



THE BASICS

Custody and Visitation in
New York State

ACKNOWLEDGEMENTS

The Cross-Borough Collaboration (“CBC”) originated as a joint project of the Brooklyn Bar Association Volunteer Lawyers Project and Her Justice (formerly known as inMotion). Originally launched in 2002, the goal of the CBC was and continues to be the dissemination of clear and concise informational booklets for the general public on various common legal issues. Also known as “The Basics” series, these booklets have been updated periodically by Her Justice and continue to be distributed to our clients on an ongoing basis. We would like to extend our thanks to the Brooklyn Bar Association Volunteer Lawyers Project for their initial involvement in this important project. Her Justice thanks and acknowledges Leila F. Bose, Translator & Coordinator of Translation Services at Cravath, Swaine & Moore LLP for their very generous in-kind donation of the Spanish translation of The Basics booklets.

SOURCES CONSULTED

The Brooklyn Bar Association Volunteer Lawyers Project and Her Justice thank the following agencies and organizations for generously contributing both written materials and advice to assist in the preparation of the booklets in THE BASICS series.

CITY, STATE AND NATIONAL GOVERNMENT AGENCIES

Administration for Children's Services, Parents' & Children's Rights Unit and Division of Legal Services

C-PLAN: Child Planning and Advocacy New, Public Advocate's Office

New York City Department of Health

New York State Department of Social Services

New York State Office of Court Administration

Social Security Administration

State of New York Unified Court System

U.S. Department of Justice, Immigration and Naturalization Service

U.S. Department of Justice, Violence Against Women Office

U.S. Department of State Office of Children's Issues

ORGANIZATIONS

Association of the Bar of the City of New York

Bronx Legal Services

The Door

The Family Center

Family Violence Prevention Fund

Lambda Legal Defense and Education Fund

Law Tek Media Group, LLC

The Legal Aid Society, New York City, Juvenile Rights and Civil Divisions

Legal Information for Families Today (LIFT)

MFY Legal Services, Inc.

New York Association for New Americans, Inc.

New York County Lawyers Association

New York Legal Assistance Group

New York Bar Association

Pace University School of Law

Safe Horizon Domestic Violence Law Project

Sanctuary for Families Center for Battered Women's Legal Services

South Brooklyn Legal Services

Urban Justice Center

Women's Prison Association



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in New York State**

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THE BASICS

Custody and Visitation in
New York State

BEFORE YOU LOOK FURTHER PLEASE READ THIS:

The law regarding “parental” relationships, child custody and support, is evolving. If you are not biologically related to a child, you may be granted full parental rights or only limited/no rights depending on your circumstances. If you have questions about your rights with regard to a child in your household who is not biologically related to you, and whom you have not adopted, seek the advice of an attorney by calling a local bar association or a legal services organization in the borough where you live.

This booklet answers common questions about custody and visitation when the parents cannot agree about who is responsible for taking care of the children.

When your life changes because of a break-up or divorce, you may have feelings of anger and fear about the future. These feelings often make it hard to make decisions about what will be best for your children. Decisions about custody and visitation can be especially tough.

It's good to have the help of another person you trust. This person may be a family member, a friend, a religious advisor, a lawyer, a therapist or a mediator.

There is no easy way to decide about custody and visitation. Each case is different because each child and each parent is different.

Sometimes you must compromise or do something another way for the sake of your children. As time passes, you may need to change things again because both your needs and your children's needs change.

Your children deserve your love and protection. You should not use them to hurt the other parent.

If you cannot work out custody and visitation with the other parent, a Judge will decide what will happen to your children. If the other parent of your children is abusing them physically, psychologically or in any other way, a Judge will help protect your children.

We will be referencing both "biological" and "non-biological" parents in this booklet. The laws about the rights of lesbian and gay parents are changing, but in some instances, non-biological parents may find it difficult to convince a court that they have custody or visitation rights.

HOW DO I GET A COURT ORDER FOR CUSTODY OR VISITATION?

If your child lives in New York State (or recently lived here for more than six months), New York courts can handle custody and visitation. You can go to either Family Court or Supreme Court. There is both a Family Court and a Supreme Court in each county.

To get a custody or visitation order from Family Court, you have to file a **petition**.

Family Court has special clerks to help you fill out the petition and file the case. In Family Court, it does not cost any money to start

a case. Although it is helpful to have a lawyer, you do not need one to go to Family Court. This court is set up to help people who do not have lawyers and who cannot pay money for filing fees.

In Supreme Court, it costs money to start a case. To get a custody or visitation order from Supreme Court, you have to file a complaint (instead of a petition). If you cannot afford to start a case, you can ask, and a Judge can order, that you do not have to pay the filing fees. But this takes time. The Supreme Court is not set up to help people who do not have lawyers.



A PETITION IS A FORM THAT TELLS BOTH THE COURT AND THE OTHER PARENT WHAT YOU WANT.

THE PERSON WHO FILES THE PETITION IS CALLED THE PETITIONER.

THE PERSON THE CASE IS AGAINST IS CALLED THE RESPONDENT.



A COMPLAINT IS A FORM THAT TELLS BOTH THE COURT AND THE OTHER PARENT WHAT YOU WANT.

THE PERSON WHO FILES THE COMPLAINT IS CALLED THE PLAINTIFF.

THE PERSON THE CASE IS AGAINST IS CALLED THE DEFENDANT.

WHAT IF I CANNOT AFFORD A LAWYER?

You have a right to have a lawyer representing you in your custody or visitation case in Family Court. If your case is moved to the Supreme Court at any time for any reason, you still have a right to be represented by a lawyer.

If you do not have enough money to pay a lawyer, ask the Judge to assign a lawyer free of charge. Also, various organizations either give or arrange for free legal services for people who cannot afford a lawyer.

WHO CAN GET CUSTODY THROUGH THE COURTS?

- A child's biological parent, whether married or unmarried. Adoptive parents are treated the same way as biological parents under the law, in both same-sex and heterosexual relationships.
- A non-biological parent in a same-sex marriage may obtain custody. This area of the law is changing.
- A non-parent, like a grandparent, stepparent, brother or sister, or other relative. **BUT, unless there's some extraordinary circumstance, a parent has a better right to custody and to decide matters about who can visit the child.**

WHO CAN GET CUSTODY THROUGH THE COURTS?

- A child's biological parent, whether married or unmarried. Adoptive parents are treated the same way as biological parents under the law, in both same-sex and heterosexual relationships.
- Non-biological parents of children in same-sex relationships may be able to obtain visitation rights. This area of the law is changing.
- A grandparent.
- A sister or brother, a stepsister or stepbrother, or other proper person.

DOES ONE PARENT HAVE MORE OF A RIGHT TO CUSTODY THAN THE OTHER?

No. The primary caretaker of the child usually has more of a right to custody than the other parent.

A primary caretaker's activities can include:

- Feeding the child.
- Getting the child ready for school.
- Bringing the child to and from school.
- Being in contact with the child's teacher(s).
- Helping the child with homework.
- Arranging for and taking the child to after-school activities and/or play dates.
- Taking the child on shopping trips to purchase clothing or other necessities.
- Arranging for and taking the child to the doctor.
- Taking care of the child when s/he is sick.
- Taking the child to religious services.



THE PRIMARY CARETAKER IS THE PARENT WHO HAS BEEN MORE INVOLVED IN THE CHILD’S DAY-TO-DAY ACTIVITIES.

But if the other parent or person seeking custody can show some serious problem(s) with the parent who has been the primary caretaker, that other person can get custody. Serious problems might include:

- Drug or alcohol abuse by the parent.
- Abuse or neglect of the child.
- Mental illness of the parent.
- Domestic violence by the parent against the other parent.
- Any other behavior of the parent that negatively affects the child.

WHAT KINDS OF CUSTODY ARE THERE?

Whoever has legal custody can make important decisions for the child. Here are the most common types:

• **Sole Legal Custody:**

A court order that gives one parent sole legal custody, usually called sole custody, means that one parent decides important things like where the child lives, goes to school and practices religion. This parent also makes any medical decisions for the child.



THE PARENT WITH SOLE CUSTODY IS CALLED THE CUSTODIAL PARENT. THE PARENT WHO DOESN’T HAVE SOLE CUSTODY IS CALLED THE NON-CUSTODIAL PARENT.

• **Joint Legal Custody:**

A court order that gives parents joint legal custody, called joint custody, assumes both parents get along and are able to make decisions together for the child. If parents disagree about how their child should be raised and go to court to have a Judge decide which parent should make these decisions, generally the Judge will not order joint custody.



OFTEN IN DOMESTIC VIOLENCE SITUATIONS, IT MAY BE DANGEROUS TO AGREE TO JOINT CUSTODY. YOU SHOULD THINK VERY CAREFULLY BEFORE AGREEING TO JOINT CUSTODY.

- **Physical or Residential Custody:**

If your child usually lives with you, you will have physical or residential custody. You may or may not also have legal custody. For example, if your child lives with you during the week and with the other parent on weekends, it's possible for you to have physical or residential custody and the other parent to have legal custody.

HOW DOES THE JUDGE DECIDE WHO GETS CUSTODY?

In a custody case between parents, the Judge must decide what is in the best interest of the child. This means the Judge must decide whether it is better for the child if one parent has custody and makes the decisions, or if the other parent has custody and makes the decisions. What is better for a parent is not important.

In a custody case between a parent and a non-parent, the non-parent first must convince the Judge that there are extraordinary circumstances present that require the Judge to even consider giving custody to the non-parent. If the Judge decides that extraordinary circumstances exist, then the Judge will decide whether it is in the best interest of the child to give custody to the parent or the non-parent.

WHAT ARE EXTRAORDINARY CIRCUMSTANCES?

- Abandonment of the child by a parent or parents (had no contact for six months or more).
- A surrender (a legal document) signed by a parent saying the child can be adopted.
- A parent's neglect or abuse of the child.
- A parent is being, or has been, deported.
- A parent is in prison for a long time.
- Other serious acts which may affect the child's well-being.

WHAT IS IN THE CHILD'S BEST INTEREST?

- Continuing to stay with the primary caretaker.
- Having a fit parent, which usually means a parent:
 - with a stable home and lifestyle.
 - with good judgment.
 - with a job.
 - who does not use illegal drugs or abuse legal drugs.
 - who does not drink alcohol to excess.
 - who is in good mental health.
 - who is in good physical health.
- Having a parent who is involved in the child's life.
- Having a parent who understands the child's physical, intellectual and emotional needs and who is able to take care of those needs.
- Having a parent who will protect the child from the other parent in cases where the other parent is physically or emotionally abusive to the child, or deliberately or carelessly puts the child in danger.
- Having a parent who is willing to let the other parent into the child's life, unless the other parent's actions could be harmful to the child. For example, a parent who tries to cut the other parent out of the child's life, or who makes it difficult for the other parent to keep in contact with the child, or a parent who criticizes the other parent to the child is less likely to get custody than a parent who does not do these things.

WHAT THINGS DOES THE JUDGE NOT CONSIDER?

- Race
- Religion
- Economic situation
- Sexual orientation
- Sexual behavior, character and lifestyle, as long as they do not directly affect the child

WHAT HAPPENS AT A CUSTODY TRIAL?

The Judge holds an evidentiary hearing or trial to get information about what will be best for the child. At the hearing the Judge gets evidence (information) about the case from witnesses. The Judge listens to the testimony (oral evidence given under oath) of the witnesses. The Judge also looks at documents (papers) submitted into evidence.

Witnesses are usually the parents, or parent and non-parent, who are involved in the custody case. Witnesses also may be teachers, relatives or mental health professionals who have treated any of the parties or the child. Each witness will testify about the child's relationship to each parent, to the extent that witness has personal knowledge. Personal knowledge means what a witness actually saw or heard.

Documents may be the child's report cards, school attendance records, medical records, birthday or holiday cards or letters to the child from a parent or from a child to a parent, or from one parent to the other.

Sometimes the Judge will appoint expert witnesses to help give information about the case. Expert witnesses may be mental health professionals or social workers from the Administration for Children's Services (ACS). Sometimes the Judge may ask a parent's or child's probation officer for information.

These professionals may visit the home of both parents. They may also interview all of the people intimately involved in the child's life. These people will include other people who live in the home of each parent or any non-parent seeking custody. They could be stepparents, live-in boyfriends and girlfriends, grandparents, siblings or step-siblings.

Sometimes the Judge will speak with the child. The Judge usually does not speak to the child in the courtroom. Instead, the Judge will interview the child in the Judge's office.



AT AN EVIDENTIARY HEARING THE JUDGE HEARS TESTIMONY FROM WITNESSES (PEOPLE INVOLVED IN THE CASE). THIS TESTIMONY IS GIVEN UNDER OATH (THE PERSON GIVING THE TESTIMONY SWEARS OR AFFIRMS THAT IT IS TRUE).

The parents and their attorneys are not allowed to be there or to know what the Judge and the child say to each other.

If a non-parent is seeking custody, the Judge first will hear evidence on whether extraordinary circumstances exist. If the Judge decides that extraordinary circumstances do not exist, the Judge will dismiss the non-parent's case. If the Judge decides they do exist, the Judge will hear evidence on what is in the best interest of the child.

If the custody trial is between two parents, the Judge will start by hearing evidence on what is in the best interest of the child.

After hearing and looking at all the evidence, the Judge will decide what is best for the child. If one parent is unfit to have custody, for example, has made bad decisions for the child, has a drug or alcohol problem, or is abusive or non-caring, the Judge's decision is fairly easy. But if both parents are fit, the Judge's decision can be very hard to make. The Judge must look at the relationship of each parent to the child and choose one to be the custodial parent and the other to be the non-custodial parent. The Judge can also grant visitation to the non-custodial parent, if appropriate.

IF THERE ARE TWO OR MORE CHILDREN, WILL THE JUDGE SPLIT THEM UP?

Judges usually prefer to keep brothers and sisters together in the same home and with the same person. They believe that when parents are involved in their own troubles and not getting along, their children need and can help each other.

But there are times when it might be in the best interests of the children to be separated and to have some live with one parent and some live with the other because the children's needs are different. For example, if the children do not get along, if there is a big age difference between them, or if a child needs more supervision than his/her siblings and one parent is better able to provide it, the Judge may order **split custody**.

DOES ANYONE REPRESENT THE CHILD IN COURT?

Normally a **lawyer** represents the child in a custody case.



**A LAWYER WHO REPRESENTS THE CHILD IS CALLED A
“LAWYER FOR THE CHILD.”**

The lawyer for the child generally interviews the child privately and tells the Judge what the child wishes. The lawyer for the child generally does not tell the Judge what s/he thinks is best for the child unless the child is very young and not able to say what s/he wishes. In any evidentiary hearing or trial, the lawyer for the child can present witnesses and can also question the parents and other witnesses in court.

Also, a Judge could appoint a **guardian ad litem** to speak for a child in a custody case. A guardian ad litem does not have to be a lawyer. The guardian ad litem will investigate the case and report to the Judge. The Judge may ask the guardian ad litem for a recommendation about custody and visitation. The guardian ad litem can tell the Judge what s/he thinks is best for the child, regardless of the child’s wishes.

WHEN WILL THE JUDGE CONSIDER THE CHILD’S WISHES?

The answer depends upon how old the child is, how mature the child is, and whether the Judge believes the child has been unduly influenced by one parent.

The older the child is, the more weight the Judge will give the child’s wishes. But the child’s wishes alone do not decide a custody case.



**WHEN ONE PARENT HAS
INFLUENCED A CHILD
NEGATIVELY AGAINST
THE OTHER PARENT,
THE CHILD MAY BE
CONSIDERED TO BE
UNDULY INFLUENCED.**

DO JUDGES EVER CHANGE CUSTODY?

Yes, but there has to be a **substantial change of circumstances** (a big change between the situation when custody was awarded and the situation when someone seeks a change). Judges do not like to bounce a child back and forth between two parents, or between a parent and a non-parent, unless there is a really good reason to do so.

Yet, everyone knows that children and parents change and grow and that life changes. What may be right at one time may not be right later on. But the reason for asking the Judge to make a new decision about custody and visitation has to be very important. And again, the Judge will make a decision about what is in the best interest of the child.

WHAT IF A CUSTODIAL PARENT WANTS TO MOVE TO ANOTHER STATE WITH THE CHILD?

Even if a custodial parent has sole legal custody, the parent must ask the Judge's permission to move (relocate), unless the other parent has agreed that s/he and the child can do so. This is because visitation with the non-custodial parent is an important right of both the child and the non-custodial parent.

The Judge will consider what effect moving will have on the child and whether the relocation will be in the child's best interest. Each case is different. It's hard to predict how each case will turn out where both parents are involved in the child's life.

If the Judge allows a parent to relocate with the child, the Judge may also change the visitation schedule. For example, if the non-custodial parent had visitation every other weekend and two weeks during the summer, the Judge may order visitation for the non-custodial parent to include most of the child's school and summer vacations after the relocation makes weekend visits impossible.

Also, if the Judge allows relocation, the Judge may lower the amount of child support to reflect the increased cost of visitation.

WHAT PROTECTION CAN YOU GET IF YOU ARE A SURVIVOR OF DOMESTIC VIOLENCE?

Contact an agency specifically set up to help survivors of domestic violence and their children. The Department of Social Services or private organizations set up to help survivors of domestic violence can help you with safety planning, finding a shelter or other kinds of assistance. You can discuss with them whether you should seek an order of protection.

If you have been the victim of repeated and/or serious domestic violence, the Judge may allow you and your child to move to another location, and even out of state. You may need to seek the Court's permission to do this.

If you have moved to New York from another state to escape life-threatening domestic violence, you can ask the Judge for help.

If your abusive spouse or partner does not abuse the child and is awarded visitation, you can request for pick-up and drop-off of your child at the local police precinct.

HOW CAN YOU PROTECT YOUR CHILD FROM AN ABUSIVE OR NEGLECTFUL NON-CUSTODIAL PARENT WHO WANTS VISITATION?

- Ask the Judge to order either no visitation or supervised visitation through one of the organizations that has such programs. There are not very many of these programs and parents usually need a court order to use their services. The reasons for the Judge to order supervised visitation must be serious. The parents may have to pay for some of these programs.
- Ask for an order of protection based upon the abusive parent's actions towards the child and/or you. An order of protection may say that the abusive parent has to stay away from the child and you. Or it may say that the abusive parent can have visitation only under certain conditions.
- Ask a friend or family member that you like and trust to be present during visitation with that parent to make sure your child is safe and/or to help with the transfer of your child during pick-up and drop-off times.
- Ask the Judge to order the abusive parent to a batterer's program.

When deciding custody and visitation matters, courts will look to all related decisions in abuse/neglect proceedings under the family court act, the sex offender registry, and the order of protection registry and consider such information before making a decision. The court must also consider previous findings of domestic violence in deciding custody and visitation.

WHAT IF SOMEONE THREATENS TO LEAVE NEW YORK STATE OR THE UNITED STATES WITH YOUR CHILD?

If you believe the person really means it, ask the Judge to limit that person's contact with your child and/or to order some form of supervised visitation. The Judge also can order that the child not be removed from New York. This order can be part of an order of protection or an order for custody/visitation.

If your child already has a passport held by another person, ask the Judge to order the passport to be turned over and held either by you or by someone else.

If someone threatens to remove your child from the United States, or, even without a threat, if you are afraid someone will take your child from this country, and your child does not yet have a passport, contact:

U.S. Department of State
Office of Children's Issues
2401 E Street, N.W., Room L127
Washington, DC 20037
Toll free within the U.S.: 1-888-407-4747
Outside the U.S./Canada: 1-202-501-4444
F ax: 202-736-9132

To issue a passport to a child under 14 years of age, either:

- The government must have the written consent of both parents.
- OR**
- One parent must appear in person and supply a legal document showing that s/he can apply without the other parent's consent.

If your child is under 18 years of age, to make sure that your child's other parent cannot act alone, call the Office of Children's Issues to put an alert on any application for a passport for your child. This way the government will not issue a passport for your child without first contacting you.

You should also get as much information as you can about the non-custodial parent and his/her family, relatives and friends, including specific names and addresses. If your child is removed from this country, telephone the Office of Children's Issues immediately for help at:

1-202-736-7090 (Monday through Friday, from 9 a.m. to 5 p.m.)

OR

1-888-407-4747 (Evenings, holidays and weekends)

They will assign a caseworker who is familiar with the country where you believe your child has been taken and who will help to get your child back.

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