



Kid Duty

The right of first refusal in custody cases and how it can backfire.

BY JONATHAN JAMES

When you're going through a divorce, the concept of the "right of first refusal" in custody cases sounds perfectly rational if both you and your soon-to-be ex-spouse understand the agreement and potential consequences. If you are the parent in possession of the child(ren) and will be absent for an agreed upon length of time, you will, in good faith and before seeking alternate child care, offer that time to the other parent.

Thus, your former partner has the first right to say no or yes to possession before anyone else enters the equation. If the answer is no, you are free to pursue other means of supervision. The idea is this, "If I am unable to be with my child, who better than his or her other parent?"

Sounds straightforward, right? Not necessarily. Many divorcing couples agree to a right of first refusal if one party requests it without thinking too much about it because it sounds reasonable. And it can be. Until it isn't. Divorce is difficult. Spouses find themselves angry, hurt, sometimes irrational, demanding, or unforgiving as the process unfolds. It can lead, even unconsciously, to a wounded spouse taking out resentment in ways that seem nonsensical.

When a party feels unheard, mistreated, or marginalized, instigating unnecessarily difficult or ugly interactions can be an off-kilter attempt to punish the ex or to right what is perceived as an imbalance of power.

Over the years, I have seen the right of first refusal cause unforeseen glitches. Some spouses insist the visitation time period be two to four hours instead of eight or overnight, for instance, and the other agrees without thinking it through. People run late, meetings go long, and children are invited to sleepovers. Does that mean because the time period will be longer than what was agreed upon, that the parent not in possession picks up the child in the morning from a friend's house on what was supposed to be the other parent's "time"? Or what if exes decide to agree on the alternate caregivers—relatives—which works perfectly until one party gets remarried and the new spouse is not written in? If a parent must go out of town unexpectedly, must his or her new spouse cede possession to the ex because the allotted time has elapsed by the time tomorrow morning rolls around?

If the spouse is indeed "proven" to have gone over the agreed upon num-

ber of hours, is this worth the cost of a hearing, attorney fees, and emotional upheaval—or even enforceable in court for defying the decree? Only when a party flagrantly disregards the right of first refusal recklessly or repeatedly and said behavior can be proven—which is difficult to do—will it yield any practical remedy in court. Even then, it is no slam dunk. What it can be is a dangerous precedent. A gotcha litigious existence can be launched, wherein ex-spouses feel compelled to spy and tell on each other. The cost of a loss of good faith can be steep and endless. Nor is it a good model for children.

Yes, if exes are reasonable, amendments or additions to a decree are relatively simple—add a clause that states when the custodial parent travels, the child can stay overnight with the new spouse. Done. Clarify that sleepovers are exempt to right of first refusal and alternate caregivers are up to the discretion of the parent in possession. Simple. But better yet, do it the first time around because there is always the chance that an ex will be steaming about another part of the settlement and might allow negative feelings to enter a right of first refusal situation. "Reasonable" isn't a word that leaps to mind when enduring the dissolution of a marriage. There is, after all, a reason the divorce is happening.

Situations exist wherein the right of first refusal is incredibly useful. Just be aware that it can also become complicated, like everything else with divorce, and it would do you well to think it through with your attorney carefully and judiciously. **TBJ**

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