

Washington Parenting Law for Unmarried Couples
Who Are Separating

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Washington Parenting Law for Unmarried Couples Who Are Separating

Introduction

This publication gives basic information about Washington State law that applies to parenting when unmarried couples separate. The following questions and answers give an overview of some common issues. A separate publication at www.washingtonlawhelp.org, *Washington Property Law for Unmarried Parents Who are Separating*, gives basic information about issues concerning property and debts of unmarried couples who separate.

This information is not a substitute for individual legal advice and cannot tell you how the law will be applied in your individual case. You should contact an attorney for further advice. The law about unmarried couples in Washington is still developing, not settled, and understanding your rights and what action to pursue is complicated. Even if you cannot afford to pay an attorney to handle your whole case for you, a meeting with an attorney may inform you about important legal rights affecting you.

If you have additional questions and you are low-income and do not live in King County, call CLEAR at 1-888-201-1014. If you live in King County, you may contact the King County Bar Association's Neighborhood Legal Clinics (206) 340-2593 to ask for a free half-hour of legal advice (ask for the family law clinic).

My domestic partner and I have been together for many years, but we have never been married. Does Washington State have common law marriage?

No. To obtain a valid marriage in the state of Washington the couple must have a marriage license and a valid marriage ceremony.¹ Washington will recognize common law marriages from another state if that state authorizes such marriages.²

My domestic partner and I raised children together. What are our rights and obligations towards the children after our own relationship ends?

Each domestic partner's rights and responsibilities depend upon their status as a "parent."³

If a domestic partner is a **biological or adoptive parent**, s/he has legally recognized rights and responsibilities concerning the child's care and support. One parent's rights are not automatically superior to the rights of the other parent.

If a domestic partner is not a biological or adoptive parent, but can show s/he has acted as a parent in fact, s/he may be able to petition the court for recognition as a de facto parent. (See questions and answer about "de facto" parents below).

¹ RCW 26.04.140 (procurement of a marriage license) and RCW 26.04.070 (a valid ceremony). In this packet, you will see footnotes, like this one. These footnotes will tell you the law or court case that supports the statement that comes before the footnote. RCW stands for Revised Code of Washington, which is the law of Washington State. Court cases have names, such as *In re the Parentage of _____*. You may use the footnotes to look up the law at your local law library, or to tell the court when you are trying to make a legal argument. Keep in mind that the references to the law are up to date as of the date this packet is published. The law sometimes changes before the packet can be updated.

² *In re Pennington*, 142 Wn. 2d 592, 602 (2000)

³ The factors applied in property/debt disputes for a "marriage-like relationship" do not apply to child-related issues.

If a domestic partner is not a biological or adoptive parent and not a “de facto” parent, then his/her rights are much more limited. S/he would need to try to negotiate time with the child with the parent(s), or seek custody as a nonparent under the difficult standards of RCW Chapter 26.10. Under RCW Chapter 26.10, the court will award custody to a non-parent domestic partner over a parent’s objection only if the nonparent can show that both biological/adoptive parents are unfit or that it would be detrimental for the child to be in the custody of the parents.

These items are discussed more in the questions and answers below and in other publications available at www.washingtonlawhelp.org.

My domestic partner and I are the natural parent(s) of the children, but we have never done anything legal to show this. How are parentage, custody, visitation, and child support decided?

Motherhood is typically decided by giving birth to a child or adopting a child.⁴

Fatherhood (paternity) is most commonly⁵ established by:

- court action (typically a parentage case)
- being married to the mother at or near the birth of the child
- adoption, or
- acknowledgment (filing a Paternity Acknowledgment/Paternity Affidavit).

Neither parent has a greater legal right to have the child live with him/her than the other parent until a court order is entered.

How is paternity established by acknowledgment, and what are the results?

Since July 1997, a very common way that the paternity of a child has been officially established is by the parents signing a paper called an *acknowledgment of paternity*, or *paternity affidavit*. (Sometimes it is also called a *paternity acknowledgment*).

By signing the affidavit, the parents are swearing under penalty of perjury that the person named as the father on the form is the child’s only possible father. A paternity affidavit form is usually given to an unmarried mother while she is in the hospital after the child’s birth, and the parents often sign it before the child goes home for the first time. However, a paternity affidavit can be signed later.

A paternity affidavit is not a court order, but if it is filed with the Washington State Department of Health on or after July 1, 1997, it has the same legal effect as a court order establishing the person named as the child’s legal parent.⁶ A paternity affidavit is legally binding even if one or more of the people who signed it is a minor (under age 18).⁷

⁴ RCW 26.26.101(1). This law also allows for motherhood status in certain surrogate parentage and assisted reproduction situations.

⁵ RCW 26.26.101(2). In addition, the law provides for paternity in certain artificial insemination and surrogate parentage situations and allows for a presumption of paternity when the man was married to the mother at or near the time the child was born.

⁶ RCW 26.26.320.

⁷ RCW 26.26.315(4).

The person named as a child's father on a paternity affidavit has all the legal rights and responsibilities of the child's parent, including rights to request a parenting plan/residential schedule and the responsibility to provide financial support for the child.

However, a paternity affidavit does not in itself establish a parenting plan/residential schedule or child support. Once a paternity affidavit is filed, either parent (or, if the children receive public assistance, the State) may ask for a child support order through a Superior Court or through the Division of Child Support's administrative process. Either parent may also file a court action to enter a parenting plan/residential schedule or a child support order. This action is called a Petition for Parenting Plan/Residential Schedule or Child Support. The publication, *Filing a Petition for Parenting Plan (Custody) or Child Support when Parentage has been Established*, contains forms and instructions for filing a Petition.

How is paternity established by court order?

One party or the State of Washington files a parentage petition in Superior Court. The petition asks the court to legally establish the paternity of the child. Usually the petition also asks the court to approve a parenting plan or residential schedule and/or set child support. (See the question and answer below for an explanation of these terms). More information on parentage actions is available. See *Parentage and Parenting Plans for Unmarried Parents in Washington* and the list of other publications below for more information and for forms and instructions. They are available at www.washingtonlawhelp.org.

Are there other resources that might help me establish paternity and collect child support?

In some situations, the State of Washington Division of Child Support will file a Parentage action or establish an administrative child support order when a parent requests their services or when the child receives welfare benefits.

If you do not have a paternity affidavit, or your affidavit was signed before July 1, 1997, you may ask the State to file a parentage case on behalf of your child. Although the prosecutor will not represent either parent, the prosecutor will file the case and help keep it moving through the court system. More information about this process and its advantages and disadvantages is available in the publication *Parentage and Parenting Plans for Unmarried Parents in Washington*.

For purposes of establishing a duty to pay child support, the Department of Social and Health Services often can initiate an administrative procedure. Where paternity has been established by acknowledgment/affidavit, the Division of Child Support will often obtain an administrative child support order, but they will not establish a parenting plan/residential schedule. For more information, see the publications *How Can I Collect Child Support?* and *Parentage and Parenting Plans for Unmarried Parents in Washington*.

A valid administrative child support order can remain in effect until modified or replaced by a court order. Court orders usually do not cancel amounts already due under administrative support orders.

If I am a biological or adoptive parent, how do I get custody, visitation, or child support?

Modern Washington law does not award “custody” or “visitation.” Instead, the law provides for court orders between parents called parenting plans or residential schedules. Either parent can file a court petition asking the court to enter a Parenting Plan/Residential Schedule and to set child support. A court-ordered parenting plan determines:

- a) The schedule for living or visiting with each parent;
- b) The division of major, non-emergency decisions about the child;
- c) How the parents will work out major disagreements.

A court-ordered residential schedule covers items “a” above only.

See the last page of this publication for a list of self-help publications that provide an overview of the law on parenting plans/residential schedules and contain forms and instructions.

How do we get a parenting plan or residential schedule?

A parenting plan or residential schedule is a court-approved document, so it must be made as part of a court case. For unmarried parents, the court case is usually a parentage action or an action to establish a parenting plan/residential schedule.

If the parents agree through mediation or negotiation on a proposed Parenting Plan/Residential Schedule, the court will usually approve it.

If the parents do not agree, the court will decide upon a Parenting Plan after a hearing or trial. The court looks at many things when deciding, but the most important factor is the best interests of the child.

The publications listed on the last page contain more information about the laws relating to parenting plans/residential schedules.

I am not a biological or adoptive parent, but I helped raise the child and want custody or visitation. What are my chances if a parent objects?

The law on this issue is developing, and is subject to rapid change. However, at the date of this publication, a person who is not a biological or adoptive parent of a child may be able to petition the court for parental rights and duties with that child if s/he can prove that s/he is the child’s “de facto” parent”⁸ To be recognized as a “de facto” parent s/he would need to show all of the following:

- that s/he has an actual “parent-like” relationship with the child;
- that the relationship was formed with the consent and encouragement of a biological or adoptive parent;
- that the petitioner (the person filing the case) lived with the child in the same household;
- that the petitioner took on the responsibilities of parenting without expecting payment;
- that the petitioner acted as a parent long enough to have developed a bonded, dependent, parent-like relationship with the child; and

⁸ *In re Parentage of L.B.*, ___ Wn.2d ___ (2005).

- that the petitioner has fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.

In a recently decided case⁹, the Washington State Supreme Court considered the case of a same-sex couple who had ended their relationship. One former domestic partner filed a court petition asking to establish her “co-parentage.” She showed she had lived with the child and biological mother, and acted as a parent from the child’s birth until she was six years old, with the approval of the child’s biological mother, and that she and the child had a strong, positive relationship. However, when the relationship between the adults broke up, the natural mother cut off all contact between the petitioner and the child. The court established the legal principle of “de facto parent.” and the court also decided that if this partner could prove at trial that she was a “de facto parent”. The trial court could grant her parental rights and responsibilities consistent with the best interests of the child.

I do not think I meet these standards for an adoptive, biological, or de facto parent. How does a nonparent seek custody?

To seek custody of a child over a parent’s objection, the nonparent must file a case in superior court under RCW Chapter 26.10. Under the present state of this law, generally speaking, custody of a child can be given to a nonparent only if

- the child is not in the physical custody of a parent; or
- the nonparent proves that the parents are unfit; or
- the nonparent proves that the child’s growth and development would be detrimentally affected by living with an otherwise fit parent; and
- the nonparent shows s/he is fit

For more information, see the publication *Nonparental Custody: Frequently Asked Questions and Answers*.¹⁰

I do not think I meet these standards for a biological, adoptive, or de facto parent. How does a nonparent seek visitation?

At the present time, non-parents do not have the right to seek court-ordered visitation over the objection of a fit parent. Previous Washington laws that allowed nonparental visitation have been declared unconstitutional. The Washington Legislature may reconsider this issue in upcoming legislative sessions, so the law may change.

Where can I file a court case for parentage, a parenting plan, a residential schedule, or child support?

Court cases concerning the parentage, parenting plans, or residential schedules for children are filed in the county where the child lives.¹¹ If the child is not living in Washington now, you may file a parentage action in the county where the other parent lives.¹² However, in all cases, if another state has entered an order about custody of the child, or the child does not live in

⁹ *In re Parentage of L.B.*, ___ Wn.2d ___ (2005).

¹⁰ This publication and all the other “self help” publications mentioned are available at the website: www.washingtonlawhelp.org.

¹¹ RCW 26.26.520, RCW 26.10.030

¹² RCW 26.26.520

Washington now, or has not lived here very long, you may not be able to file for custody in Washington. If you have questions about whether you may file in Washington, talk with an attorney or read our publication called *Parentage and Parenting Plans for Unmarried Parents in Washington*.

Can I go to Small Claims Court?

Cases to establish parentage, parenting plans, residential schedules, or child support orders cannot be brought in small claims court.

I want to bring up property and debt issues and also issues relating to children. Can this be done in one case?

The law on this is not completely clear. Some counties permit it; others do not. Try to talk to an attorney in your community to find out about local procedures.

I have an emergency. Is there anything I can do?

If you are a domestic violence victim, you maybe able to get a Domestic Violence Protection Order containing emergency protection. See the list of domestic violence related publications at www.washingtonlawhelp.org.

If you file a lawsuit concerning the children, the court may be able to enter temporary or restraining orders. See www.washingtonlawhelp.org for self-help publications on temporary and emergency orders.

Are there alternatives to a lawsuit?

Although paternity and child support can sometimes be established without court action (as explained in questions and answers above), only a court can create a binding parenting plan/residential schedule. During the court process, however, if the parents negotiate a settlement and place their agreement into a court order approved by the judge/commissioner, the process can often be easier, quicker, less stressful, and less expensive than having the judge make a decision after a trial.

If you are a nonparent of a child, and the parent(s) agree that you will have custody, consider getting either a court order under RCW Chapter 26.10 or a court-ordered guardianship. A "temporary parental consent agreement" may also be used in short term, agreed situations. However, a parent may revoke (cancel) a temporary parental consent agreement at any time, and schools, medical care providers and others may not accept it. So, a Temporary Parental Consent Agreement is not a lasting alternative to a court order. See *Frequently Asked Questions and Answers about Nonparental Custody* for more information.

Are there forms and instructions that I can use?

If you decide to represent yourself in court on issues affecting children, the following materials are among those that might be helpful:

- *Filing A Petition to Establish Parentage*
- *Parentage and Parenting Plans for Unmarried Parents in Washington*.

- *Filing a Petition for Parenting Plan (Custody) or Child Support when Parentage has been Established*¹³
- *Parenting Plans*
- *Filing an Agreed Petition for Parenting Plan (Custody) when Parentage has been Established*

These packets and other self-help law materials are available on-line at www.Washingtonlawhelp.org.

Should I talk with an attorney?

Yes. Even if you cannot afford to hire an attorney for full representation, an experienced family law attorney can

- explain local procedures,
- evaluate your case
- identify the claims you might make and your rights and responsibilities,
- advise you how to take practical steps.

The Northwest Justice Project would like to thank attorney Ron Steingold for his generous assistance in creating this publication.

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This publication provides general information concerning your rights and responsibilities. It is not intended as a substitute for specific legal advice. This information is current as of the date of its printing, December 2005.

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¹³ This set of forms and instructions for parentage, custody, visitation, and child support may be useful where the parents are not married, the parentage (paternity) of the child has already been established, and one party wants to ask the court in Washington for a court order setting a residential schedule, parenting plan or child support.