

What is child custody?

“Child custody” deals with the care, control, and protection of a minor child. There are two different types: (1) **Physical Custody** is a plan for where the child lives and how the child shares time with both parents. (2) **Legal Custody** means a plan for how important decisions like education, religion, and medical care will be made for the child.

Both Physical and Legal Custody can be either **joint** (shared equally by the parents) or **sole** (one parent bears the main responsibility).

Child custody is usually awarded to one or both parent(s), but it can sometimes be granted to someone else, like an aunt, uncle, grandparent, or unrelated foster parent. *For more information, call Legal Aid.*

How is custody arranged between parents?

Physical Custody: The parents or the court must decide who will take care of the child and how the parents will share time with the child. There are two common ways to set up physical custody. Within these two ways, there can be a lot of variation to fit the needs of the child and the parents.

(1) Sole Physical Custody. Sole physical custody assumes the child spends more than half the year with one parent, while the other parent usually has visitation. The exact visitation schedule depends on the child’s needs. The other parent will also have to pay child support.

(2) Joint Physical Custody. In this situation, the child spends half the year with one parent and half the year with the other parent. How the families work out this equal sharing plan depends on the needs of the child. The parent with more income will often have to pay at least some child support.

Legal Custody: The parents or the court must also decide who will make important decisions about the child. Again, there are two common ways, with room for lots of variation.

(1) Sole Legal Custody. When one parent has sole legal custody, s/he makes important decisions about the child. A custody order can also state that one parent must talk to the other parent before making a decision, but the final decision will be made by the parent with sole legal custody.

(2) Joint Legal Custody. In this plan, the parents must make decisions together. If they can’t agree, then no decision can be made, unless the court order says something different. To prevent problems, joint legal custodians should plan how to settle disagreements; for example, they can give one parent the final say, or decide to talk to a third person that both of them trust, or go to mediation.

Physical and legal custody are decided separately: one type can be sole while the other is joint. For example, one parent could have sole physical custody, while both parents share joint legal custody.

What are my rights to the child?

Getting custody of your child can be complicated and depends on different factors, including whether you and the other parent were married, and when the child was born. There are 3 possible situations:

1. You Are The Child’s *Mother* and You Were *Not Married* to the Child’s Father When the Child Was Born (or 300 Days Before the Child Was Born) - see *Box 1 on page 3.*

2. You Are The Child’s *Father* and You Were *Not Married* to the Child’s Mother When the Child Was Born (or 300 Days Before the Child Was Born) - see *Box 2 on page 4.*

3. You and the Other Parent Were *Married* When the Child Was Born (or 300 Days Before the Child Was Born) - see *Box 3 on page 5.*

OPTION # 1

You Are The Child's Mother and You Were Not Married to the Child's Father When the Child Was Born (or 300 Days Before the Child Was Born)

Your rights to the child depend upon whether or not paternity was established. See *Legal Aid's brochure "Paternity" for more information*. There are generally 3 different situations, and each one is described below:

(a) Paternity Was Not Established.

If paternity has never been established, the mother is considered the child's only legal parent. This means you have sole legal and physical custody of your child, and the father has no rights or obligations to the child. If the child was born before July 1, 1999, having the father's name on the birth certificate is not enough to establish paternity. If either parent has a TRO against the other, read that order to see if there's a custody/visitation schedule.

(b) Paternity Was Established by Family Court.

If paternity was established by a Family Court Order, that order should include a custody order. See that document for more information.

(c) Paternity Was Established by Voluntary Establishment of Paternity.

On July 1, 1999, a new law went into effect allowing paternity to be established by both parents signing a Voluntary Establishment of Paternity (VEP) form either at the hospital or the Department of Health. If both parents signed this form, they have equal custodial rights to the child. HOWEVER, neither parent can keep the other parent from visiting the child, or else that parent can be charged with the crime of "custodial interference" (see information on page 6 for more details). If the child was born after July 1, 1999 and the father's name is on the birth certificate, then paternity was established through VEP.

OPTION #2

You Are the Child's Father and You Were Not Married to the Child's Mother When the Child Was Born (or 300 Days Before the Child Was Born)

Your rights to the child depend upon whether or not paternity was established. See *Legal Aid's* brochure "*Paternity*" for more information, including how to establish paternity. There are generally 3 different possible situations, and each one is described below:

(a) Paternity Was Not Established.

If paternity was never established, you have no legal rights (such as custody or visitation), and no legal obligations (such as child support) to the child. The mother of the child has sole physical and legal custody unless there's an order that says something different. If either parent has a TRO against the other, read that order to see if there's a custody/visitation schedule.

(b) Paternity Was Established by Family Court.

If paternity was established by a Family Court Order, that order should include a custody order. See that document for more information.

(c) Paternity Was Established by Voluntary Establishment of Paternity.

On July 1, 1999, a new law went into effect that allows paternity to be established by both parents signing a Voluntary Establishment of Paternity (VEP) form either at the hospital or at the Department of Health. If both parents signed this form, they have equal custodial rights to the child. If the child was born after July 1, 1999 and your name is on the birth certificate, then paternity was established through VEP and you and the mother have equal rights to the child. HOWEVER, neither parent can keep the other parent from visiting the child, or else that parent can be charged with the crime of "custodial interference" (see information on page 6 for more details).

OPTION #3

You and the Other Parent Were Married When the Child Was Born (or 300 Days Before the Child Was Born)

If the parents of the child were married when the child was born (or up to 300 days before the child was born), then the husband is automatically legally considered the child's father. If there is no custody order (divorce decree, legal separation, or a temporary restraining order (TRO)) saying otherwise, then both parents have equal rights to the child. This means you both have 100% access to the child. HOWEVER, neither parent can keep the other parent from visiting the child, or that parent can be charged with the crime of "custodial interference" (see information on page 6 for more details).

If you are afraid that the other parent may snatch your child, see Legal Aid's brochure "Child Snatching."

To get a custody/visitation order while you are married to the other parent, you must get either a legal separation or a divorce. Also, if your spouse is or has been abusive, you may be able to get temporary custody of your child through a TRO. *Call Legal Aid for more information on divorce, legal separation, and TROs.*

If you already got a divorce, a legal separation, or a TRO:

Read the order to see what it says about custody and visitation.

If you don't have a copy of your order, go to the Circuit Court in your area and request a certified copy for your files.

Important Information on Custodial Interference:

Custodial Interference is a law that says it is illegal for:

1. The noncustodial parent to take the child without the consent of the parent who has custody through a court order; OR
2. One parent to take the child without consent from someone (such as the other parent) who has a right to custody, even if no custody order has been established yet.

Custodial interference is a criminal offense and is punishable by fine and/or jail time.

If you have a court order about custody: If you and the other parent have a court order (divorce decree, paternity order, or TRO) that sets out a custody/visitation arrangement, you must follow that order.

- If you have sole physical custody, remember that the other parent usually has visitation rights. Even if the other parent doesn't pay child support, that is not a good enough reason to deny him/her visitation.
- If you are the non-custodial parent, it is illegal for you to take the child from the custodial parent.

If you don't have a court order about custody: If there is no court order (divorce decree, paternity order, or TRO) outlining custody/visitation, and you want to move with the child to another state, the following guidelines can help you avoid committing custodial interference:

- Get sole physical custody through a court order.
- If it is safe, tell the other parent in writing several weeks in advance that you and the child plan to move, how to reach the child, and where you and the child will be staying. Send the letter certified mail, return receipt requested, and keep a dated copy of the letter.
- **IMPORTANT:** If you reasonably believe you must hide or take the child to protect the child from the other parent, you don't need to tell the other parent where you are going. However, you must file a report with the family court and include information on the child's location, your name, and the circumstances. See Hawaii Revised Statutes Sections 707-726 & 727 for more information.

How are custody & visitation issues decided?

- **Both Parents Decide** The most common, and often best way, to decide on custody is for both parents to agree together. If you and the other parent can agree on custody, the court will probably order what both parents agree to. If it is safe to do so, talk to the other parent about what will work for both parents and the child.
- **Best Interest of the Child** If the parents can't agree on custody, the court will decide based on the "best interest of the child." The court wants to hear about what's best for the child, not the problems you have with the other parent, how s/he cheated on you, etc. The court will consider many factors when deciding on custody. Some important factors are:
 - (1) who has been the main parent taking care of the child,
 - (2) any history of abuse of the child and/or the other parent, AND
 - (3) alcohol and/or drug abuse, especially in front of the child.

If you and the other parent cannot agree on custody, you should gather evidence to prove your side of the story. Evidence can include police reports on abuse or other crimes committed by the other parent, and medical reports supporting claims of abuse. You can also get letters from teachers, DHS workers, social workers, doctors, etc., showing you have been the main caretaker of the child and that you make sure the child's needs are met.

Third Party Recommendations: Guardians Ad Litem & Social Studies

Sometimes if the parents can't agree on custody and visitation, the court will get a third party to gather more information about your situation and make a recommendation.

- ***If you live on a Neighbor Island:*** You can ask the judge for a Social Study. This means a court social worker goes to each parent's house and interviews the parents and children, then makes a custody and visitation recommendation to the judge.
- ***If you live on O`ahu:*** You may be able to get a "mini Social Study" done or have a Custody Guardian Ad Litem (CGAL) appointed.

- Mini Social Study: In a mini Social Study, a court social worker named Barbara Shintani does short interviews with both parents and makes a recommendation to the judge about custody and visitation. The interview is free. Her recommendations are very influential so you should prepare before you go. Be ready to discuss the best interest of the child, not to bad-mouth the other parent. If you are already in the process of getting a *divorce*, call Barbara Shintani (539-4290) to set up an appointment for you and the other parent. If you are establishing *paternity*, ask the judge for a meeting with Barbara Shintani.

- CGAL: CGALs are people who interview parents and children in their homes and make custody and visitation recommendations to the court. Although they do more in-depth interviews than in the mini Social Study, they are very expensive.

If there is/has been abuse in your relationship...

(For more information, call Legal Aid and DVCLH.)

If you or your children have been physically harmed or placed in fear of physical harm, the court should consider that when making custody/visitation decisions.

In custody cases, if the judge finds evidence of violence, the court usually assumes that sole physical custody should be given to the non-abusive parent.

If you are a victim of abuse, you can ask that the other parent get **supervised visitation**. This means the abusive parent can only visit the child in the presence of another adult. See Legal Aid's *Visitation* brochure. The court can also order the abuser into drug treatment, anger management programs, etc.

The court cannot force a victim of family violence to go to counseling as part of the custody or visitation agreement. A victim of abuse also cannot be forced to go through mediation with the abusive parent.

How do I enforce an existing custody order?

Once a custody order is signed by a judge, both parents must follow that order. If you have sole physical custody through a court order and the other parent won't return your child, you should:

- Call the Police (911). If you have custody through a **TRO**, the police should enforce that order. If you have custody through a **divorce decree** or **paternity order**, the police will usually not enforce the order, but they may do so if the other parent took the child out of the state without permission. Even if the police won't enforce your order, you should file a police report.
- Call the Clearinghouse on Missing Children (see numbers at back of brochure).
- Call Legal Aid for more information and see the Legal Aid brochure: "*Child Snatching.*"

How do I change an existing custody order?

Important Note: The following information only applies to people who have an existing custody order from Hawai'i. If your custody order is from another state, call Legal Aid for more information.

Important Note: If you are on welfare, changing custody will affect your benefits. *Talk to your DHS worker and Legal Aid for more information.*

- **If you and the other parent agree on the change, you can file a stipulated agreement.**

A stipulated agreement means you and the other parent agree on the change(s). It is easier to do and takes less time than when the parents can't agree.

If you and the other parent agree call Legal Aid Society of Hawaii and/or Volunteer Legal Services. We may be able to do the stipulated agreement for you.

- **If you and the other parent do not agree, you may need to find an attorney to help you.**

To change an existing order if the parents cannot agree, you must show the court there has been a "material change" in circumstances which affects the child. This means your situation has changed since the last order, so the custody order should change. For example, if the custodial parent has been abusing the child, or has been doing drugs in front of the child, the court may change the custody order.

- *Mediation.* If there has been no abuse in your relationship, try mediation to reach an agreement. In mediation, you and the other parent meet with a neutral third person and try to come to an agreement. *See the back of this brochure for phone number of agencies that provide mediators.*

- *Find an Attorney.* If you are afraid of the other parent OR if you cannot agree even after mediation, you should consider getting an attorney to help you. You will have to file a motion with the court to change the existing order, and it could be very complicated. *For private attorneys, look in the yellow pages or call the Lawyer Referral Service at 537-9140 (call collect from Neighbor Islands.)* Call different attorneys and get estimates from them. If you are afraid of the other parent and/or the other parent has been abusive, call *Legal Aid Society of Hawaii* and the *Domestic Violence Clearinghouse and Legal Hotline* for possible assistance.