed an opinion before the hearing. You must be involved in the formation of these opinions.

2. Your conduct in the pre-trial phase is crucial. You are living under a microscope at this point in your life. Assume everything you do or say is known or knowable to your child's other parent and their attorney.

3. Extensive discovery is absolutely necessary in difficult custody cases. Discovery is a tool that attorneys use to find out facts, along with the opposing party's theory of the case and trial strategy. Be prepared to provide your attorney with any records that may be relevant to your case. Work with your attorney to determine what is pertinent in proving your position. An extensive quantity of facts in difficult custody cases must be organized and digested well before trial. Expect that your own records will also be disclosed to the opposing party.

4. Your Attorney may file pretrial motions. If the other side has disclosed in discovery that they intend to introduce evidence which may be inadmissible, pretrial motions can narrow the issues and exclude evidence which should not be allowed. Trials can be won or lost on pretrial motions.

5. Your courtroom demeanor is crucial. You must appear respectable, calm and logical in court and your attorney must be prepared with knowledge of the relevant facts and information. Your team will only be as good as you allow it to be.

6. Put yourself in the judge's place. Your judge does not have any background into your situation except for the admissible evidence presented in court. The judge may not ever see your children and will never be as invested in them as you are. The judge is seeing you and your partner for the first time, and will only be able to make decisions based upon what he/she sees and the evidence presented.

7. Unravel the facts. The other parent may present a story that seems very simple and easy to swallow. The truth is often far more complicated. Concise and accurate presentation of facts is

crucial. Timelines, charts, graphs, videos, and other forms of demonstrative evidence which break down cumbersome amounts of information into tangible and easy-to-read exhibits can be better ways of producing evidence than lengthy testimony about facts that seem less important when taken individually. The truth is essential. If you did something that makes you appear less than perfect, explain why you did what you did. Remember, we are presenting facts, not opinions. Let the judge form the correct opinion, based upon our presentation of the evidence.

9 THE SHORT LIST - THE 10 MOST IMPORTANT THINGS TO REMEMBER IN YOUR CUSTODY AND PARENTING TIME CASE

1. Bashing your child's other parent will get you nowhere. In fact, it may lose your case.

2. Be prepared to address all of the child custody factors, showing why each factor supports your desired outcome.

3. Live as if you have a private investigator following you at all times, including on social media sites.

4. Figure out how to tell your story through admissible evidence.

5. Work as a team with your attorney. Assist in gathering and organizing information.

6. Remember that attorneys for the child and court-appointed evaluators are relied upon heavily by judges. Prepare with your attorney before meeting with them.

7. Always tell the truth, but don't spill your guts. Be ready to address and explain unflattering facts.

8. Focus on the positive. Be able to show the court the unique and wonderful aspects of your parenting.

9. Come to court prepared. The more prepared you are, the less nervous you will be.

10. Your courtroom demeanor may be the most important facet of your case. Do not make faces and do not lose your temper, no matter what.

**** Please Note!*** *A guide book or website can only be useful to a certain point. If you have questions or need assistance, we encourage you to make an appointment with* **DONNELLAN & KNUSSMAN, PLLC** *so that we may evaluate your unique situation and provide you with the quality advice you deserve.*

Please call us at 518-278-4059 to schedule your free consultation.

About The Authors

Teresa G. Donnellan, Esq. is the managing partner of **DONNELLAN & KNUSSMAN, PLLC**. She is a graduate of Albany Law School and has been admitted to the New York State Bar since 1992. Attorney Donnellan has been a member of the Saratoga County and Warren County Attorney for Children panels throughout her career in the Capital District and currently serves as the Saratoga County Attorney for the Child Liaison.

SuperLawyers has recognized Teresa Donnellan as among the top 5% of attorneys in New York State in 2015 and 2016.

Attorney Donnellan is an active member of the community and is a member in good standing of:

- The American Bar Association;
- New York State Bar Association;
- Saratoga County Bar Association;
- Adirondack Women's Bar Association; and the
- Collaborative Divorce Association of the Capital District

She has been mentioned twice in the Saratoga Business Journal for her work with the Collaborative Divorce Association of the Capital District.

.

Amy J. Knussman, Esq. is a Partner with **DONNELLAN & KNUSSMAN, PLLC.** She is a graduate of Albany Law School and has been admitted to the New York State Bar since 2003. She focuses her practice in the areas of Matrimonial and Family Law and has been a member of the Saratoga County and Warren County Attorney for Children Panels since 2003.

Attorney Knussman is an active member of the community and is a member in good standing of the:

- American Bar Association;
- New York State Bar Association;
- Saratoga County Bar Association;
- Adirondack Women's Bar Association; and the
- Collaborative Divorce Association of the Capital District

Amy Knussman has been mentioned twice in the *Saratoga Business Journal* for her work with the Collaborative Divorce Association of the Capital District. Atorney Knussman was the recipient of the Legal Project's 2012 Brigid Nolan Memorial Award. This award is presented to an attorney who, through his or her dedication and pro bono service with The Legal Project, has helped a victim of domestic violence to begin life anew.