

***Fox Rothschild Podcast***

**Texas Family Law Podcast Series: Custody and Possession Schedules**

***Featuring Laura S. Hayes and Jamie-Lee Denton of Fox Rothschild LLP***

**Laura Hayes:** Hi and welcome to the Fox Family Law podcast. We are on episode number four. I'm Laura Hayes, a Partner in the Dallas Office. I'm here today with my associate Jamie-Lee Denton. We are going to talk about custody and possession schedules – the standard in Texas, but also how to work to create some creative possession schedules when you don't have the typical 9-5 jobs, or you have unique circumstances. Jamie-Lee, welcome.

**Jamie-Lee Denton:** Thank you! I'm excited to be back.

**Laura Hayes:** Yeah, this has been really fun! If you want to go ahead and start talking about, in the Texas family code there is a standard possession schedule that is the default for the judges to go to. Although, the family code talks about the expanded standard possession schedule, and I will have you explain what that means in a few minutes. I will say that more recently because of the pandemic I have seen more judges deviate from the standard possession schedule because of everyone's remote working schedules and some other things. Nonetheless, the Texas family code still applies, so why don't you explain to our audience what the expanded standard possession is from the Texas family code?

**Jamie-Lee Denton:** Of course. The standard possession schedule is for parents living 100 miles or less apart. The non-custodial parent gets the child the first, third and fifth weekend from 6 p.m. on Friday to 6 p.m. on Sunday. They also get the child, or children, every Thursday during the school year from 6 p.m. to 8 p.m. Then school holidays, if there is a holiday – President's Day for example – if that is a school holiday, which it generally is, then the parent's weekend is extended through that Monday rather than Sunday.

**Laura Hayes:** So what you are talking about is the standard possession, and we will get into some alternatives for that, but keep going.

**Jamie-Lee Denton:** OK, so then the parents switch off even and odd holiday years, so one will get spring break one year, then the next spring break goes to the other parent. The non-custodial parent also gets the children, or child, for 30 days during the summer.

**Laura Hayes:** So what you said is the standard possession schedule for parents who reside 100 miles away from each other. Now, that being said, within the family code there is the option to

choose expanded standard, which is very similar except that it extends the weekend through Monday morning return to school, and then the Thursday period of possession is actually overnight. The non-custodial parent would pick up the children from school on Thursdays, and return them to school on Friday every week during the school year. That is generally what the courts default to. Although, as I was saying in the beginning, I have noticed that more and more judges are defaulting to a 50/50 schedule because of the pandemic. Before the pandemic, there were some judges who were very enthusiastic about 50/50 schedules and there were some other judges who were very against 50/50 schedules. You just had to know your judge when you had clients who wanted to get 50/50, but I have noticed that there has been a lot of deviation from that. I think because of remote working schedules, everyone is a bit more available to be around their children and accommodate children's schedules due to more flexible work schedules. It will be interesting to see whether the courts continue to order more 50/50 schedules, but right now, the family code is still the expanded standard possession schedule.

That being said, that is what the courts are supposed to do under the family code, but obviously, every custody decision is based on the unique circumstances of each case and what is in the best interest of the children. The courts are always looking at what is in the best interest for the children. However, what many parents tend to forget is that they have the ability to decide together what is in the best interest of their children. Even if you have a possession schedule that has been court ordered for expanded standard, the parties forget that they can reach agreements otherwise. Sometimes that's just not possible because it's too high conflict, but once you get this agreement in place or even before you get the court order, if the parties want to, they can come up with a schedule that may not make sense to anyone else, but if it makes sense to them and it works for their child, then the courts will sign off on that.

Another thing I try to talk to my clients about, obviously not in the high conflict cases, but in the cases where the parties can get along, is that they can always deviate from the court schedule. Even if it is court ordered, as long as it is by agreement, they can change the schedule as the kids get older, or as things change between the two of them. There is a provision in almost every court order that says this is the default schedule if the parties cannot agree otherwise. It is really important to explain to my clients that it is possible to make a different schedule.

That being said, there are some cases where we do not go to court, we talk about expanded standard schedules, but we do reach agreements. So do you want to talk a little bit about 50/50 schedules and what that means? It means something different to everybody – 50/50 generally means equal time, but how the parties define that and actually implement a 50/50 schedule can be different. So do you want to talk about some of the different options that we have seen in our cases?

**Jamie-Lee Denton:** Definitely. We have seen a lot of parents that like to just do every other week. One parent will choose which day – maybe Sunday, Monday – which they start getting the

child, or children, then they get them for the whole week. Then the next parent takes a turn. I feel like that one is just easy – easy to remember, you always have a set day. That is one option.

Then another option is where it is every other week like the one I just mentioned, but on Wednesday, there is an overnight for the parent who does not have the child currently. As we discussed earlier, it is kind of “oh I’m missing my child. I can’t go a whole week without them.” I don’t have kids yet, so I can’t understand, but I do miss my dog, so I think that is always a good option.

Then there is the 2/2/5/5 schedule, in which one parent has possession on Monday and Tuesday each week. The other parent has possession Wednesday and Thursday. Then they alternate weekend possession, which is defined as Friday through Monday morning every other week. That is an option that we have seen quite a few families choose.

One more I would talk about is the 2/2/3 schedule, which is where the child will live with one parent for two days of the week, the other parent for the next two days, then the first parent for the next three days. This rotation will switch and each parent ends up having an equal amount of time.

**Laura Hayes:** Right. That particular schedule, some parents really like it and other parents – I am a parent and I would find that a little more difficult for my kids, just because it can get confusing. A lot of kids want to know which nights am I going to be at mommy’s or daddy’s or whatever the case may be. Some parents have made that work. To make a 2/2/3 schedule work, I really do think the parents have to have a good co-parenting relationship. Otherwise, it can be confusing for the kids. Kids are forgetful and someone forgets a backpack, or a school uniform, or tennis shoes, or whatever the case may be, so you’re kind of having to run back and forth between each other’s houses when the kids forget things. So you really do have to have a good baseline co-parenting relationship that is not high conflict in order to be able to do some of these more customized 50/50 schedules.

The week on, week off schedule, you don’t necessarily have to have the good co-parenting relationship because it’s just one custody exchange every week and hopefully the two of them can cooperate if someone forgets a soccer uniform, or homework. However, you never know, we do run into those issues where the parties do not cooperate even with the 50/50 schedule and then there are issues for the child.

At the end of the day, coming up with a schedule is really what works for the parents, but what’s in the best interest for the kids. The courts do listen on a case-by-case basis, if you have to go to court if the parties cannot reach an agreement. Most courts will default either to the expanded standard possession, or a week on, week off, are really not going to modify it very much in most cases unless there is a history and pattern of operating on a different schedule. Really parents

need to look at what works for their kids – what schedule works that the kids are happy with. Some kids don't care, they can be more flexible. Others need more structure, they need to know every Tuesday is at daddy's house, or every Thursday, whatever the case may be, they need a whole lot more structure. So really a big part of coming up with possession schedules is really looking into the details and the particulars of each family and each child. As I said, there are some kids who just really need that structure and so they need to know what the schedule is going to be and that it does not change, and their parents need to be aware of that. While there is good default family code, expanded standard, people need to understand that they really can work with what their child needs and what they need in their particular family, and not necessarily revert to what the default is. Sometimes convincing one parent to deviate from what the court says is a little harder than in other case.

Then you get into situations where you don't have parents who don't have your typical 9-5 job. You have nurses who work nights or firefighters, or pilots, jobs that do not have your typical Monday through Friday schedule. Those parents, where they agree or they go to court, can't have the rubber stamp expanded standard possession schedule. There needs to be a little more creativity and a lot more flexibility in those particular cases. I'll just say, my ex-husband and I, we get along very well but we have to accommodate his schedule because he is overseas for 90 days at a time, then he comes home for about 60 days. Obviously when he's gone, the kids are with me, but then we sort of work together when he's home to come up with a creative schedule that works. I usually give him some extra time when he gets home – I enjoy the break, but the kids want to see their dad, too. We kind of just work together for what works for our children. That requires a lot of flexibility. He's not military, but his schedule is similar to a military family – so if you're involved in that kind of situation, it does require a lot more flexibility. When the courts look at it, there is no set default like there is in the family code, because obviously in that kind of situation, you can't have a standard possession schedule. It's the same way with pilots, for example. If you work for a commercial airline, your schedule is different all the time, depending on which airline you work for. The parent working for the airline may have two weeks advanced notice, may have 30 days advanced notice, then obviously schedules can change if flights get canceled or whatever. Those kind of situations – obviously there has to be a court order explaining the circumstances – but it also requires the parents to be a whole lot more flexible with ever changing schedules.

When you have firefighters, or EMT workers, their schedules are posted generally a lot more in advance, and you can see what the schedules are going to be. Again, there is some creativity in drafting orders for firefighters, and those types of workers – have certain days off, then have 24 on and 24 off. You don't want to have the kid bouncing around every couple of days, but you do have to plan in advance so the parents can make their schedules and the kid knows where they are going to be and when.

It does require good drafting on our part, but creativity and planning for the parents. So working on those customized schedules, I always enjoy those because it is like solving a puzzle – what works best and what fits into everybody's schedule. It is interesting, especially if they are

high conflict. There is the unique work schedule for the parents that need to be accommodated, so those are a little bit more interesting to handle.

**Jamie-Lee Denton:** Yeah, I'm sure. Also, you talked about how you can have an agreement to change the schedule. Say there was a firefighter who changed jobs and you need to rework the schedule. Are those agreements more likely to be in writing, or are they going to be informal? What do you usually tell your clients?

**Laura Hayes:** To protect the client, I always say to put something in writing. If the parties got divorce and there was an expanded standard possession schedule and then the parties started to operate in a different way – it is great that you can work together, but you always want to protect yourselves in case somebody decides to go back on the agreement. It doesn't have to be a formal court order. It does have to be a court order if you want it to be enforceable later, but if the two of you agree – say you have an expanded standard possession schedule, but you agree you want to try week on, week off – that's fine, I just always recommend that at a minimum there be an email exchange between the parents saying we agree to start working 50/50. That way if somebody decides to revoke their consent to that, you at least have some kind of document to go back to court that says we agreed on a certain date to start doing this and we have been doing it ever since and they suddenly decided not to. Courts are more likely in that case to confirm the modified schedule if there was an agreement.

Sometimes, if you don't even have that minimum, I've seen it where they had an expanded standard possession schedule in their decree, they decided to try 50/50, my client thought that was going to stay that way but the other side thought it was only going to be for the summer. Then once school started, they decided to say no, we are going back to the expanded standard possession schedule, so then a modification case had to be filed and both parties had to spend a lot on attorneys' fees because the agreement was not clear and it was not in writing.

Obviously as an attorney, I say put it in writing, but like I said it doesn't necessarily have to be a formal legal document, at least in the beginning if you guys just want to try to deviate and see if something works. Just make sure that it is clear in an email or a text message. Of course, that is easier said than done, but at a minimum, I would say there has to be some kind of agreement in writing, even an informal email is sufficient in some cases to at least start the process. However, if you want it to be enforceable, or you want to modify things like child support in addition to modifying the possession schedule, then you definitely want to have a court order. It can be an agreed order, it does not have to be a long, ugly litigation, but just formalizing it, just in case, is always a good recommendation.

**Jamie-Lee Denton:** So it doesn't end up being "he said, she said," in front of the court. Got it.

**Laura Hayes:** Coming up with possession schedules can be very complicated. The more creative schedules do require more flexibility on both parents. Part of our job as family law attorneys is to evaluate each situation. It's not just looking at our clients. It's looking at the other side, and looking at the future of when emotions die down and we're not in litigation, are these two going to get along and deviate. That is great if they can because that is in the best interest of everybody, but if they cannot then that is OK. Accepting their particular circumstances and then writing an order that is very detailed and enforceable so everyone is clear on what is going to happen and where the kids are going to be and when is very helpful. It does require a lot of discussion and a lot of negotiation and really understanding each family's unique circumstances. And what the kids need, too. If there is a child who really doesn't do well with transitions — whether it's two moms or two dad, it really doesn't matter — who needs a lot of structure, you have to take that into consideration when talking about what type of possession schedule works, and not just always defaulting to what the family code says. While that is generally what the courts go with, it is not always in the best interest of the particular child.

**Jamie-Lee Denton:** And I feel like, Laura, we have been seeing cases where there are two children and one needs something a little different from the other child, so you even can modify that this child is going to spend the night, and this child is not going to spend the night with this certain parent all the time. I think it can even be as specific as, it's not a one size fits all for one family even.

**Laura Hayes:** Absolutely, that is very true. On that note, I will say that generally courts do not like to split up children. They like to keep them on the same schedule and keep the siblings together. But you are absolutely right, there are circumstances where there are different schedules for different children within the same family. Sometimes that is court ordered and sometimes that is by agreement. There are a lot of different circumstances for why that may be, but that certainly is a possibility for clients who do think that different schedules for the different children would be in their best interest. That is a great point, Jamie-Lee.

**Jamie-Lee Denton:** Thanks, Laura.

**Laura Hayes:** Well, great. I think we have provided a good overview of the general terms of coming up with possession schedules and how creative you can be, and also, if you can't be creative, what the default is going to be. Anything else to add?

**Jamie-Lee Denton:** I do have one last question for you: what is your favorite divorce or family law show or movie? Since we haven't had a podcast together, you have to tell me.

**Laura Hayes:** Absolutely. I wouldn't necessarily say this is my favorite, but I will say that a lot of my clients have recently brought up "A Marriage Story," which is on Netflix and came out within the last year or so. They found it very helpful and very interesting to watch. I watched it;

personally, I did not particularly like it. I know that a lot of my clients have enjoyed it and asked me if I've seen it. So if you are going through a divorce, or thinking about going through a divorce, watching that has been a recommendation from some of my clients.

**Jamie-Lee Denton:** OK, I have not seen that one, so I have to check it out now.

**Laura Hayes:** Now you have something to do this weekend.

**Jamie-Lee Denton:** Yes, I do, besides work.

**Laura Hayes:** Of course. Well, thanks for joining me today Jamie-Lee. Thanks for listening. We look forward to hearing any questions or comments about our podcast.