

Some Sample Restrictions on Custody and Visitation

The courts generally hold that access to both parents serves the best interests of children. "The right of visitation is an important natural, and legal right, but is one which must yield to the good of the child," *Radford v. Matszuk*, 223 Md. 483, 164 A.2d 904 (1960). "Visitation rights . . . are not to be denied even to an errant parent unless the best interests of the child would be endangered by such contact," *Roberts v. Roberts*, 35 Md. App. 497, 371 A.2d 689 (1977). When making a custody (or visitation) determination, "the paramount and overriding consideration is the fitness of the parent *at the time of the hearing, rather than based on earlier misconduct.*" *Raible v. Raible*, 242 Md. 586, 219 A.2d 777 (1966). Although a parent whose child is placed in another person's custody has the right of access to the child at reasonable times, the "*parens patriae* power of the equity courts is plenary to afford minors whatever relief may be necessary to protect their best interest," *Wagner v. Wagner*, 109 Md. App. 1, 41, 674 A.2d 1 (1996); see also *Raible v. Raible*, 242 Md. 586, 219 A.2d 777 (1966). Only in exceptional cases will the right of access or visitation be denied. See *Painter v. Painter*, 113 Md. App. 504, 688 A.2d 479 (1997), where the denial of visitation between the father and the parties' son was upheld in light of the substantial physical and verbal abuse the child received from the father.

Although the complete denial of visitation to a parent is rare, sometimes it is necessary for courts to set certain restrictions and limitations on custody and visitation in order to assure the safety and welfare of minor children. Below we will discuss several restrictions that seek to address the impact of abuse, alcoholism and substance abuse, paramours, and other circumstances on the best interest of a minor child. Sometimes courts also order supervised visitation, including through court-related supervised visitation programs. The courts also provide for make-up visitation where a parent has intentionally interfered with the other parent's court ordered child access.

Review Hearings/Conditions on Custody. See *Frase v. Barnhart*, et al., 379 Md. 100, 840 A.2d 114 (2003): Trial Court's conditions imposed on custodial parent to move to certain housing and to require sibling visitation to occur at place of third parties who were hostile to her were impermissible conditions, and it was error to subject her to continuing review hearings. In *Koffley v. Koffley*, 160 Md. App. 633, 866 A.2d 161 (2005), the appellate court held that for good cause the trial court may hold a case open for a reasonable period of time to consider additional evidence which it found necessary to make a proper determination. But, it is not permissible for the trial court to make findings that dictate a particular result and then, leave its

ultimate determination in abeyance by ordering a review hearing. Review hearings are discouraged and new petitions must be filed to support a request for modification. “It is procedurally impermissible for a court, without a new or amended petition, to alter a custody arrangement based on a later review of circumstances known or predicted to exist at the time of the initial determination.” *Koffley*, 866 A.2d at 166 (2005).

Physical/Sexual Abuse, Alcohol/Substance Abuse, and Supervised Visitation

Physical Abuse (or Sexual Abuse) or Neglect. A court's "finding of child abuse does not preclude *all* visitation as a matter of law." *Arnold v. Naughton*, 61 Md. App. 427, 486 A.2d 1204 (1985). Maryland statutes describe the court's responsibility in assessing evidence of abuse and likelihood of further abuse or neglect and in assuring the child's safety and well-being. Each case must be decided on its own facts. If the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court is required to determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party. Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child. In *Volodarsky v. Tarachanskaya*, 397 Md. 291, 916 A.2d 991 (2007), the Court of Appeals held that under FL § 9-101 the Court must believe the party abused or neglected the child by at least a preponderance of the evidence in order to have the requisite “reasonable grounds to believe.” In *In Re: Adoption No. 12612*, 353 Md. 209, 725 A.2d 1037 (1999): court must specifically find no likelihood that parent may abuse or neglect child whose custody/visitation is within court’s control. “The focus is not on a particular child but on the party guilty of the previous abuse or neglect.” Neglect or abuse of “a” child in the past, as stated in FL § 9-101, refers to the abuse or neglect of any child in the past, not only the child at issue in the current proceeding. See also FL § 9-101.2 regarding the consequences on custody/visitation of a parent’s conviction of murdering the other parent, another child of the parent or family members residing in either parent’s household. “Abuse” has the meaning set forth in the Domestic Violence Act, FL § 4-501. Denial of visitation between the father and the parties' son, and restricted visitation between the father and the parties' daughter, was upheld in *Painter v. Painter*, 113 Md. App. 504, 688 A. 2d 479 (1997).

In *Hanke v. Hanke*, 94 Md, App. 65, 615 A.2d 1205 (1992), the court held that where there is a factual basis for a parent's fear that the other parent is sexually abusing the child, it is improper for a judge to order that child be surrendered to the alleged abusing parent for visitation without “stringent safeguards” satisfactory to “all

parties,” even if the judge does not agree that there is an appreciable risk of further abuse. The appellate court held that the overnight visitation with a designated third party to be present was not sufficient to protect the child from further sexual abuse. See also *John O. v. Jane O.*, 90 Md. App. 406, 601 A.2d 149 (1992), where the appellate court affirmed the decision of a trial court restricting access between the father and the parties' 13 year old son. The trial court had denied overnight visitation but did not require supervision for daytime visits. In light of the strong evidence of that the child was at risk of sexual abuse, the appellate court remanded the case to allow the trial court to "take another look at the situation . . . to see whether supervised visitation is indicated."

The Maryland Judiciary website contains a [directory of court based domestic violence programs](#) throughout Maryland. There are [Abuser Intervention Programs](#) in Maryland that are specifically designed as interventions for perpetrators of intimate partner abuse. Most of these programs are 26 weekly group sessions of one and one-half hours length, such as the Montgomery County DHHS Abused Persons Program (phone: 240-777-4210). These Abuser Intervention Programs focus on power and control issues in the intimate relationship, while anger management programs generally focus on anger control and avoiding outbursts of anger that lead to violence. Some providers of Abuser Intervention Programs also offer anger management programs.

Abstention from Alcohol and Other Substance Abuse. A parent who uses drugs or alcohol on a regular basis and in amounts that impair functioning can pose a significant risk to a child. In *Cohen v. Cohen*, 162 Md. App. 599, 875 A.2d 814 (2005), the Court of Special Appeals held that a court may impose a condition (i.e., father's right to custody/visitation conditioned upon his abstention from the use of alcohol) although the condition had not been requested or pled by the other party so long as the condition is in the child's best interest and there is sufficient evidence to support it. Similarly, courts will address issues of substance abuse and may require regular drug testing, e.g. urine monitoring programs, continued participation in Alcoholics Anonymous, Narcotics Anonymous, and other safeguards. In *Cohen v. Cohen*, the court's order also conditioned the father's access upon his abstention from the abuse of prescription or non-prescription drugs and from unlawfully possessing any controlled dangerous, and that he subject himself to monthly random urinalysis and make the results available to mother. See sample [Consent Order and Referral for Testing](#) for urine monitoring program in Circuit Court for Montgomery County, Maryland, which may be issued only through Family Division Master or a Judge in accordance with the instructions. A basic provision concerning alcohol consumption

during visitation: "**ORDERED**, that father/mother shall not consume any alcoholic beverages, exceed prescribed medication dosages, or take any non-prescription drugs during any period of such parent's access with the minor child." A sample of other kinds of provisions include:

" **ORDERED**, that Father/Mother shall continue his/her active membership in Alcoholics/Narcotics Anonymous and attend meetings at least four times a week, maintain regular contact with a sponsor, and provide documentation of his/her attendance by the end of each month. In the event Father/Mother fails to comply with this provision his/her access shall revert to non-overnight supervised day access only until he/she presents documentation of compliance; and it is further

ORDERED, that each party shall undergo once a week full screen urinalysis testing for amphetamines, barbiturates, benzodiazepines (benzos), cocaine, marijuana, opiates, and PCP through Montgomery County Adult Addiction Services, Addiction Services Coordination, Urine Monitoring Program, or a comparable urine monitoring program in Maryland, and the result records will be provided to the parties/counsel, and shall be maintained for use in this litigation only, and no party/counsel shall provide the original or any facsimile of these records to any persons or third parties without further Order of this Court.

ORDERED, that commencing with Father's/Mother's next monthly access, and continuing each month thereafter, Father/Mother shall present Mother/Father with documentation of his/her compliance with the foregoing drug testing which shall include the results of a drug test taken within five (5) days prior to the scheduled weekend access, and in the event of his/her failure to provide such documentation or if such documentation shows a positive test result in any of the tests taken during the four weeks preceding the scheduled access then Father's/Mother's access shall revert to non-overnight supervised day access only pending further Order of Court."

Supervised Visitation. As mentioned in the discussion of abuse and substance abuse, there are situations where the court may determine that supervised visitation is in the children's best interest. In some jurisdictions there may be a supervised visitation program in place. For example, see the [Montgomery County Supervised Visitation Program Guidelines](#) and sample [Consent Order](#). The Supervised Visitation Program also has a phase-out or "step down" plan for use in appropriate situations. (Sample ["Step Down" Order](#)). Any referral to the court's supervised visitation program must be through the court's protocol and procedures and subject to space availability. Where there is no available supervised visitation program, the visitation order should designate an appropriate neutral third party supervisor.

The ABA Center on Children and the Law's *A Judge's Guide: Making Child-Centered Decisions in Custody Cases* (ABA, 2001), 99-104, provides some helpful insight and suggestions concerning selection of a supervisor, adapting some of its

guidelines from Robert B. Straus, *Supervised Visitation and Family Violence*, 29 Fam. L. Q. 229-252 (1995) and Nancy K.D. Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes*, A National Judicial Curriculum 57-68. With respect to selection of a supervisor who is a family member or friend, considerations include:

1. Is the individual neutral?
 - a. Will the supervisor report adequately and honestly about the visiting parent's behavior?
 - b. Is there animosity between the supervisor and visiting parent?
 - c. Is the supervisor afraid of the visiting parent?
2. Can the supervisor protect the child?
3. Is the individual adequately mature to supervise?
4. Will the supervisor be present during the entire visit?
5. Is the supervisor available and willing to supervise?
6. The supervisor should NOT be chosen if the custodial parent has concerns about his or her qualifications.
7. The supervisor should NOT be the custodial parent.

Community members may provide more neutral supervision than family members and friends, and where supervision is required due to domestic violence or child abuse, family members should not be chosen as supervisors. The supervisor should be a neutral and mature individual, able to supervise the parent and protect the child, willing to communicate reports on the visit, and available for the entire visit. A copy of the order and responsibilities should be distributed to parent and supervisor. The supervisor should be informed of the reason for the supervision. The order should set forth the visitation schedule, including appropriate restrictive provisions concerning alcohol and controlled substances, provisions pertinent to batterer's prevention programs, and provision for visiting parent to post bond if there is a concern regarding child abduction.

Visitation Exchange. The visitation order should also include the procedure for visitation exchanges providing for the safe transfer of the child. This is particularly necessary in situations of alleged domestic violence, so that the visitation exchange is monitored to ensure the safety of the child and the custodial parent. In such domestic violence instances, planning for visitation exchanges should include:

- 1) Parents should NOT have contact with each other unless a third party is

present.

2) The visiting parent may pick the child up from school or day care. The school or day care center should approve the arrangement. Such an arrangement is NOT appropriate if the parent had a history of being late for return or pick up.

3) When using a public location as the exchange point, you should ensure that the third party is there, the parents agree to remain at an established distance from each other, and the visiting parent arrives first and leaves only after the custodial parent and child have left.

4) The custodial parent's address should remain confidential.

5) If a safe exchange does not appear possible, then the necessary alternative may be to deny or suspend visitation between the visiting parent and the child.

Maryland Supervised Visitation & Monitored Exchange Centers. For help locating supervised visitation and monitored exchange centers throughout Maryland, see http://www.peoples-law.org/finding/supvd-visit-cntrs/supervised_visitation.htm .

Outside presence of paramour: In Maryland, a child's exposure to a parent's paramour is not *per se* detrimental to the parties' child. However, courts may place restrictions on a parent's right to visit with the parties' child if there is sufficient evidence showing that such access is detrimental to the child or not in the child's best interest. Visitation rights may be conditioned upon a parent "not to be in the company of" a boyfriend or girlfriend. *Deckman v. Deckman*, 15 Md. App. 553, 292 A.2d 112 (1972): Such a condition imposed upon either party's right to have custody of the children must be based upon adequate proof that it is reasonable to believe that the association of the restricted parent with certain persons in the presence of the children would be contrary to their best interests. See also *North v. North*, 102 Md. App. 1, 648 A.2d 1025 (1994), concerning the restriction of visitation of a homosexual parent who is HIV positive. The trial court's restriction on overnight visitation was vacated and remanded as the restriction did not demonstrate how it would protect the children from harm, nor did the restriction follow logically from the facts and was not reasonably related to court's objective. See also *Boswell v. Boswell*, 118 Md. App. 1, 701 A. 2d 1153, aff'd 352 Md. 204, 721 A.2d 662 (1997), where it was held that the trial court erred in ordering a restriction on a father's visitation based on his sexual orientation absent evidence of actual or potential harm to the children. The court stated that "reasonable maximum exposure to each parent is presumed to be in the best interests of the child." The applicable standard in visitation cases involving the presence of non-marital partners (whether heterosexual or homosexual) is "best interests of the child with liberal visitation being restricted only upon a showing of

actual or potential adverse impact to the child resulting from the contact with the non-marital partner." There must be a nexus between the harm to child and contact with the non-parent for the court to limit visitation.

Counseling. It is permissible to condition custody/visitation upon continued participation in family counseling if such condition is in the best interests of the children, *Kennedy v. Kennedy*, 55 Md. App. 299, 462 A.2 1208 (1984).

Mental Health Therapy and Medication Compliance. Sometimes mental health issues are apparent and protections need to be put in place to ensure that a parent is continuing to obtain necessary mental health treatment and is compliant with medication requirements in order to provide for the child's safety. An example of the kind of provision that may be appropriate:

"**ORDERED**, that with respect to Father/Mother's ongoing mental health treatment:

1) Father/Mother shall continue with her psychotherapy, follow recommended treatment and comply with prescription medication requirements;

2) No later than _____ Father/Mother shall furnish Mother/Father with the name of his/her current treating psychotherapist and medication management doctor and a letter from such current therapist and doctor stating Father/Mother's current prescribed medication, and whether Father/Mother is regularly attending therapy sessions and following recommended treatment including medication compliance, and whether Father/Mother is a present risk to harm herself or third persons;

3) Commencing _____ and continuing each month thereafter, Father/Mother shall furnish Mother/Father with a letter from her then treating psychotherapist and medication management doctor stating any changes to Father/Mother's prescribed medication, and whether Father/Mother is regularly attending therapy sessions and following recommended treatment including medication compliance, and whether Father/Mother is a present risk to harm herself or third persons;

4) In the event Father/Mother fails to comply with this provision his/her access shall revert to non-overnight supervised day access only until he/she presents the requisite current documentation."

Religious Activity Limitations. The parents' own constitutionally protected freedom of religion includes the right to direct the religious upbringing of their children. There has to be a clear showing that a parent's religious practices have been or are likely to be harmful to the child, before the court will interfere with those religious practices. A clear showing requires more than simply the general testimony that the child is "confused" or "upset" by conflicting religious practices. A factual finding of a causal

relationship between the religious practices and the actual or probable harm is required. See, e.g., *Kirchner v. Caughey*, 326 Md. 567, 606 A.2d 257 (1992); *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 605 A.2d 172, *cert denied*, 327 Md. 625 (1992); and *Levitsky v. Levitsky*, 231 Md. 388, 190 A.2d 621 (1963) (parental refusal to permit necessary blood transfusions for their children on religious overridden). In *Kirchner v. Caughey*, the court limited the proselytizing religious activities the father could engage in during his visitation with his daughter. The appellate court remanded the case to consider a restriction which intrudes the least on the religious practices of the parent and yet is compatible with the child's welfare. This case discusses the non-custodial parent's right to involve the child in their religion while not overriding the legal custodian's decision on the child's long range religious training.

Non-Smoking. In *Brice v. Brice*, 133 Md. A2d. 302, 754 A.2d 1132 (2000), a grandparent visitation case, the Master had recommended that there be no smoking in the child's presence while she was visiting with her grandparents. Sometimes this issue is particularly significant due to a child's asthma condition. A sample provision:

"**ORDERED**, that neither parent will smoke cigarettes when the minor child is present and each parent will take reasonable steps to minimize said child's exposure to second-hand smoke."

Use of Infant/Child Car Seat. Sometimes a concern arises over a parent's failure to use an appropriate car seat for a child, particularly a very young child. You may want to consider a provision such as the following in an agreement or court order:

"**ORDERED**, that each party shall properly install and use an age-appropriate approved car seat for the minor child at all times when transporting said child."

Geographical Restriction. In *Schaefer v. Cusack*, 124 Md. App. 288, 722 A.2d 73 (1998), the trial court was found to have improperly imposed a requirement that the parties not live more than 45 miles from each other.

Court Ordered Advance Notice of Relocation. In any custody or visitation proceeding the court may include as a condition of a custody or visitation order a requirement that either party provide advance written notice of at least 45 days to the court, the other party, or both, of the intent to relocate the permanent residence of the

party or the child either within or outside the State. FL § 9-106. The statute permits the court to waive any required notice if it is shown that notice would expose the child or a party to abuse or for other good cause. Additionally, if a party is required to relocate in less than the specified 45-day period in the notice requirement, then in any action brought for such notice violation the court may consider as a defense that: (1) relocation was necessary due to financial or other extenuating circumstances; and (2) the required notice was given within a reasonable time after learning of the necessity to relocate. Moreover, the court may consider any violation of the notice requirement as a factor in its merits determination of custody in any subsequent custody or visitation proceeding.

Make-up Visitation. If the court determines that a party has unjustifiably denied or interfered with visitation granted by an order, the court may take certain additional remedial measures to provide "make-up" time or ensure future compliance. FL § 9-105. Note that in *Barton v. Hirshberg*, 137 Md. App. 1, 767 Md. App. 1, 767 A.2d 874 (2001), the parent who was not the primary custodial parent was given increased visitation due to the child's parental alienation syndrome, which endangered the child's emotional maturation. The increased contact was intended to allow the child to develop a better relationship with the father, while continuing a close bond with the mother. See also *McCready v. McCready*, 323 Md. 476, 593 A.2d 1128 (1991), where the court modified custody in favor of father, finding the mother was selfish and immature and not acting in the child's best interest in her attempts to deny or limit father's access to their child; and *Braun v. Headley*, 131 Md. App. 588, 750 A.2d 624 (2000).