



## OFFICE OF THE STAFF JUDGE ADVOCATE

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## CHILD CUSTODY

### What Types of Child Custody Arrangements Are Available?

There are two basic types of custody:

- **Sole custody:** In a sole custody arrangement, one parent (the custodial parent) is assigned the responsibility of care and control of the child. The custodial parent has sole decision making authority concerning the child's upbringing, and may make all major decisions concerning the child, such as schooling, medical care, etc. The non-custodial parent will ordinarily be granted reasonable visitation rights with the child unless there are unusual factors present, such as a history of abuse.
- **Joint custody:** Unlike sole custody, a joint custody arrangement assigns primary responsibility for the care and control of a minor child to both parents equally. Parents share decision-making authority and responsibility for emotional well being of the child without consulting the other. If disagreement arises over an important issue affecting the child's future, the parents must come to an agreement about how to proceed.

### What Type of Custody Is Better?

It depends. Countless factors may play a role in determining what type of custody arrangement will best suit the parents and the child. One such factor is geography. If the parents are widely separated geographically, a joint custody arrangement may be unworkable, whereas, if the parents live in the same town, responsibilities may be easier to share. A second important factor is the relationship between the parents. A great deal of cooperation and compromise are necessary for joint custody to be successful. If the parents' relationship after divorce is strained or bitter, joint control and decision making may be impossible. Most importantly, try to focus on what will make the child happy. For example, is it more important for the child to have stability, or is exposure to both parents more beneficial? All factors affecting the parents' lives and their plans for the future should be considered when determining what custody arrangement is the most suitable.

What factors does the court consider in granting custody? The court will always determine custody issues based upon "the best interest of the child." To find out what is in the child's best interest, the court will consider many factors, some of the most common being:

- Which parent was the child's primary care giver during the marriage (i.e. feeding, discipline, helping with homework, etc.)?
- What are the time constraints on each of the parents?
- Which parent is best equipped to provide for the child's emotional needs?

In many states, the mother is still more likely to be granted custody, because she is usually the child's primary care giver. This trend is changing as men become more active in parenting, and are more commonly primary care givers. The current trend is for courts to award joint custody if both parents desire custody, are capable of caring for the child, and are on good enough terms that the custody arrangement would be workable. Every state is different, however, in how they determine custody issues, so it is very important to know that law in the state where the proceeding will be held.

### **How Does The Court Determine Visitation?**

A non-custodial parent is generally entitled to "reasonable visitation" with the child. The visitation can be flexible and unstructured, (i.e. "non-custodial parent can have the child whenever convenient for all") or it can be extremely detailed, stating the times and places that visitation will occur (i.e. "child will be picked up at father's home every Thursday at 2:00 P.M. and returned by Sunday at 4:00 P.M."). Visitation arrangements usually include substantial visitation for the non-custodial parent on holidays and during summer vacation. A structured visitation schedule is usually preferable to a completely unstructured one because, if cooperation between parents breaks down, an unstructured agreement is difficult to enforce.

### **Will Custody Issues Be Settled In The Divorce Proceedings?**

Custody issues may be settled in a divorce proceeding, though it is also possible to obtain a custody order either before or after the final divorce decree.

### **Can A Custody Order Be Changed?**

Parties may voluntarily change custody arrangements, or a court may grant a change at the request of one of the parties. The court, however, is very unlikely to change a custody arrangement when both parents do not agree to the change. The party requesting the change will typically have to demonstrate that the current custodial parent is unfit to care for the child (this usually requires some showing of abuse), or that there has been a fundamental change of circumstances since the prior decree was ordered which makes the original decree fundamentally unfair.

### **In What Court Do I File For Custody?**

Usually a custody suit is filed where the child is presently residing. However, it may also be possible to file in a state where the child and at least one parent have significant contacts or connections such as former neighbors, relatives, teachers, doctors, etc.

### **What If The Custody Decree Was Granted In One State, But I Live In Another?**

You can register the decree with the county court where you reside, and with the county court where the other parent resides. This is a good idea because it allows your local court to enforce the decree if problems arise.

### **Can A Legal Assistance Attorney Obtain A Court Decree For Custody?**

No. You will need to retain a civilian attorney for the preparation of court documents and to represent you at the hearing. The legal office has a listing of civilian attorneys and lawyers referral services.

### **Will A Court Award Attorney's Fees In A Custody Case?**

Generally no, though some state courts may award reasonable attorney's fees as part of a custody order when the person requesting the fees is acting in good faith and is unable to afford an attorney. In the usual case, however, each party is expected to cover their own legal expenses.

### **What Will Happen If One Of The Parents Kidnaps The Child In Violation Of The Custody Order?**

All states except West Virginia have parental kidnapping laws, which make such violations of custody orders a felony. States can attempt to track children kidnapped by a parent through the Federal Parent Locator Service.

***NOTICE: This brochure is based in South Dakota law and is designed to inform, not to advise. No person should ever apply or interpret any law without the aid of an attorney who knows the facts and may be aware of any changes in the law.***