



## Family Law: Child Support and Child Custody

Whether you are a single parent or in the process of divorcing or separating from your child's other parent, you may be wondering about your legal rights. This handout provides general information to anyone who would like to learn more about their rights to child custody, child support, or visitation.

### What types of child custody are there?

There are two main types of custody: physical and legal custody. Physical custody means that a parent has the child physically present, under their supervision. This differs from legal custody because a parent with legal custody of a child has the right to make decisions that affect a child's welfare, such as a healthcare decision or deciding where the child will attend school. Physical and legal custody can either be joint or sole, meaning that either one or both parents will hold physical and/or legal custody of their child. This means that a judge can award joint physical custody to both parents but legal custody to only one parent, or any type of custody agreement that the court sees fit.

- With joint physical custody, both parents will share time with the child, and if there are disputes, the court may assign visitation rights. If a judge awards joint legal custody, both parents will have the authority to make decisions about the welfare of their child. Although courts ideally favor joint custody, physical or legal, these arrangements can be difficult if the parents involved have trouble cooperating with each other.
- With sole physical custody, one parent will hold physical custody of their child. If a judge awards sole legal custody, only one parent will hold the authority to make decisions about their child's welfare. In an effort to reduce future administrative costs, courts award sole legal custody more often.

### Are there advantages to joint physical custody?

With the child or children living between both parents' households, you may have a reason to be friendlier or more cordial to your child's other parent in order to maintain a positive co-parenting relationship. Sharing the responsibilities of child-rearing may reduce stress on each parent.

### Are there disadvantages to joint physical custody?

You may have difficulty in taking your children back and forth between homes, especially if both parents do not live near each other. Children may be negatively affected if there is non-cooperation or ill-will between the parents, and it may be stressful for the child to have to grow up between two homes.

### Can someone other than the child's parents get custody?

Typically, courts significantly favor biological parents in custody disputes. If the courts believe that granting custody of children to their biological parents is not in the children's best interests



because a parent is no longer fit to assume that responsibility (or if the biological parents do not want custody), then the courts will look to third party custody.

- Third party custody is typically granted to those who can show that they have “legal standing.” This means that the courts will usually not grant third party custody to someone who does not have a strong enough connection to the children or family. For example: a 3<sup>rd</sup> cousin who has not spoken to the family in years, that applies to take third party custody of the children, will likely not be able to show that they have a strong enough connection to be awarded custody. However, a grandparent or family friend who has been taking care of the children for a number of years may be able to show that they have sufficient legal standing to be considered for third party custody.

### **What will a judge consider when awarding custody?**

Generally, a judge will consider what is in the “best interests” of the child. States will each have their own standards that they follow, but typically they center around the best interest of the child standard. This standard is determined by a number of considerations, including the child’s circumstances, the parent’s ability to effectively parent, and the child’s safety.

Some other factors that the judge will consider include federal or state protections, maintaining sibling and close family bonds, and the child’s wishes.

### **Can my cancer diagnosis affect my chances in a child custody proceeding?**

As mentioned earlier, the best interests of a child will be considered by the judge when determining child custody. Unfortunately, if the judge thinks that a parent’s cancer diagnosis, or their ongoing treatments, will not allow them to properly take care of their children, then a parent’s cancer diagnosis and treatments may be considered in determining child custody. However, cancer is only one factor in a larger list of factors the judge will consider.

### **What is a guardian?**

If a parent has not set up a guardian for his or her child, a judge may establish guardianship if or when they believe that a child needs someone other than the parent(s) to take the responsibility for their care.

### **What type of authority does a guardian have?**

Generally, a guardian has the legal authority to make decisions that can affect the child, the same way a parent with legal and physical custody would. This may include the ability to decide where the child will live, how to spend child support or government benefits, as well as other things that affect the child’s welfare.

### **What does it mean to appoint a joint-guardian?**

A parent dealing with a terminal illness that wants to make sure their child has security in the future may choose to appoint a joint-guardian. A joint-guardian can be appointed by the parent while they are still alive so that the joint-guardian will have an easier time getting third-party custody after the parent passes away. Appointing a joint-guardian does not mean that the parent gives away their custody rights, but rather it means that the parent is able to have someone participate in the care of their child when they are not currently available, and once they have passed away. Appointing a joint-guardian also gives a child a sense of security that they will be cared for if anything happens to their parent.

- To appoint a joint-guardian, a petition and relevant documents must be filed with the probate court in your area. During a guardianship hearing, the court will decide whether joint-guardianship is appropriate.
- If you do not have the time to follow through on the process of appointing a joint-guardian, you can appoint one in your will and the court will try to best accommodate your wishes, if they are able to do so.

### **How will a judge determine visitation rights?**

#### Reasonable visitation:

If the judge feels that the parents are able to cooperate, the judge will sometimes grant “reasonable visitation.” This means that the parents will be accountable to determine a plan of visitation. If one parent has physical custody, then that parent (referred to as the custodial parent) will typically have more of an influence over what is considered “reasonable.”

#### Fixed visitation:

If a judge chooses to place you on “fixed visitation,” this means that a court has ordered specific times where the non-custodial parent will have the right to visit his or her children. Courts will generally try to do this if they believe that the parents involved are not willing to cooperate with each other, or if there is still some sort of conflict present.

### **Will child support be required if parents separate from each other or never married?**

Child support will be mandatory in a divorce that involves minor children. A minor is a child below the age of 18. If the parents are not married, the court may order the parent with whom the child does not live to pay a portion of their income to the parent who has physical custody. The amount of child support will generally depend on things such as state laws, each parent’s income, and the amount of time they will be spending with the children.

### **Can child support be increased or decreased?**

Child support can be agreed upon by the parents themselves, resolved by out-of-court dispute resolution, or it can be determined by a court of law. Child support orders can be changed at any time if special circumstances arise, such as an income change. For example, if you are paying child support and become unable to continue working due to your cancer diagnosis or treatment, this may be a reason to request a change to your child support order.

- Note: The judge has the authority to change any child support decision as they see fit.
- If you asked your local child support agency for help, you may want to contact them again and ask for help filling out the correct documents to submit to the court.
- If you worked with an attorney, you may wish to contact them to assist you with this process.

#### What is retroactive child support?

Retroactive child support is granted by the court if it believes that the non-custodial parent should have been making child support payments at a time before there was an official child support order in place. Retroactive child support is different from unpaid child support because unpaid child support involves missed payments after a child support order was issued by the court.

- Retroactive child support can typically be granted if the court determines that the non-custodial parent concealed their assets or finances to avoid paying child support, or in any circumstance in which the court believes there is a need.

### **What if one parent chooses not to pay child support?**

The district attorney<sup>1</sup> can impose certain consequences if a parent fails to pay child support. This may include:

- Withholding tax refunds to pay child support.
- Garnishing wages.
- Seizing wages.

If a parent continues to fail to pay child support, the court may find that individual in contempt of court and impose jail time. This will typically be a last resort for the court.

Trying to enforce a child support order by yourself can be tedious and time-consuming, so it is best to consult with a family law attorney who is familiar with your state's laws to help you in this process.

### **Resources:**

The procedures relating to child custody and child support will vary from state to state, so if you would like more information about your state's laws, you may wish to consult:

- National Court Database: <http://www.uscourts.gov/>
- American Bar Association – Child Custody and Support Information: [https://www.americanbar.org/groups/public\\_education/resources/law\\_issues\\_for\\_consumers/child.html](https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/child.html)

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<sup>1</sup> The Child Support Enforcement Act of 1984 states that District Attorneys or State Attorneys must help a parent collect child support. The District Attorney will assist in enforcing child support orders.