

# Texas Family Law Podcast Episode #20: Filing for Sole Custody of Your Child

**Brian:** Good morning, Jake. We're back today to discuss filing for sole custody in Texas, specifically what that means and how that works. Jake, do you want to define the term?

**Jake:** So, I think it's a common sort of what I would say "lay-person's" term to come in and talk about sole custody. People come to us a lot and say "I want sole custody of my kid."

I think the first step is to talk through and define what we're actually talking about in a child custody order, which is interesting because custody is not even a word in the Texas family code. When we're looking at orders related to children, we're talking really primarily about three things, that's conservatorship, possession/access, and child support. Child support being how much a parent pays the other parent for supporting the child and health insurance and unreimbursed medical expenses, those types of things.

When we talk about visitation, I think that's the lay-person term, but the term in the family code is actually possession access. There's conservatorship, conservatorship has to deal with decisions for a child, the biggest one being who has the right to determine the primary residence of a child.

So just taking that word custody, judges and lawyers do it too actually. It's a logical term, it's just not the legal term for it, but what they're actually talking about is the right to determine the primary residence of the child. That's, who has "custody" of the child.

That's the biggest decision, but there's a variety of other decisions that are outlined in the family code. And family code talks about those rights and duties. And like we said, there's conservatorship, there's the right to determine the primary residence, then there's 10 other or 10 total rights and duties. The biggest one, obviously, like I said, being the rights of the term of the primary residence, but then there's also the right to consent to medical procedures that involve in basic procedures, right to consent to psychological psychiatric treatment, to make educational decisions. Those are the biggest ones that we talk about when we talk about conservatorship.

When we're talking about custody, we're actually talking about conservatorship and then when people come in talking about sole custody, if they're talking about decision-making, there are really two types of arrangement the court can do to a custody order. One is that the parents are joint managing conservators and the other is that a parent can be made sole managing conservator of the child and the other parent be made, what's called a possessory conservator. Then there is a provision in the family code that says the court can actually appoint one parent as the sole managing conservator and not even make the other parent a possessory conservator if some specific findings are made.

That's a big overview of conservatorship, but I guess, Brian, can you talk to us sole managing conservatorship versus joint managing conservatorship, what that looks like?

**Brian:** Sure. I think when people say sole custody to me they either mean one of those two things: that they get to make all the decisions, or the other parent doesn't get to have any possession or meaningful possession, and sometimes that means both. Sole conservatorship is essentially saying those 10 major items are going to be all made by one parent and they're not going to have any obligation to get the other parent's agreement and really even to get their input on it. Now out of those 10, a good 5 of them are probably so obscure that most people are not going to run across them, but those are big deals, especially when you're talking about educational decisions, medical, or psychological counseling type decisions. Those are really important things.

The default is the joint managing conservatorship. I think a lot of times, these days the default is also that you need to at least confer with the other parent, even if you're the tie breaker, to get their input and opinion about it, but as a sole managing conservator you have no obligation to even do that. If you want to move schools for the child, you just do it and the other parent finds out when it's already happened. Or if you want to, if there's going to be surgery for the child, you consent to your child's surgery and you can essentially tell the parent the other parent when they're done with the surgery. You can take them to a counselor and just essentially tell the other parent I put them in counseling, that's occurring.

So that's a really powerful thing, especially if those are issues that you have with a parent. How often do you see a parent being awarded sole managing conservatorship?

**Jake:** It's rare. I think I'm pretty clear with people when they come and talk that it is rare. We've certainly had that happen but the presumption is joint managing conservatorship, and we'll talk about how the court can deal with those rights and duties even in a joint managing conservatorship.

Frankly judges tend to push people towards joint managing conservatorship, even if it's just the title of joint managing conservatorship. And like I say, we can talk about that just a second, but we have had quite a few cases usually that were tried either to a judge or jury where we got our client awarded sole managing conservatorship, but those are usually tried. It is rare that you go to a mediation, and the other side goes "yep, you're right. You can also be sole managing conservator and I'll be with, what's called a possessory conservator."

By the way, the term possessory conservator is misleading. A possessory conservator, I think a lot of people think that means that I have possession of the child. Most of the time, possessory conservator is the opposite of sole managing conservator, where you don't get to make any of those big decisions.

Anyways, I've been able to convince judges and juries of awarding sole managing conservatorship but they are difficult cases and they have to be litigated.

Yeah, I guess the other thing I'll point out is that the most clear instruction the family code has on conservatorship is a section of the code that talks about if there's been a history or pattern of family violence. If there is then the court will do sole managing conservatorship.

So if you have cases where there's a protective order involved, something like that, then a lot of times you'll see sole managing conservatorship being ordered in those situations.

What about you?

**Brian:** I agree. And that's interesting. It tells you how serious the family violence issue is taken in our family code. If you think about it, the most common reasons for sole managing conservatorship are family violence, addiction issues, and mental health issues. And then I guess, fourth is the inability to function as a parent or as an adult. But out of those four, each of which were very serious problems, family violence has got the specific wording about it.

Like you said, there's not even really a debate about that. So, if there has been a history of pattern of family violence that's something you should definitely bring

to the attention of your attorney and that may be your gateway to the sole managing conservatorship.

**Jake:** Yeah. So what can a court do? So when I think a lot of people when they say do I want sole managing conservatorship or sole custody, there are two reasons for that. The first is I don't want joint because I don't want to have to make joint decisions with this person.

We just finished a trial for example this week where the parties are joint managing conservators, but they knew it was a problem because they were ordered under temporary orders to make what we refer to as true joint decisions. They had to agree on these major decisions in order for them to happen. If you think about it, for example, the court says for psychological psychiatric decisions, you all have to agree about whether or not your child goes and sees a counselor. You really do have one parent making the decision then because whoever says no is the one making the decision, it essentially gives a parent veto.

So, if you're true joint managing conservators where you have to make a joint decision on psychologicals and the other parents are like, I don't think our kid needs counseling. You're stuck. You can't get counseling without having to go back to court. so, I guess, Brian, can you talk about ways that courts address that while still saying parents are joint managing conservators?

**Brian:** Sure. Let's say that you wanted to move your child from one school to another, you're the primary parent under a sole managing conservatorship. You just do that and then you tell the other parent later at some point "Hey, by the way, the kids are at a new school."

Under joint managing where you have an obligation to confer with the other parent you would say "Hey, I'm thinking of moving our child from Smith elementary to Jackson elementary. And, what do you think?" And the other parent says "I don't want to do that. I think they ought to stay where they are." You can essentially say, too bad, screw you and so the outcome's the same.

It just, it's a feel good provision. In some cases, I think parents who are really trying to co-parent would take that into consideration and would try to make it more than just checking a box while I sent him an email and then did it anyway, but that's really the outcome. The other possibility is having some other mechanism to decide things. Let's say, for example, that it was a big issue that

two parents were wanting to make sure that their children didn't get moved to a different school because I wanted to live nearby.

You could agree, look, this parent has the right to make educational decisions, but this child is going to attend Smith elementary, Jackson middle school, and Williams high school in Austin or wherever, and then that's already been dealt with. You don't have to fight in the future or have conflict in the future about which school a child's going to attend or which pediatrician that they are going to use or whatnot.

So that's one way to work around it. That's not foolproof, because life can intervene. Things can come up and that might become unworkable 10 or 12 years down the line, or even a couple of years down the line.

Another option is to have some other person be a tie breaker. This is a common one where there's education or medical decision-making issues. You could say the doctor is going to be the tie-breaker or viewer. If it's a counseling issue, you're going to say the child's existing counselor is going to be the tie-breaker. Those are ways to work around those, but again, those have their own set of problems.

**Jake:** I see people do that a lot and people come to us with court orders that say they have a tie breaker, and, it's like Brian was saying; what you want to avoid, or what you want to be wary of, at least in the joint managing conservatorship is when the order says, you all have to agree or it doesn't happen it's all subject to agreement because then you can get stuck.

People come to me sometimes with a court order that says education is by agreement and doesn't even spell out where the kid goes to school. It's like what happens if y'all can't agree on where the kid goes to school, he doesn't go to school? That doesn't make sense.

I think people started doing tiebreakers because they want a mechanism where the parents aren't stuck in a situation where they can't agree on something and then nothing happens for the kid. But like you're saying, if you really don't think about it then they can be problematic.

So take for example invasive medical procedures. I see people a lot of times say we have to agree on invasive medical and if we don't, then the pediatrician is the tiebreaker. That one's not the end of the world. I think that would sometimes make sense, but think about a pediatrician. Most of your kids' pediatrician is not gonna wanna be the tiebreaker to make the major decision like a surgery. They're

going to sit there and say, I think you should do that. Or are they going to refer you to a specialist more likely. I usually tell people on invasive medical that you can do a tiebreaker, but I've been practicing 11 years and I litigated invasive medical issue once. Those are usually pretty straightforward lawsuits because the doctors are saying do it or don't and a judge is going to go with what the doctor says.

I guess there's no guarantees in life, but I can't imagine a situation where a judge doesn't just go with what the doctor says. But then, people do tiebreakers on counselor. I see this one a lot. When people come in and they say "okay, we're going to make joint decisions on psychological decisions and psychiatric decisions."

If we can agree on counseling, then the child's pediatrician is going to do the tiebreaker. For some reason, I see people with their child's pediatrician in there a lot. It's like what is a child's pediatrician is going to say, little Johnny needs to go see a counselor, by the way. I see little Johnny twice a year for wellness checks? How on earth would a pediatrician be able to say whether or not he needs to go see a counselor? Sometimes you see people do the school counselor, even then these people aren't going to make tie-breaking decisions. They're going to make recommendations to parents.

For example, I talked to people about this a lot, my son's on the autism spectrum. So when my son was two years old, his pediatrician said "okay, I think that what y'all are describing, he may be on the spectrum. You should go get him tested." Myself and his mother were divorced, but we were able to get on the same page and we agreed but that pediatrician was never going to say, you guys shall go get this child tested, he must go get tested to whether he's gonna be on the autism spectrum, but that's not his job, at the end of the day. So I don't get it. When people sign up the child's pediatrician to be a tiebreaker and stuff.

Now you can make educational decisions. People sometimes do tiebreakers, which makes sense. As far as if we can't agree on the school, we're going to use this metric per category on the school, we're going to have this educational consultant, and make a recommendation. I think you can do that, but I'm pretty wary of tiebreakers. Me personally, when I do it, I don't know about you Brian, but I'm pretty wary of them.

I see mediators pitch them a lot because it's a feel-good way of trying to get something resolved, but they cause a lot of problems and they're really not practical.

**Brian:** I think that's right. They get people to agreements because they think that's the solution. And I think probably in life, most of the time, the issue isn't going to come up in a way that needs to be re-litigated.

So for many people, it does work only in the sense that there's not a problem, but if there is a problem, you're right, they're not going to do it. I think school counselors are the perfect example. If they're asked to do something like that and they have any brains at all, they're going to talk to their principal and their lawyer for the school district is going to tell them to not say anything. "We don't get dragged into these people's conflict." So I think they're just gonna pass on it and you're gonna either have to deal with it as co-parents together without that safety valve, or you're going to have to come back to court to get some resolution, if the problem arises and maybe it won't.

Okay, let's talk briefly then about the other part of what people often mean by sole custody, which is, I don't want the other parent to have possession of the child or not much or restricted.

Those are really the options, right? So the presumption in Texas is that one parent's gonna establish a residence and be quote unquote "primary parent" when it comes to possession, which just means time. An the other parent's going to have a standard possession order, which has a couple of variations, but it's a good chunk of time.

It's quality time, but that isn't the way it is for everybody, because there are problem parents and we have the same group of problems that we have with conservatorship, family violence, addiction issues, mental health issues, and again, just the best term I can think of is just failure to function as an adult, or an inability to put your child's needs ahead of your own. Probably the, whatever that category is that fourth one, and those are all reasons why a court can restrict a parent either partially or fully from having access to their child.

Do you want to talk about a couple of those and how courts typically approach them when there is a problem parent?

**Jake:** It depends on the problem. I think, with that, the presumption to standard possession order. But I think we're doing, doing a console yesterday where a

parent had. No access to the child, except for two hours a month supervised because of drug and alcohol issues and stuff. I think it's back to the issue of when people say sole custody all the times they are talking, they do mean they want no access.

And it's rare that there's no access. If you're at the point where you're doing no access and you really should be at the point where you're talking termination probably, but the court's going to put in provisions that. If you had the problem parent, like you were talking about that, we're going to have supervised visits.

We have drug and alcohol testing. There's lots of different ways that it can look, to change up the possession schedule, to make things safe for the child at the end of the day. That's what the court is going to care about. They're not going to care about a parent's feelings or their rights as a parent.

That's all they care about the rights of the day. I want a child to have a relationship with a parent, but it's going to have to be safe. I think there's lots of different mechanisms for how they can do that.

**Brian:** I agree, there's many ways as I've seen a court do it or settle as there are possibilities for possession. But, I think the goal of courts is to try to get both parents involved as long as they're safe and functioning. It is difficult to get off of that standard possession order, but if it's justified and called for they'll do it, they, I think they try to make it temporary rather than permanent, but it's sometimes it needs to be permanent.

I think those are the realities of it. I think there's also gamesmanship in some of this litigation where sometimes a parent will be seeking more time than they really want. Yeah. To spend with the children or maybe they changed their mind over time. And, sometimes it's the other way around where there was, directly or indirectly a parent is using time or possession with the child to obtain something else.

I think courts were really sensitive to that and we need to be really careful to make sure our clients don't come across that way. Of course they also don't get you intimidated or use that as leverage to obtain a bad settlement.

I think those are the big picture items for sole custody, and hopefully we've cleared up some of the wording around that and what those terms mean in the

family code. It has its own set of confusing terms like possessory conservatory, like you pointed out. So, although we've cleared some of that up, I'm sure we'll have further podcasts that drill down on some of these other issues more specifically in the future because they are certainly, some of them are really complex and deserve more attention than we have for this kind of broad overview.

**Jake:** Okay. Very good. Thank you.