



Child Custody FAQs

Answers to Common Child Custody Questions



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What Factors Do Courts Take Into Account When Deciding Who Gets Custody of the Children?

Almost all courts use a standard that gives the “best interests of the child” the highest priority when deciding custody issues. What the best interests of a child are in a given situation depends on many factors, including:

- ◆ the child's age, sex, and mental and physical health;
- ◆ the parent's mental and physical health;
- ◆ the parent's lifestyle and other social factors, including whether the child is exposed to second-hand smoke and whether there is any history of child abuse;
- ◆ the emotional bond between parent and child, as well as the parent's ability to give the child guidance;
- ◆ the parent's ability to provide the child with food, shelter, clothing, and medical care;
- ◆ the child's established living pattern (school, home, community, religious institution);
- ◆ the quality of the child's education in the current situation;

- ◆ the impact on the child of changing the status quo; and
- ◆ the child's preference, if the child is above a certain age (usually about 12).

Assuming that none of these factors clearly favors one parent over the other, most courts tend to focus on which parent is likely to provide the children a stable environment, and which parent will better foster the child's relationship with the other parent. With younger children, this may mean awarding custody to the parent who has been the child's primary caregiver. With older children, this may mean giving custody to the parent who is best able to foster continuity in education, neighborhood life, religious institutions, and peer relationships.

If One Parent Moves Out and Leaves the Kids with the Other Parent, Does It Hurt the Moving Parent's Chances of Getting Custody At a Later Date?

In a word, yes. Even when a parent leaves to avoid a dangerous or highly unpleasant situation, if the parent hopes to have physical custody at a later time it's unwise to leave the children behind. The parent who leaves sends a message to the court that the other parent is a suitable choice for physical custody. Also, assuming the children stay in the home where the parents lived as a family, continue in the same school, and participate in their usual activities, a judge may be reluctant to change physical custody, if only to avoid disrupting the children's regular routines.

If a parent must leave the familial home (and wants to be the primary physical custodian), the moving parent should take the children along and, as quickly as possible, file in family court for temporary custody and child support. If this process is delayed, the other parent may go to court first and allege that the kids were taken without that parent's consent or knowledge. Family law judges frown on a parent who removes the children from the home without seeking the court's recognition. A judge may order that the children be returned to the family home, pending future proceedings to determine physical custody.

Are Courts More Likely to Award Custody to Mothers Than to Fathers?

In the past, most states provided that custody of children of “tender years” (about five and under) had to be awarded to the mother when parents divorced. In most states, this rule has either been rejected entirely or relegated to the role of tie-breaker if two otherwise fit parents request custody of their pre-school children. No state now requires that a child be awarded to the mother without regard to the fitness of both parents. Most states require their courts to determine custody on the basis of what's in the children's best interests, without regard to the parent's gender.

As it turns out, many divorcing parents agree that the mother will have custody after a separation or divorce and that the father will exercise reasonable visitation. This sometimes happens because the parents agree that the mother has more time, a greater inclination, or a better understanding of the children's daily needs. But it can also be because fathers presume that mothers will be awarded custody or because the mother is more tenacious in seeking custody.

If you are a father and want to ask the court for physical custody, do not let gender stereotypes stop you. If both you and the mother work full-time, and the kids have after-school care, you may be on equal footing. In fact, if

you have more flexible hours than the mother, you could have a leg up. In any event, the judge will look at what's best for the children. So if you think that you should have primary custody and that you can persuade the judge that it's in the kids' best interests, you should go ahead and ask for custody. If you present yourself as willing and able to parent, it will go a long way towards challenging any lingering prejudice against you as a father.

Does Custody Always Go to Just One Parent?

No. Courts frequently award at least partial custody to both parents, called “joint custody.” Joint custody takes one of three forms:

- ♦ joint physical custody (children spend a substantial amount of time with each parent);
- ♦ joint legal custody (parents share decision-making on medical, educational, and religious questions involving the children); or
- ♦ both joint legal and joint physical custody.

In New Mexico and New Hampshire, courts are required to award joint custody, except where the children's best interests—or a parent's health or safety—would be compromised. Many other states expressly allow courts to order joint custody, even if one parent objects to such an arrangement.

Are There Special Issues If a Gay or Lesbian Parent Is Seeking Custody or Visitation Rights?

In a number of states, a parent's sexual orientation cannot in and of itself prevent a parent from being given custody of or visitation with his or her child.

As a practical matter, however, lesbian and gay parents -- even in those states -- may be denied custody or visitation. This is because judges, when considering the best interests of

the child, may be motivated by their own or community prejudices, and may find reasons other than the lesbian or gay parent's sexual orientation to deny custody or appropriate visitation.

If you are involved in a custody case and are concerned about bias against you because you are gay or lesbian, make sure you consult a lawyer about protecting your rights. You can get attorney referrals from the National Center for Lesbian Rights (www.nclrights.org).

Is Race Ever An Issue In Custody or Visitation Decisions?

The U.S. Supreme Court has ruled that it is unconstitutional for a court to consider race when a noncustodial parent petitions for a change of custody. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), a white couple divorced, and the mother was awarded custody of their son. She remarried an African-American man and moved to a predominantly African-American neighborhood. The father filed a request for modification of custody based on the changed circumstances. A Florida court granted the modification, but the U.S. Supreme Court reversed, ruling that societal stigma, especially related to race, cannot be the basis for a custody decision.

Who Determines How Much Visitation Is Reasonable and Fair?

When a court awards physical custody to one parent and "reasonable" visitation to the other, the parent with physical custody is generally in the driver's seat regarding what is reasonable. This need not be bad if the parents cooperate to see that the kids spend a significant amount of time with each parent.

Unfortunately, it sometimes translates into little visitation time with the noncustodial parent, resulting in disputes over missed visits and inconvenience. To avoid such problems, many courts now prefer for the parties to

work out a fairly detailed parenting plan that sets the visitation schedule and outlines who has responsibility for decisions affecting the children. Or, for more about parenting agreements, see *Child Custody: Building Parenting Agreements that Work*, by Mimi Lyster (Nolo).

Is Mediation the Best Approach to Solving Disagreements About Child Custody?

Mediation is a non-adversarial process where a neutral person (a mediator) meets with disputing persons to help them settle a dispute. The mediator does not have power to impose a solution on the parties, but assists them in creating an agreement of their own. (In Alaska, California, Delaware, Michigan, New Mexico and South Dakota, however, the mediator may be asked by the court to make a recommendation if the parties cannot reach an agreement.)

There are several important reasons why mediation is a superior method to litigation for resolving custody and visitation disputes.

- ◆ Mediation usually does not involve lawyers or expert witnesses (or their astronomical fees).
- ◆ Mediation usually produces a settlement after five to ten hours of mediation over a week or two. (Child custody litigation can drag on for months or even years.)
- ◆ Mediation enhances communication between the parents and makes it much more likely that they will be able to cooperate after the divorce or separation when it comes to raising their children. Experts who have studied the effects of divorce on children universally conclude that when divorcing or separating parents can cooperate, the children suffer far less.

How to Find a Mediator

Two resources for finding a family law mediator in your area are:

- ◆ **Academy of Family Mediators**

5 Militia Drive
Lexington, MA., 02421
Telephone: 781-674-266
Fax: 718-674-2690
E-mail: afmoffice@mediators.org
Web site: www.mediators.org

- ◆ **Society of Professionals in Dispute Resolution (SPIDR)**

1527 New Hampshire Ave., N.W. #3
Washington, D.C., 20036
Telephone: 202-667-9700
Fax: 202-265-1968
E-mail: spidr@spidr.org
Web site: www.spidr.org



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