

Back to School Basics: A Guide for Navigating Legal Custody for Education Purposes

by Lindsay Belmont

It is a well-established and fundamental principle that parents have the right to direct their children's educational upbringing.¹ Choosing a day care, enrolling their child in preschool, or applying for a Montessori program are only the beginning of what parents may decide for their children's development.

As children grow, more and more choices must be made – choices that are inherently the parents' to make. Public or private school? What about homeschooling? Should my child start kindergarten before age six? How can we plan for our child's post-secondary education? What does "FAFSA" stand for?

For parents with similar parenting philosophies, these questions may be easily answered and are not decisions that involve the legal system. But what happens when divorced or separated² parents do not see eye-to-eye on education decisions that need to be made? Who decides?

The focus of this article is to provide insight as to how family law issues necessarily intersect when a child's educational growth and development are at stake. This article will delve

into the world of legal custody (the umbrella under which education decisions fall) and how that can affect education, provide useful tips for setting children up for educational success, and discuss best practices for maximizing financial opportunities for divorced or separated parents.

What is "legal custody" and how does it impact a child's education?

In Nebraska, there are two types of custody: legal custody and physical custody. The Nebraska Parenting Act defines legal custody as "the authority and responsibility for making fundamental decisions regarding the child's welfare, including choices regarding education and health[.]"³ Physical custody, on the other hand, is the "authority and responsibility regarding the child's place of residence and the exertion of continuous parenting time for significant periods of time[.]"⁴

Legal custody may be awarded to one parent or both parents jointly. If one parent is awarded legal custody, that parent is the primary and final decisionmaker for the fundamental decisions regarding the child.

Joint legal custody means that both parents share equally in the fundamental decision-making. Joint legal custody is generally recommended only when the parents are able to effectively communicate with one another and have similar parenting philosophies.

If the parents are unable to reach agreement on fundamental decisions, they may need to attempt mediation to resolve the issue, select any third-party adult to act as their arbiter, or ask the court to make the decision.

Parents of child(ren) under the age of nineteen who are affected by divorce or custody proceedings must create a

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parenting plan. A parenting plan details how parents going through a divorce or separation will parent their child(ren) *after* the court proceedings end. The plan will include of number of statutorily-required provisions, including the parents' legal custodial arrangement.

The plan must advance the child(ren)'s best interests, meaning the parents must create an arrangement that provides for the child(ren)'s "safety, emotional growth, health, stability, and physical care and *regular and continuous school attendance and progress for school-age children*["]⁵

The Nebraska Parenting Act is the statutory scheme that divorced or separated parents must follow whenever parenting functions are at issue.⁶ Decision-making is a core parenting function; the Nebraska Parenting Act aims to ensure that a child's best interests are advanced when fundamental decisions need to be made.

There are multiple provisions throughout the Nebraska Parenting Act directly relating to the importance of education and its direct effect on advancing a child's best interests. The Nebraska Parenting Act enumerates a non-exhaustive list of specific parenting functions, one being "attending to adequate education for the child, including remedial or other special education essential to the best interests of the child["]⁷

Best practices for parenting plan provisions:

In cases where parties agree to have joint legal custody, it is best practice for their plan to include very clear language regarding how parents will be expected to make *joint* decisions.

Education decisions include, but are not limited to: which school a child will attend (including day care), the child's curriculum, special education, tutoring, advanced placement, college preparation tests, selecting a college, and so forth.

The parenting plan should direct the parents to discuss school or general education-related issues and present a united front with regard to the same.

Examples of education-related parenting plan provisions:

"COMPULSORY SCHOOL ATTENDANCE: The parents acknowledge their statutory responsibility to ensure that their school-age minor children have regular and continuous school attendance and academic progress, and each parent will assist the minor children to the maximum extent possible to assure a quality education."

"ACCESS TO OFFICIAL RECORDS: The names of both parents will continue to be included on all of the minor children's official records, including but not limited to medical, dental, educational, and legal records, and each parent will have unrestricted access to these records. Neither parent will conceal the creation or existence of any of these records from the other parent. Both parents will be aware of the names of

the current treating physician, dentist, and/or therapist for the children at all times.

Each parent will be responsible for notifying the administrator of the schools that the minor children attend of their wish to appear on the school records, of their desire to be included on the mailing list and be notified of conferences and events, as well as receiving copies of report cards, progress reports, and all other pertinent information."

"MEDIATION OF FUTURE DISPUTES: The parents agree that should a future dispute arise concerning their children, which they are unable to resolve, absent an emergency situation, they will first attempt to mediate a solution prior to the filing of any legal action."

Saving for your child's future – the Nebraska Educational Savings Trust ("NEST")

College savings plans are an invaluable option for parents to begin saving for their child's post-secondary education. A 529 plan is "a plan operated by a state or educational institution, with tax advantages and potentially other incentives to make it easier to save for college and other post-secondary training, or for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school for a designated beneficiary, such as a child or grandchild."⁸

The main advantage to a 529 plan is that earnings are not subject to federal tax.⁹ However, contributions to a 529 plan are not tax-deductible.¹⁰

Nebraska's 529 plan is the Nebraska Educational Savings Trust (NEST 529), and is one way parents can plan for their child(ren)'s future. The NEST 529 program provides significant tax benefits including tax-deferred earnings and a state tax deduction for Nebraska tax payers.¹¹ Withdrawals from his or her NEST 529 account are tax-free so long as the funds are used for qualified college expenses, such as tuition, books, supplies (including a computer or computer-related equipment), and room and board.¹²

According to the NEST 529 College Savings website, other tax advantages parents can enjoy include:

- No income limit or savings cap, and there is a high contribution of \$400,000 per beneficiary;
- State tax benefits, which out-of-state parents may be able to enjoy;
- An annual \$10,000 income tax deduction for investing in NEST 529.¹³

Contributions to a NEST 529 account can begin at the child's birth. There is no minimum amount to start an account. One parent (or both) will be typically designated as

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the account's custodian(s). The child is named the beneficiary.

When parents divorce or separate, it is best practice to specify what happens to their child's NEST 529 account. Generally, the monies in the account should *not* be included in the parents' marital estate nor should the monies be subject to division. The account's balance should be considered the child's property.

If the parents wish, they may be able to separate the account into two separate accounts, each being named the custodian of their half, while the child remains the beneficiary of both. Parents may also freeze the account.

The custodian of the account is the person who controls the funds and makes decisions regarding the use of the funds. It is ideal if the parents can reach agreement on who will maintain control of the 529 for their child's benefit.

Sample provision for a 529 account:

"NEST 529 ACCOUNT. The NEST 529 account shall be considered the property of the minor child and shall not be considered in the division of the marital estate. Plaintiff/Defendant shall remain as the custodian of the minor child's NEST 529 account. The assets in the account may only be used for the direct benefit of the child who is named on the account.


Neither parent may withhold the use of the funds in these accounts from the child for any reason. Any funds

remaining in any of these accounts that are not used for the direct educational expenses of the child for whom the account was originally opened and funded, shall belong to the child, and neither parent may utilize the child's funds for his or her own benefit. On an annual basis, at the request of the other party, they shall disclose the balance of the child's NEST 529 account."

Best practices for maximizing the FAFSA for children of divorced or separated parents

Recently, a scandal surfaced in higher education regarding wealthy parents transferring legal guardianship of their children to friends or relatives so their children can increase their financial aid award. In such a scenario, only the child's earnings are considered in their application – not their parents'. While this is *not* a best practice to maximize financial aid benefits, it is a timely example of how custodial arrangements directly impact the aid a child can receive.

The Free Application for Federal Student Aid ("FAFSA") is a common tool for college-bound students to apply for financial aid to pay for their post-secondary education.¹⁵ The application contains a number of questions for the student (and sometimes his or her parents), and for the divorced or separated parents, there are important considerations to note. ➔



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If the child is considered a “dependent student,” he or she must report his or her individual information as well as his or her parents’. The FAFSA form defines a dependent student¹⁶ as one who –

1. Is under the age of 24 by January 1st of the year he or she will begin college;
2. Is not married or separated;
3. Is not working towards a master’s or doctorate degree;
4. Does not have children who receive more than half their support from the applicant;
5. Does not have other dependents who receive more than half their support from the applicant;
6. Is not currently active duty in the U.S. armed forces;
7. Is not a veteran of the U.S. armed forces;
8. Is not in foster care or a ward or dependent of the court after turning 13 years old;
9. Is not an emancipated minor or in a legal guardianship as determined by a court;
10. Is not an unaccompanied youth who is homeless or self-supporting and at the risk of being homeless.


If the child is considered a dependent student, then he or she will have to disclose, among other things, his or her parents’ marital status, their tax filing statuses, adjusted gross income, total income tax, the number of tax exemptions claimed, total earnings, and other financial information.¹⁷

For divorced or separated parents, it is best practice to be strategic about the structure of their custodial arrangements when they have children who are college-bound. The custodial parent’s finances will generally be used to determine the dependent student’s financial aid eligibility and award.¹⁸ Determining the custodial parent is key.

For example, in joint physical custody arrangements where the parents exercise equal time sharing, it may be advisable to put in the parenting plan that the lower-income parent has 183 overnights, rather than stating each parent has 182.5 overnights. That way, the lower-income parent will be deemed the “custodial parent” which could maximize the child’s potential financial aid award.

Note, however, that if a divorced or separated parent remarries, his or her new spouse’s income will be considered

for the applicant’s financial aid award. There is also a trend of colleges requesting financial information regarding *both* parents, regardless of who the custodial parent is, as well as the parents’ new spouses, if any.¹⁹ This means there’s a potential that four adults’ income could be considered when determining a financial aid award to a dependent student.²⁰

Additionally, it is best practice to be strategic about which parent claims the child as a qualifying dependent on his or her taxes. The parent who claims the child may be eligible for any college credit(s) from the IRS for the applicable tax year.²¹ A divorce decree or custody order can specify which parent may claim the child as a dependent for tax purposes; it is common that parents will alternate claiming the minor child. With a college-bound student, parents should keep this in mind. 

Endnotes

- ¹ See *Meyer v. Nebraska*, 262 U.S. 390 (1923).
- ² For purposes of this article, “separated” means parents who were not previously married, but who had a child together.
- ³ Neb. Rev. Stat. § 43-2922(13) (emphasis added).
- ⁴ Neb. Rev. Stat. § 43-2922(20).
- ⁵ Neb. Rev. Stat. § 43-2923(1).
- ⁶ See Neb. Rev. Stat. §§ 43-2920 – 43-2943.
- ⁷ Neb. Rev. Stat. § 43-2922(17)(c).
- ⁸ IRS 529 Plans: Questions and Answers, <https://www.irs.gov/newsroom/529-plans-questions-and-answers> (last visited August 4, 2019).
- ⁹ *Id.*
- ¹⁰ *Id.*
- ¹¹ Nebraska State Treasurer’s Office, <https://treasurer.nebraska.gov/> (last visited August 4, 2019).
- ¹² NEST 529 College Savings, <https://www.nest529direct.com/home/learn/tax-advantages.html> (last visited August 4, 2019).
- ¹³ *Id.*
- ¹⁴ Douglas Belkin, “College Financial-Aid Loophole: Wealthy Parents Transfer Guardianship of Their Teens to Get Aid,” *The Wall Street Journal* (July 29, 2019), <https://www.wsj.com/articles/college-financial-aid-loophole-wealthy-parents-transfer-guardianship-of-their-teens-to-get-aid-11564450828>.
- ¹⁵ See <https://studentaid.ed.gov/sa/fafsa> (last visited August 4, 2019).
- ¹⁶ “Do I Have to Provide My Parents’ Information on the FAFSA Form?” <https://studentaid.ed.gov/sa/sites/default/files/dependency-status.png> (January 2019).
- ¹⁷ “2019-20 Completing the FAFSA Form,” <https://studentaid.ed.gov/sa/sites/default/files/2019-20-completing-fafsa.pdf> (last visited August 4, 2019).
- ¹⁸ Andrea Williams, “3 Important College Funding Questions to Answer During a Divorce,” <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2015/08/19/3-important-college-funding-questions-to-answer-during-a-divorce> (August 19, 2015).
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ *Id.*