

Eric Higgins Teleseminar

A top family lawyer from McKinney law firm Loughmiller & Higgins discusses issues of child custody and child support within the context of Texas divorce and family law.

Our goal at Divorce Magazine is to help divorcing people make better, more informed choices to ensure that they are not simply surviving their divorce but they're actually growing and thriving through the process. We find at Divorce Magazine that the best way to accomplish these goals is to have professionals like Eric Higgins share information about the divorce process based on his years of working in the family law field. Eric is a partner in the McKinney firm of Loughmiller & Higgins.

The firm serves the needs of people throughout the Dallas-Fort Worth metroplex and North Texas who have legal concerns or problems involving family law and divorce issues. Eric and his partner, Brian Loughmiller, have 47 years of combined trial experience, which is very helpful whether your case is going to trial or not, because it provides a base of experience to help guide and advise divorcing clients through what can be a very challenging and confusing process if you don't have the guidance of a top family lawyer like Eric Higgins or Brian Loughmiller.

Eric has been cited as a rising star in the area of family law and he has served on the Board of Organizations, which is recognized for assisting children who find themselves thrust into the legal process. To learn more about Higgins & Loughmiller's firm, I recommend you visit their website: www.familylitigation.com. Today Eric and I will be talking about Texas child custody and child-related issues. So, Eric, let's get started. Thank you for joining me today.

Higgins: Thank you, Dan.

Let's start with talking about the difference between sole child custody and joint child custody; how is it decided whether there's going to be sole custody or joint custody?

Higgins: Well, in Texas, Dan, we have labels that we assign to each parent in a divorcing situation or a paternity situation, and we have sole managing conservators and joint managing conservators. These titles have more to do with the rights and duties that you have as parents than it has to do with the amount of time you actually spend with your children. In Texas at this time, there's a presumption that each parent be appointed as a managing conservator unless we find that it would not be in the best interests of the children, because appointing one of the parents as the managing conservator would significantly impair the child's physical health or emotional development. So, unless you have an abnormal situation where you might have a parent who has a substance-abuse problem or has committed crimes against their spouse or the other parent, as examples. And typically what we have is the joint managing conservatorship model, where the

parents are allocated rights and duties. Just an example, the right to make educational decisions for the children. Typically each party would have those independently or subject to the agreement of the other party.

But what we see in most of our cases is a joint managing conservatorship model. Again, that doesn't mean that the parties are necessarily going to have equal time with the children, it just means that they're going to be able to have the right to participate in that decision-making process. You know, all of the decisions that are made in our family courts in Texas are to be based on what is in the best interests of the child. That's the standard that we use here in this state, and so the courts are going to look at each case on a case-by-case basis to determine whether a parent should be a managing conservator or whether they should have a reduced role as a possessory conservator.

So how does this work in reality? Let's say this one is the managing conservator and the other isn't, do they then figure out a schedule? Or how does joint custody agreement actually work in practice?

Higgins: Sure. Even if you're only appointed as a possessory conservator, there's a rebuttal presumption in the Texas Family Code that each parent should have access and possession of their children. We have a model possession schedule in our Family Code that we call the Standard Possession Order, and there's a rebuttable presumption that even a possessory conservator should have the amount of time that's set forth in the Standard Possession Order. And although it can get a little complicated, essentially, the Standard Possession order would give the possessory conservator or non-custodial parent the first, third and fifth weekends of every month. There's a mid-week visit, which under our Order model would be on Thursday evenings, and there's a rotating holiday schedule and there's an extended summer possession contained within the Stand Possession Order.

So again, these titles deal more with the rights and duties of the parents and not with the times of possession. We have some courts and we're seeing, I think more frequently now, possession schedules that are either agreed to or ordered by the court that try to equalize the amount of time that each of the parents has with the children. We don't have a model possession schedule for that, and so the parents can be as creative as they want to be, whether the children are with mom one week and then with dad one week, or whether we split the weeks up. And certainly the parties and the courts have to look at the age of the children, the distance between where they live, where the children go to school, and what their activities are. And even looking at the parents' work schedules, to figure out what schedule would work best for the kids and both parties in any case.

What happens if a schedule is set and then something changes with one of the spouses? Is it typical that the courts would come back to you to change the schedule and the arrangement or are they just left on their own to figure it out?

Higgins: Well, certainly the courts are available to modify or enforce their orders. Once an order is entered with the court here in Texas, that court maintains the continuing exclusive jurisdiction over those children until they're emancipated or another court assumes jurisdiction. So, if a change is warranted and it can't be agreed on by the parties informally, then certainly either party can petition the court for modification to change either the conservatorship, rights and duties, or change the possession schedule.

When we enter an order, for instance in a situation with children, our divorce decree says that the parties can have possession and access to the children by agreement of the parties. And if there's not an agreement, then here's the schedule that needs to be followed. So, if they're just minor changes and the parties can work it out informally, there may not be a need to go back to the courthouse. But if they can't work through that and they need formal changes to that order, then certainly the courts are available to hear those cases and to consider a change in a possession schedule.

Tell me a little bit about the choice that children have. At what age can they choose to live where they want to live?

Higgins: Well, I think there's a misconception that children get to choose, because in Texas they do not get to choose. And in my 20 plus years of practice the process has changed somewhat and the legislature has kind of toyed with this and how to handle this. At this time in Texas, if you're going to have a trial before court and you want the child to be interviewed to express their wishes about conservatorship or possession and access or what the schedule is going to be, you can request the judge interview that child in chambers. If the child is 12 years of age or older, the court has to interview the child. If the child has not yet reached 12 years old, then the court has the discretion to say that they're not going to interview that child.

The misconception is that the child gets to go in and tell the judge where they want to live and then the judge comes out and just announces a decision consistent with what the child's wishes are. And I don't find that to be true. As a matter of fact I find that a lot of our judges would prefer not to interview the children because the decision about where a child's going to live primarily is left up to the court if the parents can't agree. And so I think the interview process is just a factor that the court's going to consider in ultimately making their own decision.

It sounds like in the best interests of the children is the primary criteria for determining primary custody. Is there anything else that affects who will get the primary custody of the children, or of the child?

Higgins: Well, the best interest standard is obviously very broad, so our courts can consider a whole host of factors in determining where they believe the children should live primarily. A lot of times, these cases focus on the history of what each

parent's role has been within the family. Do we have a parent who has assumed the primary role of raising these children, of waking them up in the morning and feeding them, and getting them to school and to the doctors' appointments, and getting them to the dental appointments and participating in the school activities or extracurricular activities or parent/teacher conferences?

In some families, there's naturally been one parent who's assumed that role as the primary caretaker and so you're going to look at what the history has been of caring for the children. You're also going to look at whether we have any issues like anger management issues, whether we have some mental health problems on one side or the other, whether we have substance-abuse problems, whether we have criminal history, whether we have somebody who has engaged in some activity that's caused this divorce or the breakup of this relationship. And so there's a very broad spectrum of topics and issues that a court can consider as they determine what they believe would be in the best interests of the kids.

Talking about that brought back one of the reasons that people divorce is because of infidelity. Let's say that one spouse has been cheating on the other and the spouse that's been cheated on wants to move out of the house, but they're concerned that in some way it's going to affect their chances of getting custody of the children. Should they be concerned about that or does it not affect their chances of having custody or joint custody of the children?

Higgins: Well, certainly infidelity is one of the factors that the court can consider. With most of your experienced family law judges, I think that when they see a situation where adultery's been alleged, either as a grounds for the divorce or as a reason why they believe one parent or the other should have primary custody of the children, the courts are going to want to know, did this affair occur while the two parties were still living in the same household or did it occur post-separation? I think they're going to want to look at the character of the boyfriend or girlfriend, whichever side it's on; I think the courts are going to want to know has the girlfriend or boyfriend been exposed to these children, and what role have they played in the kids' lives, if any. So, I think even within that one issue of adultery, there are a lot of things that the court's going to want to look at. If you have two parties who are living in the same household and one of them has had an affair and the other one's trying to determine whether to move out of the house, I'm not sure I would want my client moving out of the house and leaving the children with the parent—I wouldn't want to set that precedent.

What we would probably want to do is get a divorce on file, schedule a temporary hearing as soon as possible, try to get into court within a couple of weeks to see if we can have the other spouse removed from the home so that my client could stay in the home with the children. What you can't do in those situations is put blinders on and just get too focused on one person having an affair and being the bad actor. I think you've got to still look at the history of who's been the primary caretaker of these children. In our courts, especially in Cowan County where my office is located,

temporary hearings in our cases are limited to 20 minutes a side to determine these issues, and many courts really want to maintain the status quo. Well, if the status quo is that one party has been the primary caretaker, even if they've engaged in some affair, it may be that at least on a temporary basis they're going to maintain that status of having primary custody of those children unless they've engaged in some other behaviour that may put these children at risk.

So, when you have a client that comes in and says I want primary custody because my spouse or the other party in this case has had an affair, you have to open their eyes up to all the other issues that are involved and find out what their involvement's been in their children's lives and not get too focused on that one issue.

In Texas courts, is there any reluctance to award primary care to a father?

Higgins: Well, I don't think so. Each judge comes to the bench with their own life experience and their own historical biases. I think that when I started practicing 20 plus years ago, even though it wasn't written in the code, in practice you had this presumption that a mother was going to get primary custody of children and it was hard for dads to overcome this historical bias. I think that is changing. I know that we have had success in obtaining primary custody for dads for years in this area. And I think most of our courts are very open-minded to having dads be appointed as the primary custodial parent of children, and even young children.

I think this is a result of changes in society and the roles of parents within the family. I mean, you have a lot more women who are becoming professionals and going into the work world, and you have more men who are assuming more of the caretaker role within the family unit. I know that recently I looked at some research that the Peer Research Centre did on single-parent households and, based on the latest census numbers that they have, the increase in single-father households, fathers who had primary custody had risen from 14% back in the 1960's to almost 24% in 2011.

So, if you're trying to get to a point where fathers have custody approximately 50% of the time, I think you can see that men have made great strides in that area. I don't think we're there yet, but as we allow new generations of judges—I mean, we have male judges in our county who are in their 30's and 40's who are very active in their children's lives. And that's the way they were brought up, so they're very open-minded about dads getting primary custody. We have a lot of female judges here who are career-oriented and they know that their husbands have played a major role in bringing their children up, and I think more and more they're open-minded to it.

Right

Higgins: So, I think the people that are on the bench here are following the lead of society. I think the law may be lagging in terms of what society thinks about the role of the father and the mother within the family unit, but I think it's headed in the right direction for fathers; you just can't be afraid to go to a court and ask for it. There are a lot of people who come through our doors who think, as a dad, there's no way I can get custody unless my wife is abusing the children. That's just not true.

While you mention that, is there anything else that fathers who are looking to have primary custody of their children can do, aside from asking?

Higgins: You know, the judges are very intelligent and they want to see what people have done in the past with their kids. If you want primary custody of your kids, you have to be an involved parent. You have to participate in your children's lives as opposed to just provide for them or warehouse them—a term that I've used in some of my trials. I mean, you can't be in the house with the child and having them watch TV in the other room, and you're sitting behind the computer doing work. You need to engage with your children, you need to go to their extracurricular activities, and you need to be involved with their schooling. You need to be involved in the discussions with their teachers and school administrators; you need to be involved with their physicians or their dentists.

If you want to have primary custody of your children, you need to be able to show the court that you been involved in their lives even before the divorce situation started, and show that you're doing it for all the right reasons. You're not coming to court having a history of not being involved in your child's life. Then the court questions, why all of a sudden do you want to get involved now? Are you doing it because you want to reduce your child support? You just want to get back at your spouse because you're angry at them?

As an attorney, when you go to tell your client's story in front of a court, you want to be able to show that you've had a parent who's been involved, not only physically being there but involved in participating in their children's lives.

In the case where you have a couple who is unwed and they have children, what happens regarding child custody and child support? How is that decided when you deal with the situation?

Higgins: It's a great question, and in Texas, once you determine paternity, as long as the identification of the mother and the father has been determined, the Family Code treats those two the same as if they were married, whether they were married or not. I mean the marital status doesn't provide any more benefit, so if we have a paternity case and we determine who the father of the child is, then the same presumptions, the same conservatorship models, the same support provisions, the same possession and access presumptions, apply to those parents also, whether they had been married or not. The overriding standard by which decisions will be made by the court will be in the best interests of the children. So, once we jump the

paternity hurdle, then we're essentially in the same type of case just as though we were in a divorce case.

What happens in a case where one spouse wants to move to another state and take their children? Can they do that or do they need to go through some process to do that?

Higgins: Well, one of the rights and duties that have to have apportioned in a paternity order, or an order establishing paternity or a divorce decree with children, is one parent is given the exclusive right to designate the primary residence of the child. And then within that right, the parties either have to agree or a court decides whether there's going to be a geographic restriction on that right or no geographic restriction on that right. Historically, we've seen courts or parties agree to a geographic restriction that involves the county of residence or the county that the divorce is pending in, or the lawsuit's pending in. It may be contiguous counties to that, to give a parent some ability and flexibility to move around. If there's no geographic restriction in the order and you have a parent that wants to move away, for instance, if the divorce was here in North Texas and they want to move to the east coast or the west coast, then they've got the right to do that. They would need to give notice to the other party, and certainly the other party has a right to come in and petition for a modification to either impose the geographic restriction or to potentially change custody.

If there's a geographic restriction in the original order and a parent wants to move with the children outside of that geographic restriction, they're going to have to petition the court for that ability to relocate; and they're going to have to show the court why they think it would be in the best interests of the children to be able to do that. In Texas, in a modification, you've got to show that there's a material change of circumstances between the time of the original order and the requested modification. So, a lot of times what we see is a spouse who has primary custody either gets a job offer outside of that geographic area or maybe they've remarried and want to move out of that geographic area. Maybe their new spouse has a job offer outside of that geographic area. Or maybe they want to move home. Maybe you have two parties who were born and raised in Chicago and they came to Texas because of the husband's job, and now maybe the wife wants to move back home.

Relocation litigation is hotly contested and can be some of the most intense litigation. But certainly the parties have a right to go to the court and ask for that, and more and more we're seeing courts allow that. Again, it goes back to how involved the parents are with the kids. If you've got a mom and dad who are very involved, you may not have the right to move out of this area, but if you've got a dad who exercises his visits but really isn't engaged in the process with his kids and doesn't participate in rearing his kids, then a court may be more inclined to let you move out of this area.

Is there negotiation that happens in that situation within the court so that one spouse gets the children for the summer, or similar deals are made, that are going to work for the children and for the couple? Is that how it's sometimes resolved?

Higgins: Certainly. I mean, if we have a client that comes to us and wants to move out of the area, one of the things to do is try to create as much time for the other parent as possible. We also have to have the ability to sell the new community that they want to move to. So, we have to know what schools the kids would go to and what activities are available for those kids in that new town. We have to be able to look at the school schedules and say, okay, if mom's moving and dad's still here then we want to look at the school schedules in the new community, find out where we have long weekends, where we have holiday schedules. We want to look at the summer schedules and try to make the children available for the dad as much as possible so they don't lose a lot of time with their kids.

But you know, in today's times you also want to be able to open up lines of communication so that dad can FaceTime, Skype, and email, depending on the age of the kids. Maybe they have cell phones. You want to sell to the court that dad will still be involved and have access to his children even if physically they don't live in the same geographical area.

Another issue that can be negotiated is travel cost, because there's a presumption that the person that moves away is going to participate more in the increased cost related to the travels. So, you can negotiate child support or you can negotiate buying plane tickets or paying for gas and hotels and these types of things. Certainly, if you have a client that wants to move out of this area, you want to try to negotiate some of these things and give the other party some benefits. And the deal then ties in to allow your client to move out of the North Texas area, for instance.

You mentioned child support. Who has to pay child support, and how is the amount the they have to pay determined?

Higgins: Well, in Texas, in a historical situation here, you have one parent who's a primary custodial parent and the other parent has the Standard Possession Order or something like a Standard Possession Order in which they will have the children maybe 40 percent to 45 percent of the time, depending on each case. Usually, the non-custodial parent has a duty to pay support. And that support is based on some guidelines that we have and you pay a percentage of your average net monthly income. So, for the first child you pay 20 percent of your net monthly income and for each additional child you had an additional 5 percent of your income. So, if you have two children, you pay 25 percent of your net monthly income. Three children would be 30 percent.

If you have a situation where parties either agree to a 50/50-type schedule or if a court order s a 50/50-type schedule, there's not specific guideline that we have in

the Texas Family Code to deal with that situation. What we find in practice that a lot of courts do is they calculate what dad would pay mom if he was paying support under our guidelines, and then do a calculation and calculate what mom would pay dad under our child support guidelines, and then do some sort of offset calculations, so that there is still some support paid but it may be a reduced amount. But in that type of situation, the court's got the authority and the flexibility to do what they believe is in the best interests of the children and what's equitable under those circumstances.

Is there any connection to standard of living in relation to child support, as well, if the father lives in a mansion and the wife lives in a trailer? Does that come into play at all or not?

Higgins: Well, it's not supposed to be part of the equation for child support here. Under our guidelines, it's not supposed to be a lifestyle issue. It really is based on the monthly net income. And there's some presumptive caps there also, so at this time the net monthly income is presumptively capped at \$8,550.00 per month, and I think you're probably going to hit that if you make probably \$125,000 a year to maybe \$130,000 or \$135,000 depending on what the tax charts say, and they change every year.

So, if you have somebody making a child support obligor making \$500,000 a year, there's still a presumption that he only pays child support on the first \$8,550 of monthly net income. Now, in a divorce situation, if you have that kind of disparity in income, certainly there are other things the court can do to try to level the playing field. If you have that type of income, typically you have more assets within the divorce; so in a divorce context, the court could give the other party, the non-monied spouse so to speak, a disproportionate share of the assets and that might provide them with the resources necessary to increase their lifestyle.

Another thing you've got to think about is if you're representing the party that makes a half-million dollars a year and they're not going to have primary custody, they're going to pay for child support. And let's just say that's the dad. Then do you want the mom living in a trailer? Or do you want to give her more assets or do you want to pay her more money so she has the ability to get into a neighborhood that you think is safe for your children, with schools that are going to give your kid the education that they're going to need, have the parks that you're going to want them to have close by. So, sometimes, even if the court is not supposed to consider lifestyle, a lot of times lifestyle comes into the negotiations so that hopefully you can get these things resolved and not make a judge make these decisions.

What happens, Eric, in the case where the spouse who is receiving child support isn't receiving it because the payor is not paying? Is there something that can be done to get the money?

Higgins: Well, sure. You can file a child support enforcement action to enforce the terms of the underlying order. Again, whether it's an order establishing paternity whether it's a divorce decree. The leverage you have here in Texas is that if someone fails to pay their child support then you have the right to ask a court to hold them in contempt. If they're held in contempt, it means that the court has the authority to put them in jail if they don't pay their child support. And a lot of times, what our courts do, even if the order is contemptible, is sentence somebody to jail time and then put them on community supervision or probation. And as a condition of that probation, order them to give them a repayment schedule for their child support.

Yet, there's other relief that's available. There are child support liens that can be filed with the County and you can try to collect on non-exempt property if, for instance, there are bank accounts out there then you can try to levy on those accounts. You can also ask the court to suspend any licenses that have been issued by the State of Texas, whether it be a driver's license or some other sort of license. In my experience, the courts have been a little hesitant to do that because, usually, it's those licenses that allow people to go out and make money. If I can't drive, I can't get to work. If you suspend a professional license that I have through the State, then I can't work in my primary job that that license has allowed me to create in my profession, for instance, a law license.

So, I think people are hesitant to go ask for this suspension of license. I think the contempt is probably the remedy that's sought in about 99% of the cases, but there are several options available to a party who's not receiving the child support that they were ordered to receive under a decree from our courts.

There are lots of questions I could ask you on this subject because it's very deep, and anybody who's listening should consult with a top family lawyer like Eric if they have children and they're going through a divorce; it is very complex and you just can't know everything that Eric or another top attorney would know from the years of his experience.

The question I want to end up with has to do with special needs, or what the Texas courts refer to as disabled children. Some of our listeners may have a disabled child. Will the courts order a higher amount of child support when there is a disabled child in the family? How does that work?

Higgins: Certainly, Dan. In Texas, we have provisions that allow our courts to order support for a disabled child whether they're a minor or an adult. And under our Family Code, a child is defined as being disabled whether they're institutionalized or not if they require substantial care and personal supervision because of either mental or physical disabilities; if they're not capable of self-support, and the disability existed or the cause of disability is known to exist on or before the 18th birthday of that child.

A lot of times with minor disabled children—and again I'll go back to maybe a more traditional hypothetical—maybe mom is going to have primary custody of the children and dad is paying child support. If mom can show that even with the child support she's receiving from dad that this child has proven needs on a monthly basis that exceed the child support amount, then the court can take a look at what those proven needs are, whether they're medical bills or counselling or therapy; or maybe it's just people that have to watch the child while mom's at work or after school. If the child has those proven needs, then our courts have the ability to assign to one party or the other a percentage of those costs, or a fixed amount over and above child support. And what they do is look at what the proven needs of the child are on a monthly basis and then look at the resources of the parties and allocate those expenses in an equitable manner.

They can also do that if you have a minor child who's disabled. Once they turn 18, then the court can order that the support continue beyond 18 or graduation from high school, which is when our child support in Texas would traditionally terminate. Again, depending on what the proven needs of that child continue to be and looking at the resources of the parties and their ability to pay, then the court can allocate the different costs amongst the parents of the child.