



Understanding Child Custody



When couples with minor children separate or divorce, they have to decide what sort of custody arrangement they want. Whom will the kids live with? How much will the other parent see the kids? Who will make the important decisions for the kids? Can one parent force a decision on the other? Can one parent prevent the other from doing certain activities with the kids? If you want a favorable arrangement, you'll want to know how custody is treated under the law.

What does "custody" mean?

It has a few different meanings in different contexts. At a very general level, *legal custody* is the right to make major decisions on behalf of the child, and *physical custody* refers simply to actual possession (the home) of the child. *Joint custody* means the parents share legal or physical custody, and *sole custody* means one parent has full legal or physical custody. Different states, though, use different terminology and might even define the concepts a little differently, so it's important to learn about your state's law. Still, all states share some basic core principles, so you can at least learn what sorts of custody arrangements those principles permit.

Joint Legal Custody. Parents with joint legal custody work together to make important decisions that are in the best interests of their children. They share the same rights, input, authority, and responsibilities, and neither can make a major decision without the other, no matter whom the child lives with. The parent who has physical custody of the child at the moment can decide the little things in life alone (what they eat for lunch, what they wear to school, if they go over to Johnny's after school to play), but they should not make big decisions without consulting with the other parent. These are decisions like: Where will Junior go to school? Should Junior be held back a year at school? What religion will Junior be raised in? Can Junior get a tattoo? Is Junior old enough to date? Is Junior ready to get a driver's license? Should Junior go to college, and where? What medical or dental treatment does Junior need? Should Junior be taking birth control pills? These sorts of questions come up all the time, and a joint legal custody arrangement means the parents should reach the answers together.

Because having both parents involved in a child's life is often beneficial for the child, many states encourage this sort of arrangement. Now, when the parents live far apart (as is often the case in the Army), a joint legal custody arrangement can become difficult and complicated. But that doesn't mean the non-custodial parent loses his legal rights. Junior might live with Dad, but Mom has *exactly* the same legal parental rights as Dad. Dad may have "residential custody" or "residential placement," but he enjoys no more authority or power than Mom. So, for instance, schools have to treat both parents the same, giving them equal feedback and equal access to grades, report cards, and the like. Likewise with the child's doctors: Each parent has equal rights to information regarding the children's health, and doctors should respect those rights.

Sole Legal Custody. A parent with sole legal custody can make important decisions for the child *without* consulting the other parent. Likewise, schools and doctors can ignore the other parent. Of course the other parent has not lost his or her parenting rights altogether – he could still have visitation rights and be ordered by the court to pay child support – but he has lost the right to make important decisions regarding the child.

Sole legal custody is relatively uncommon and reserved for cases where the child already has very little or no contact with the non-residential parent or it has been demonstrated that the children are better off when one of the parents is excluded from the decision making process. Maybe, for instance, Dad has a history of poor decision-making, like allowing Junior to drink alcohol at age five or allowing thirteen-year-old Susie to spend the night with her twenty-year-old boyfriend on Tuesdays. Maybe Mom has a criminal record, has been violent towards the children, or is mentally ill. Sometimes a parent is awarded Sole Custody simply because the other parent has never been around, never built a relationship with the kids, and does not even know the children.

Convenience is usually not a good enough justification for sole custody. That is, it might be far simpler to call all the shots and never have to talk to your “ex” again, but this isn’t a basis for being granted Sole Custody. Likewise with the one night stand who has just discovered that he’s a father – if he’s a normal person who just wants a relationship with his child, the mother generally can’t use his prior lack of relationship with her (or with the child) to obtain sole custody.

Joint Physical Custody. This form of child custody is also called "Shared Custody," "Shared Parenting," or "Dual Residence." In this situation, the children spend time living with each parent on a regular basis. This does not mean, however, that the children must spend equal amounts of time with each parent. The parents can divide the child’s time however they want, so long as it’s in the best interests of the child.

Sole Physical Custody. With this type of child custody, the child physically resides at one location. In most cases, the non-custodial parent is awarded generous visitation rights, including sleepovers.

How Does a Court Decide the Custody Arrangement?

A court will always decide the custody arrangement based on the best interests of the child, and that can depend on a lot of different factors. Who has a more stable home? Who has the child been living with? Who has proven to be a better parent? Many things can matter, which might make the ultimate result seem unfair or unpredictable. You can often avoid that, though, by agreeing on the custody arrangement with the other parent before you go to court. The judge will still review it, but if it’s sensible enough, he will simply approve what you’ve already decided instead of deciding himself.

What If I Don’t Like the Custody Arrangement?

You can petition a court for a modification of the custody arrangement. The “best interests” standard described above still applies, though, so you’ll need to show some change in circumstances that makes the change that you want a change that’s in the best interests of the child. There’s more on this and on the previous question below.

Other Child Custody and Visitation FAQs

Do mothers automatically get custody of their children when a separation occurs? The courts of most states do not establish an automatic preference for either mother or father, but they do look very closely at which parent will best promote the welfare and interests of the children of the couple.

What kinds of factors do the courts consider in granting custody? In some states, especially if the children are young, they look at who has primarily taken care of the child during the child’s life (washing, feeding and clothing the child, for example, or helping the child with homework), who has the best approach to discipline, who has cared for the child since separation (if the couple has already separated), what work schedules either or both parents have, and how each parent can provide for the physical, emotional, educational, religious, and social needs of the child. A parent can hire an expert such as a child psychologist to conduct interviews and a parenting assessment. After the psychologist has interviewed both parents and sometimes the child, he provides recommendations to the court as to which parent should be the parent of primary residence and why. If one or both parents do not have enough money to hire experts to testify in court, a court will sometimes order its own investigation to be conducted by a state or county social worker, who then makes recommendations to the judge regarding custody of the children.

Can a legal assistance attorney help me get a court decree for custody? No. You will need to retain a civilian attorney for the presentation of the papers and the appearance in court.

Do I have to file for custody in the state where I am living now? Not necessarily. While a custody suit is usually filed where the child is presently residing, a parent must file a custody action in the “home state” of the child. Sometimes the child’s home state is where the child has lived for the last six months, or possibly in a state where the child and one parent have significant contacts and connections (such as former neighbors, teachers, doctors, relatives, etc.). You should speak to an attorney about the facts of your situation before you decide to file paperwork in a particular state.

What if the custody arrangements aren't working out? Can the order be changed? No custody order is ever permanent, except when a court orders a termination of parental rights. However, it is not always easy to modify a custody arrangement that has been ordered by the court, even if it was agreed upon by both parents. Whether the other parent consents to the proposed change can be an important factor. The agreement itself may set out methods by which it can be changed. Your state will also have laws that apply to custody modification. It is typically more difficult to change the custody arrangements than it was to set them in the first place; there must have been a substantial change in the circumstances affecting the best interest and welfare of the child or children this time around.

Will my separation agreement protect me from the other parent snatching my child? No. A separation agreement which hasn't been incorporated into a court order or divorce decree is *only a contract* between you and the other parent, not a court order. A court order is enforceable by contempt of court. Court orders of one state can be filed and registered in another state and thus be treated as if they were issued by the second state for purposes of enforcement. None of this applies to separation agreements. You can, however, take a separation agreement that has been signed by both parents and file it in a family court. Then the separation agreement will have the same legal effect as a court order that the judge had ordered himself.

If my spouse is granted custody, will I get visitation rights? The noncustodial parent is entitled to reasonable visitation rights with a minor child except in extraordinary situations, such as when the noncustodial parent has a history of abusing the child. Visitation can be flexible and unstructured, assuming the parties can get along and agree on the times and terms of visitation or it can be highly structured and rigid, with certain days and times set out with great specificity.

Can I register a court order from another state here in this state so that this state can treat it as one of its own decrees for purposes of enforcement? Yes. You may want to register the decree in the county where you reside or in the county where the other parent lives if you no longer live in the same county where the court order was issued.

If I don't see my child, can I stop paying child support? No. Access to the child for visitation and payment of child support are two separate issues. If you are having trouble seeing your child when you are scheduled to, or if the other parent is preventing you from seeing your child according to a court order, you need to return to court to address your current situation. Similarly, if one parent has not been paying child support, the other parent cannot interfere with the child's court-ordered visitation schedule with that parent.

I want to move to another state with my child. Can I do that? This is a custody matter that varies from state to state. Some states allow short-distance moves without court approval, and others require court approval for any change in location. If you intend to move, check your state's law. If you need to justify the move, know that a court will probably evaluate the reasons for the proposed move, its probable effect on the child, whether you have sole or joint legal or residential custody, if the other parent objects to the move, and how often the other parent will be able to see the child.

If the other parent does not like the present custody order, can he or she file for custody in another state? Under the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, the court in a custody case must always inquire into whether the child or children have been the subject of custody litigation in any other state. When a judge finds that another court has made an award of custody, the judge should refuse to rule on the case. However, if the first court has released or transferred jurisdiction to the new state, then a court may assume jurisdiction to hear the custody case.

Will custody be settled when I obtain a divorce? A divorce decree may, but does not necessarily, settle custody matters. A custody order can be entered before or after a final decree of divorce in many states.

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