



# CUSTODY AND VISITATION

Legal Information Guide

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## What is Custody and Visitation?

- **Custody** means which parent is responsible for the child after a divorce or breakup. The parent with custody is called the **Custodial parent**. The parent without custody is the **Non-Custodial parent**.
- **Visitation** means whether the non-custodial parent can visit the child, and how often those visits can happen.

Laws about Custody and Visitation exist to make sure that kids affected by a breakup or divorce of their parents are happy and safe. If the parents can't agree about what Custody and Visitation arrangement is best for their child, a Judge will decide for them. The Judge will make a decision based on what's in the best interest of the child. The purpose of the ruling will be to protect the child, and to ensure the child's safety.

Orders of Custody and Visitation last until a child turns 18.

## **What Are the Different Types of Custody?**

There are two different types of custody: legal and physical.

**Legal custody** gives you the ability to make decisions about the child's life. The parent who has legal custody decides important things like where the child lives, goes to school, and what religion that child will practice. This parent also makes medical decisions for the child.

Having **Physical Custody** means the child lives with you. The parent who has physical custody is responsible for the child's everyday needs, such as shelter or food. It's possible for a parent to have physical custody, but **not** have sole legal custody.

Legal and Physical Custody can be divided between parents in different ways:

- **Sole Custody** is when only one parent is granted custody. A parent can have sole physical custody, sole legal custody, or sole physical and legal custody.
- **Joint Custody** is given to parents who get along and are able to make decisions together for their child. Joint Custody can be Physical or Legal.
  - Joint Physical Custody – the child may live with both parents at different times. For example, a child could live with one parent for one week, and with the other parent the following week.
  - Joint Legal Custody – the parents work together to make important decisions for the child.

- **Split Custody** – Split Custody is when siblings are split up between parents. This almost never happens, but sometimes it is best to separate the children if their needs are different. For example, if the children don't get along, if there's a big age difference between them, or if one child needs more supervision than his or her sibling(s).

## **How Does the Judge Decide Who Gets Custody?**

In a custody case between parents, the Judge must decide what is best for the child. The Judge will give custody to whichever parent the Judge thinks will provide a more stable life for the child. The Judge will consider several factors in deciding what is best for the child, such as the parent that has been the primary caregiver of the child, and the parent that can best provide a loving, stable and nurturing environment for the child. The Judge will also consider drug or alcohol abuse by one parent, domestic violence by one parent against the other parent, and abuse or neglect of the child by one parent.

The custodial parent usually must also show they are willing to maintain a relationship between the child and the other parent.

However, if the other parent can show that the primary caretaker's behavior may cause harm to the child, the other parent may get custody. Examples of harmful behavior might include:

- Drug or alcohol abuse by the parent
- Mental illness of the parent
- Domestic violence by the parent against the other parent
- Abuse or neglect of the child
- Unwillingness to maintain a relationship between the child and other parent

## **Can a Non-Parent get Custody Instead of Parent?**

In general, a parent has a right to custody before anyone else. But if the judge decides that it's in the best interest of the child to live away from the parents, the judge might give custody to a relative. For this to happen, the non-parent must show the Judge that there are "Extraordinary Circumstances." Extraordinary Circumstances occur when the parent is unable to care for and protect the child. Examples of this might include:

- The parent has had no contact with the child for a considerable length of time.
- The parent has neglected or abused the child.
- The parent is being deported, or has been deported.
- The parent is in prison for a long time.
- The parent abuses alcohol or drugs and the child may not be safe.
- Other serious acts that might affect the child's well-being

There must be a Custody Trial for the court to decide that there are extraordinary circumstances. While the court is deciding whether there are extraordinary circumstances, the court might allow the non-parent to have temporary custody of the child. If that happens, the parent can still ask for visitation.

## **How Do I Start a Custody or Visitation Case in Family Court?**

**Note:** If you file for Custody, there's a chance the child(ren)'s other parent will try to get back at you by filing for Visitation. This type of behavior is called **retaliation**. Retaliation is particularly common in cases of Domestic Violence. If you're concerned about this happening, and/or if you're a survivor of Domestic Violence, you should consult with a Domestic Violence Advocate or attorney before you file for Custody. For help with this, go to the Family Justice Center nearest you. For locations and phone numbers of the centers, visit this website:

<https://www1.nyc.gov/site/ocdv/programs/family-justice-centers.page>.

### **Starting the Process**

If your child lives in New York and has been living here for at least 6 months, you can file for Custody or Visitation in New York State. You don't need a lawyer in Family Court, but you're allowed to get one. For help finding a lawyer, visit [www.lawhelpny.org](http://www.lawhelpny.org). In addition, in a custody case in Family Court you have the right to be assigned an attorney at no charge to you if you can't afford one. If you haven't found an attorney to represent you, you can bring proof of your income or benefits to your next court date and ask the judge to assign you a lawyer.

There is a Family Court in each borough of New York City. You should go to the Family Court in the borough in which your child(ren) live to start a Custody or Visitation Case. **Make sure you bring your child(ren)'s birth certificate(s).**

To start your case, go to a Family Court clerk and ask them to help you file a Petition for Custody/ Visitation. This is your formal request for Custody/ Visitation. You don't need to pay to file the Petition.

After you sign the Petition, the clerk will give you a summons with a return date. Plan to return to court on that day. Make sure the clerk also gives you:

- 2 copies of the Custody or Visitation Petition
- 2 copies of the Summons with a return date
- 1 Affidavit of Service

The final step is to give one set of these papers to the other parent. This is called Serving the Papers.

### **How Do I Serve the Papers?**

1. Serving the papers means giving the court documents to the other parent. You must find someone to serve the papers for you. We'll call this person the Server. This person:
  - Can't be you

- Must be at least 18 years old
- Can't be directly involved in the case, such as your child under 21
- Must live in the state where the other parent is served
- Can be the sheriff of the county in which the other parent lives

**For serving papers outside New York State:** The requirements for who's allowed to serve papers are different in each state. If you're having papers served to someone outside New York State, make sure the server is legally permitted to serve papers there. You may find out who can serve from an attorney, law office, or court located in that state. You can also check [lawhelp.org](http://lawhelp.org) for more information.

2. Once you've found the Server, give them the following documents:
  - 1 copy of the Custody/Visitation Petition
  - 1 copy of the Summons
  - The Affidavit of Service
3. The Server must give the Petition and the Summons to the other parent. Papers must be served:
  - In person
  - At least 8 days before your return date
  - Not on a holiday or on Sunday, or on a different day or religious observance
4. Next, the Server must fill out the Affidavit of Service in front of a Notary Public. A Notary Public is a person licensed by the state government who confirms that you signed a document. You can find their locations online. The Server must then give you the original Affidavit of Service. Make a copy of the signed document for your records, and then give it to the Judge on your return date. If the Sheriff served the other parent, then they will give the Affidavit of Service directly to the Judge for you.
5. Sometimes the other parent will hide from the Server to get out of going to court. **The server must try to serve the papers at least 3 times on different dates, and at different times.** If the Server is not able to serve the papers within 3 attempts, they should sign an "Affidavit of Attempted Service" in front of a Notary Public. An Affidavit of Attempted Service describes all the times and places where the Server tried to give the papers to the other parent.

### **Prepare for the Return Date:**

When you go to court on the return date, make sure to bring the Affidavit of Service and any evidence that you believe shows the child is better off with you. The Judge will ask you if you want a lawyer to represent you. You don't need a lawyer, but you can ask the Court to appoint a lawyer to represent you for free. You should have proof of your income with you for the Judge to review.

### **What If I Need an Interpreter in Court?**

The courts will give you an interpreter if you'd like one. If English isn't your first language and you'd be more comfortable in a different language, you should tell the clerk right away.

Spanish language interpreters are in court almost every day. There are also interpreters for many other languages. If you want to know if an interpreter is available, call the court before you go in.

### **Will I Need to Pay for Anything in Court?**

In Family Court, there are no fees. You will not be asked to pay for your case.



## **What Happens on the Return Date(s)?**

Your first return date is a court “appearance,” not a trial. This means that the structure is a bit more informal. The Judge will ask you and the other parent questions about your family and your lives. The court will try to see if you and the other parent can come to an agreement about Custody and Visitation. If you and the other parent can’t come to an agreement, the Judge will schedule more return dates.

## **Will My Case go to Trial?**

If you and the other parent are not agreeing, the Judge may conduct a trial to decide who should get custody. To help decide, the Judge gets evidence about the child’s life and relationship with each parent.

## **How Does the Judge Make a Decision?**

**Witnesses:** The first way to get evidence is from witnesses. Anyone who knows the child or the parents can be a witness. The Judge will listen to witnesses talk about the child’s relationship to each parent. Witnesses can be:

- Parents
- Relatives
- Teachers
- Therapists

**Paper Evidence:** means any document that shows the child's relationship with the parent and the parent’s involvement in the child’s life.

Paper Evidence can include:

- Child’s report cards
- Child’s medical records
- Birthday cards from a parent to the child

**Expert Witnesses:** Sometimes the Judge will appoint an Expert Witness to the case. These professionals try to find information about the case. To do this, they might visit the homes of both parents. They might also interview people involved in the child’s life, such as siblings or good friends. Expert Witnesses can be:

- Mental health professionals (may be referred to as a “forensic evaluator”)
- Social workers
- ACS workers (ACS stands for Administration for Children’s Services)
- Probation officers

**The Child:** The Judge will also consider what the child wants if the child is old enough. There are two ways the Judge will get information from the child:

- **Lawyer for the Child:** In many Custody and Visitation cases, there is a "Lawyer for the Child." The Lawyer for the Child talks to the child alone, to ask the child what the child wants.
- **Guardian ad Litem:** If the child is very young, the Judge might appoint a "Guardian ad Litem" to speak for the child. The guardian ad litem investigates the case and tells the Judge what they think is best for the child.

The older and more mature the child is, the more the Judge will factor in their opinion. But if one parent has made the child think badly about the other parent, the Judge will consider the child's opinion less. The court calls this being "unduly influenced" by one parent.

### **Who is the Custodial Parent?**

After the Judge sees all the evidence, the Judge will issue a final order of Custody and/or Visitation. The Judge will do what they think is best for the child, not the parents. From now on, the parent with whom the child lives is the "Custodial Parent." The other parent is the "Non-Custodial Parent."

## **What Happens After Custody is Decided?**

Children and parents change and grow with time. What is right at one time may not be right later on. Because of this, custody orders can be changed if there is a “Substantial Change of Circumstances.” This can happen if the child becomes unsafe or very unhappy with the Custodial Parent.

### **What if the Custodial Parent Wants to Move to Another State With the Child?**

Custodial parents can't move to another state without permission from either the other parent or the Judge.

- If you have a good relationship with the child's other parent and you feel safe discussing it with them, you can ask them if they agree that you can relocate.
  - It can be helpful to have this agreement “so-ordered” by a judge. To do this, go to court to get an Order on Consent. This is a document where the court acknowledges that there has been an agreement. You will not need to go through a trial.
- If you don't feel safe discussing your plans with the other parent, go to court to file your request to move. The court will then conduct a trial. The Judge will only let the Custodial Parent move if the Court determines that it is in the child's best interest.

If the Judge allows a parent to move with the child, the Judge may also change the visitation rules.

### **How Can I Get Protection if I'm in Danger or if my Child is in Danger?**

1. If the other parent is abusive or neglectful, ask the Judge to stop their visitation. You should also ask for an “Order of Protection.” An Order of Protection will help keep you and your child safe. For more information, see our guide on Orders of Protection.
2. If you are a survivor of domestic violence, ask the Department of Social Services for help. They can help you with safety planning, finding a shelter, and more. If you're a survivor of domestic violence, the Judge may also allow you and your child to move away.

### **What if Someone Threatens to Leave New York With My Child?**

Ask the Judge to suspend the person's Visitation if you think they're going to leave with your child. If this person has the child's passport, ask the Judge if you or someone else can hold the passport.

You may also be able to enroll in the [Children's Passport Issuance Alert Program](#). This program would notify you if they received a passport application for your child, and would ask for your

consent before granting the passport. If your child does leave New York, you should **immediately** call:

***The Office of Children's Issues in the U.S. Department of State – (888) 407-4747***

If you have an Order of Custody and Visitation and the non-custodial parent violates the order by taking the child out of New York State, you can also call the police. The police typically do not make arrests for violations of custody or visitation orders, but they can document your complaint in a police report, and that report may help you in tracking down the other parent.