CHAPTER 125C - CUSTODY AND VISITATION

VISITATION

MISCELLANEOUS PROVISIONS

VISITATION

SECTION 125C.010 Order awarding visitation rights must define rights with particularity and specify habitual residence of child.

1. Any order awarding a party a right of visitation of a minor child must:

(a) Define that right with sufficient particularity to ensure that the rights of the parties can be properly enforced and that the best interest of the child is achieved; and

(b) Specify that the Ely Shoshone Tribe or the state or reservation where the child resides within the United States of America is the habitual residence of the child.

➥ The order must include all specific times and other terms of the right of visitation.

2. As used in this section, "sufficient particularity" means a statement of the rights in absolute terms and not by the use of the term "reasonable" or other similar term which is susceptible to different interpretations by the parties.

SECTION 125C.020 Rights of noncustodial parent: Additional visits to compensate for wrongful deprivation of right to visit.

1. In a dispute concerning the rights of a noncustodial parent to visit his child, the court may, if it finds that the noncustodial parent is being wrongfully deprived of his right to visit, enter a judgment ordering the custodial parent to permit additional visits to compensate for the visit of which he was deprived.

2. An additional visit must be:

(a) Of the same type and duration as the wrongfully denied visit;

(b) Taken within 1 year after the wrongfully denied visit; and

(c) At a time chosen by the noncustodial parent.

3. The noncustodial parent must give the court and the custodial parent written notice of his intention to make the additional visit at least 7 days before the proposed visit if it is to be on a weekday or weekend and at least 30 days before the proposed visit if it is to be on a holiday or vacation.

SECTION 125C.030 Imprisonment for contempt for failure to comply with judgment ordering additional visit.

1. A custodial parent who fails to comply with a judgment ordering an additional visit may, upon a judgment of the court, be found guilty of contempt and sentenced to imprisonment in the jail. During the period of imprisonment, the court may authorize his temporary release from confinement during such hours and under such supervision as the court determines are necessary to allow him to go to and return from his place of employment.

2. A custodial parent imprisoned for contempt pursuant to subsection 1 must be released from the jail if the court has reasonable cause to believe that he will comply with the order for the additional visit.

SECTION 125C.040 Imprisonment for contempt: Violation of condition; failure to return when required.

1. If a custodial parent is imprisoned for contempt pursuant to SECTION 125C.030 and violates any condition of that imprisonment, the court may:

(a) Require that he be confined to the county jail for the remaining period of his sentence; and

(b) Deny him the privilege of a temporary release from confinement for his employment.

2. A custodial parent, imprisoned for contempt, who fails to return to the jail at the time required by the court after being temporarily released from confinement for his employment, may be deemed to have escaped from custody and, if so, he is guilty of a **Category C offense**.

SECTION 125C.050 Petition for right of visitation for certain relatives and other persons.

1. Except as otherwise provided in this section, if a parent of an unmarried minor child:

(a) Is deceased;

(b) Is divorced or separated from the parent who has custody of the child;

(c) Has never been legally married to the other parent of the child, but cohabitated with the other parent and is deceased or is separated from the other parent; or

(d) Has relinquished his parental rights or his parental rights have been terminated,

➥ the tribal court in the county in which the child resides may grant to the great-grandparents and grandparents of the child and to other children of either parent of the child a reasonable right to visit the child during his minority.

2. If the child has resided with a person with whom he has established a meaningful relationship, the tribal court in the county in which the child resides also may grant to that person a reasonable right to visit the child during his minority, regardless of whether the person is related to the child.

3. A party may seek a reasonable right to visit the child during his minority pursuant to subsection 1 or 2 only if a parent of the child has denied or unreasonably restricted visits with the child.

4. If a parent of the child has denied or unreasonably restricted visits with the child, there is a rebuttable presumption that the granting of a right to visitation to a party seeking visitation is not in the best interests of the child. To rebut this presumption, the party seeking visitation must prove by clear and convincing evidence that it is in the best interests of the child to grant visitation.

5. The tribal court may grant a party seeking visitation pursuant to subsection 1 or 2 a reasonable right to visit the child during his minority only if the court finds that the party seeking visitation has rebutted the presumption established in subsection 4.

6. In determining whether the party seeking visitation has rebutted the presumption established in subsection 4, the tribal court shall consider:

(a) The love, affection and other emotional ties existing between the party seeking visitation and the child.

(b) The capacity and disposition of the party seeking visitation to:

(1) Give the child love, affection and guidance and serve as a role model to the child;

(2) Cooperate in providing the child with food, clothing and other material needs during visitation; and

(3) Cooperate in providing the child with health care or alternative care recognized and permitted under the laws of this State in lieu of health care.

(c) The prior relationship between the child and the party seeking visitation, including, without limitation, whether the child resided with the party seeking visitation and whether the child was included in holidays and family gatherings with the party seeking visitation.

(d) The moral fitness of the party seeking visitation.

(e) The mental and physical health of the party seeking visitation.

(f) The reasonable preference of the child, if the child has a preference, and if the child is determined to be of sufficient maturity to express a preference.

(g) The willingness and ability of the party seeking visitation to facilitate and encourage a close and continuing relationship between the child and the parent or parents of the child as well as with other relatives of the child.

(h) The medical and other needs of the child related to health as affected by the visitation.

(i) The support provided by the party seeking visitation, including, without limitation, whether the party has contributed to the financial support of the child.

(j) Any other factor arising solely from the facts and circumstances of the particular dispute that specifically pertains to the need for granting a right to visitation pursuant to subsection 1 or 2 against the wishes of a parent of the child.

7. If the parental rights of either or both natural parents of a child are relinquished or terminated, and the child is placed in the custody of the Ely Shoshone Social Services licensed to place children in homes, the tribal court in the service area in which the child resides may grant to the great-grandparents and grandparents of the child and to other children of either parent of the child a reasonable right to visit the child during his minority if a petition therefor is filed with the court before the date on which the parental rights are relinquished or terminated. In determining whether to grant this right to a party seeking visitation, the tribal court must find, by a preponderance of the evidence, that the visits would be in the best interests of the child in light of the considerations set forth in paragraphs (a) to (i), inclusive, of subsection 6.

8. Rights to visit a child may be granted:

(a) In a divorce decree;

(b) In an order of separate maintenance; or

(c) Upon a petition filed by an eligible person:

(1) After a divorce or separation or after the death of a parent, or upon the relinquishment or termination of a parental right;

(2) If the parents of the child were not legally married and were cohabitating, after the death of a parent or after the separation of the parents of the child; or

(3) If the petition is based on the provisions of subsection 2, after the eligible person ceases to reside with the child.

9. If a court terminates the parental rights of a parent who is divorced or separated, any rights previously granted pursuant to subsection 1 also must be terminated, unless the court finds, by a preponderance of the evidence, that visits by those persons would be in the best interests of the child.

10. For the purposes of this section, "separation" means:

(a) A legal separation or any other separation of a married couple if the couple has lived separate and apart for 30 days or more and has no present intention of resuming a marital relationship; or

(b) If a couple was not legally married but cohabitating, a separation of the couple if the couple has lived separate and apart for 30 days or more and has no present intention of resuming cohabitation or entering into a marital relationship.

MISCELLANEOUS PROVISIONS

SECTION 125C.200 Consent required from noncustodial parent to remove child from Reservation; permission from court; change of custody. If custody has been established and the custodial parent intends to move his residence to a place outside of this Resrvation and to take the child with him, he must, as soon as possible and before the planned move, attempt to obtain the written consent of the noncustodial parent to move the child from this Reservation. If the noncustodial parent refuses to give that consent, the custodial parent shall, before he leaves this Reservation with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent.

SECTION 125C.210 Child conceived as result of sexual assault: Rights of natural father convicted of sexual assault; rights when father is spouse of victim; rebuttable presumption upon divorce.

1. Except as otherwise provided in subsection 2, if a child is conceived as the result of a sexual assault and the person convicted of the sexual assault is the natural father of the child, the person has no right to custody of or visitation with the child unless the natural mother or legal guardian consents thereto and it is in the best interest of the child.

2. The provisions of subsection 1 do not apply if the person convicted of the sexual assault is the spouse of the victim at the time of the sexual assault. If the persons later divorce, the conviction of sexual assault creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the sexual assault is not in the best interest of the child. The court shall set forth findings that any custody or visitation arrangement ordered by the court adequately protects the child and the victim of the sexual assault.

SECTION 125C.220 Presumptions concerning custody and visitation when parent of child is convicted of first degree murder of other parent of child.

1. The conviction of the parent of a child for murder of the first degree of the other parent of the child creates a rebuttable presumption that sole or joint custody of the child by the convicted parent is not in the best interest of the child. The rebuttable presumption may be overcome only if:

(a) The court determines that:

(1) There is no other suitable guardian for the child;

(2) The convicted parent is a suitable guardian for the child; and

(3) The health, safety and welfare of the child are not at risk; or

(b) The child is of suitable age to signify his assent and assents to the order of the court awarding sole or joint custody of the child to the convicted parent.

2. The conviction of the parent of a child for murder of the first degree of the other parent of the child creates a rebuttable presumption that rights to visitation with the child are not in the best interest of the child and must not be granted if custody is not granted pursuant to subsection 1. The rebuttable presumption may be overcome only if:

(a) The court determines that:

(1) The health, safety and welfare of the child are not at risk; and

(2) It will be beneficial for the child to have visitations with the convicted parent; or

(b) The child is of suitable age to signify his assent and assents to the order of the court awarding rights to visitation with the child to the convicted parent.

3. Until the court makes a determination pursuant to this section, no person may bring the child into the presence of the convicted parent without the consent of the legal guardian or custodian of the child.

SECTION 125C.230 Presumption concerning custody when court determines that parent or other person seeking custody of child is perpetrator of domestic violence.

1. Except as otherwise provided in SECTION 125C.210 and 125C.220, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

2. If after an evidentiary hearing held pursuant to subsection 1 the court determines that more than one party has engaged in acts of domestic violence, it shall, if possible, determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving any of the parties;

(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;

(c) The likelihood of future injury;

(d) Whether, during the prior acts, one of the parties acted in self-defense; and

(e) Any other factors that the court deems relevant to the determination.

➥ In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies to each of the parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies only to the party determined by the court to be the primary physical aggressor.

3. As used in this section, "domestic violence" means the commission of any act described in SECTION 33.018.