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## FAMILY LAW

# What Is the Role of a Custody Agreement?

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**M**any attorneys assume it is necessary to write a custody stipulation that covers all the waking and sleeping hours of a child. Is this type of agreement really necessary in every case? If it is necessary, chances are no one is following the agreement.

In a case where parents are agreeable to custody arrangements on a regular basis, it is not necessary to enter into an agreement for custody, or maybe it is. Schools will often ask for a custody order to schedule parent-teacher meetings, send grades to parents, enroll the children in school and generally communicate with a parent about a child's performance. Doctors also may require a custody order to schedule an appointment with a child, provide well visit medical care and generally treat the child.

But what about a high-conflict custody case? Attorneys spend



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painstaking hours addressing every detail in an agreement only to find out from their clients they haven't been following the agreement for months leading up to a contempt petition. This type of situation leads to more fighting.

There are many types of non-compliance in these instances. First, there is the blatant non-compliance where a party signs the agreement with no intention of ever following the terms. One party may continue to withhold custody or generally shift his or her responsibilities to third parties such as grandparents. If there is a withholding of custody, there should be a contempt petition filed against the parent with financial penalties and make-up time.

But what about a case where custody is used by a third party? Can the court force a parent to exercise custody? Can a parent demand the child back and tell the other parent that he or she has forfeited custody? These are difficult issues because if the third party is a good influence on the child, why shouldn't the child spend time with that person? If a parent chooses not to exercise custody, can the court force the parent to exercise custody?

Another type of noncompliance is when both parties make

consensual schedule changes on a regular basis. This is exercising good parenting skills until there is a conflict. What often happens in this scenario is the parent who was getting additional time outside of the agreement does something to make the other party angry, such as getting married. The angry party then wants to enforce the agreement exactly as written while the other party now feels he or she is losing time with the children. In this scenario, can you enforce the de facto custody arrangement both parties were following? Can the angry party now attempt to enforce the original agreement knowing all along he or she had no problem granting significant time to the other party?

Custody agreements are sometimes more of a crutch than a solution. If no one is going to follow the agreement, why bother? Isn't it more likely than not in a high-conflict case the agreement is never going to be followed anyway? Why go through the excruciating ordeal of discussing the minutiae when both parties will probably break the agreement before they have walked out the door of your office?

If the parties aren't going to reach an agreement should they then be encouraged to just try their custody case? Going to

court and having a judge tell the parties what to do each time they need to make a custodial decision is costly, time-consuming and probably not beneficial to the family. But if the parties can't work out an agreement and they choose to be confrontational, is there any other solution? What is our responsibility as attorneys to force the parties to enter into an agreement if they are not going to follow it anyway?

Enforcement is another element that needs to be examined. If the parties are truly following their agreement and there is an issue of interpretation or vacation or travel, a court should easily step in and make those types of decisions to facilitate the continued interpretation of the agreement. But what about a case where there is withholding of custody or noncompliance? Our statute clearly provides remedies, such as make-up time, fines, penalties and even jail time for noncompliance. But are courts really enforcing the agreements?

Attorneys can receive different results on the same type of custody contempt depending on the county, which can be very frustrating to the practitioner. For instance, a parent who has missed several custodial visits because of purposeful scheduling by one parent may get little or no make-up time in one county,

but may get make-up time and attorney fees in another county. Why is this so? Why isn't there more universal enforcement of an agreement? If a parent knows he or she can violate an agreement with little to no consequence, he or she will continue to do it and cost everyone more time and money.

Agreements are not the solution. They are one step in the process toward resolution. Attorneys should speak to their clients to see if an agreement is right for them. Know who the parties are and if they are more apt to follow a schedule. Finally, if an agreement is the right choice for your client, let him or her know how important it is not only to follow and enforce it but to confirm changes in writing, whether it is by an amended agreement drafted by attorneys or one drawn up by the parties.