

# Child Custody and Visitation in New York

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## What is child custody and visitation?

- Custody is the legal responsibility for a child's care. Physical custody or residency provides for where the child lives. Legal custody provides for decision making power over things like education and health care.
- There are two types of legal custody.
  - Sole custody means that one parent has the authority to make decisions about the child. The non-custodial parent may have the right to receive medical or education information, but he/she does not make the decisions.
  - Joint custody means that two parents (and sometimes other caregivers) share the authority to make decisions about the child. With joint custody, the parents must communicate well enough to keep each other informed of the child's needs and to make decisions together.
- Decision-making authority is separate from where the child lives or visitation.
- Courts in New York use different phrases like "physical custody" or "primary placement" to describe where the child lives primarily. Courts use phrases like "visitation" or "secondary placement" to describe the parenting time for the other parent.
- The court can set a visitation schedule that suits the child and the parents' schedules. Or the court can keep visitation as agreed between the parents, if neither parent is requesting a schedule.

## Who can get custody of a child in New York?

- The mother and legal father (or other legal parent) can ask for custody. A legal father is a man who has signed an Acknowledgement of Paternity or received

an Order of Filiation from the court or is listed as the father on the child's birth certificate. Each of these documents states that the man is the legal father of the child. See the article on Paternity in New York.

- There is a presumption that the spouse of the child's birth mother is also the child's parent, including when the child was conceived through artificial insemination or in-vitro fertilization with the spouse's written agreement. This presumption also applies to same-sex married couples.
- Under a new case decided in 2016, in some situations the domestic partner of the child's birth or adoptive parent can establish parental rights, even if this person was not married to the parent listed on the child's birth certificate and did not adopt the child. The former partner may need to prove that they and the other parent had agreed to conceive and raise the child together.
- Neither parent has a greater right to custody. If there is no custody order, either parent can keep the child.
- Relatives and friends of the child can ask the court for custody. First, they must prove that there are "extraordinary circumstances" that would give them the right to ask for custody in preference to either parent. Extraordinary circumstances include situations such as surrender by the parent, abandonment, persistent neglect, unfitness, or disruption of custody over an extended period of time. Two years is specifically defined by the law as being an extended period. If they can show extraordinary circumstances, then they must also prove that it is in the best interest of the child for the non-parent to have custody.

If your family would like to have a non-parent care for your child temporarily, and be able to handle matters with the school and medical providers, New York has a form that can voluntarily set up temporary custody without needing to go to court. If all parties are in agreement, you can use the form which is available here, called a "Designation of Person in Parental Relationship": <https://www.lawhelpny.org/resource/designation-of-person-in-parental-relationship>

### **Who can get visitation in New York?**

- Either parent, siblings and half-siblings, and grandparents can ask for visitation. The court will determine whether visitation is in the child's best interest. A parent is entitled to frequent and meaningful visitation, unless it is

shown that it would be harmful to the child. Grandparents do not have an automatic right to visitation, and must show conditions exist under which equity would see fit to intervene, which could include the death of the child's other parent or an unjustified interruption of a previously close relationship with the grandchild.

### **How do I ask the court for custody or visitation of my child?**

- Anyone can file a custody or visitation petition in Family Court. The parent must name the other parent on the petition and explain the reasons why he/she should have custody. Either parent in a custody or visitation petition has the right to an attorney. If a parent or custodian cannot afford an attorney, Family Court will assign one to him/her.
- A parent can request custody or visitation when he/she starts a divorce in Supreme Court. While a divorce case is open or pending, pending or new petitions in Family Court will be transferred to the divorce case in Supreme Court.
- An Attorney for the Child (sometimes called the AFC) will be assigned to represent the child. The Attorney for the Child will meet with the child and perhaps the parents. After the Attorney for the Child meets with the child, he/she tells the court what the child wants.
- At one or more court appearances, the parents will have the opportunity to reach a custody and visitation agreement. The court can issue temporary and final orders.
- If there is no agreement, the court will have a trial.
- If a parent or custodian does not appear in court, the court may issue a warrant for his/her arrest or the court may issue a default order.

### **How does a court decide who gets custody of a child?**

- First, the court decides if it has the authority to hear the case. A court has authority to hear a case if:
  - the child is less than six months old and lived in New York his/her entire life,

- the child has lived in New York for the past six months, and no other State has made an order yet,
- New York issued the last custody order for that child, or
- the child is in New York after an emergency occurred in his/her home state.
- If a parent requests custody, the court decides what custody arrangement is in the child's best interest. The court will consider each parent's lifestyle, stability, and ability to care for the child. For example, the court will consider whether a parent uses drugs, whether a parent has a clean and stable home, and how much time each parent spends with the child. The court will also consider whether there is domestic violence.
- The child can state his/her preference through the Attorney for the Child. Older children have greater weight given to their preference, but until the child is 18, the court makes the final decision regarding where the child lives.

#### **Can custody or visitation of my child be changed?**

- Either parent can file a petition to change custody or visitation. That parent must prove that there is a significant change of circumstances since the last order and that a change to custody is in the child's best interest. The courts want to promote stability for custody arrangements and will not change primary residence unless there has been a substantial change.
- Either parent has the right to an attorney in this type of case. If a parent or custodian cannot afford an attorney, one will be assigned.

#### **Can a parent move away with the child?**

- If the parent with physical custody or primary placement wants to move with the child to a place that is so far away that the other parent's visitation will be affected, the parent must obtain permission from the other parent or the court before moving.
- A parent can request permission to relocate with the child by filing a custody modification petition in Family Court.

### **What happens if the other parent does not follow the custody and visitation order?**

- If you have a custody order and the noncustodial parent refuses to return the child to you, you may contact the police for assistance in returning the child or in serious circumstances for the other parent's arrest.
- Also, you may file a violation petition in Family Court to enforce provisions about custody or to enforce provisions about your visits.
- Parents and custodians can have attorneys assigned to represent them regarding violation petitions.
- If the other parent refuses to visit the child, the court cannot force him/her to visit. Instead, that parent's visitation might be limited and will not be increased until he/she visits the child consistently.

### **Can a parent stop visitation if the other parent does not pay child support?**

- The custodian or parent cannot stop visitation if the other parent does not pay child support. Instead, he/she can file a child support violation petition to require payment. See the article on Child Support in New York.

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