

Q&A By John T. Syrtash, Associate, Garfin Zeidenberg LLP

Answers to pressing questions on Family Law.

Equal access strategy.

Question: I was married for almost 10 years and have a six-year-old son. My wife was having an affair with my son's Godfather, which resulted in the birth of a baby girl. The truth came out about the affair and the baby girl in May when the baby was 7 months old, making it an affair of more than two years. Now my ex wife is on maternity leave until early November and she has more time with my son in a new house into which she moved with the boyfriend, baby girl and my son. I am trying to get 50 per cent of access time with no luck. How is that possible? What are my rights?

Answer: The problem in getting "50 percent" access is that you appear to be seeking advice after the most significant event has already happened" a period of time has elapsed since she left you. This is a crucial mistake most men make. She has no legal right unilaterally to leave with your child without a court order or your express consent. But because you appeared to acquiesce to her doing so a "status quo" situation has now developed and it is now difficult to undo the damage. Normally, I advise clients that if their spouse attempts to take matters into their own hands, to make an urgent application to locate the child. They should also apply to a court for sole or shared custody on the basis that their spouse has attempted to leave without prior consent since, in law, both parents are presumed to share the child's time equally until a court orders otherwise. I give this advice even if such a parent leaves by giving notice of where they are going because I take the position that, absent violence or the threat of violence, no other parent has the right to unilaterally take a child away from the other parent without prior consent or a court order. It's often not in a child's best interests. In your case you are best to have your lawyer assemble good witnesses about your relationship with your son. Alternatively, you may ask the court to order the Children's Lawyer to investigate your relationship with the child or to order a private clinical assessment with a social worker or psychologist to do so. These clinicians interview everyone and then make recommendations to the court that can often maximize your time with your son.

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