

## Establishing Physical Custody: Who should the child live with?

The court looks at many different things the first time it decides custody. But the decision depends on the facts of each specific case. It is difficult to change a judge's decision about custody.

The court looks at the following 13 factors to decide what is in the best interests of the child. This is for the *very first time* the court decides custody. These factors are:

- 1) what each parent wants for custody;
- 2) what the child wants. This only counts if the child is old enough. Generally a child must be at least 10 years old before a court will ask about what they want. But the court will look at each child's situation and decide if the child is old enough or able to say what they want.
- 3) who is the child's primary caretaker;
- 4) the closeness of the relationship between each parent and the child;
- 5) the situation and relationship between the child and parents, siblings and other people who may play a big part in the child's life (like grandparents or parent's new partner);
- 6) the child's adjustment to home, school and community;
- 7) the amount of time the child has lived in a stable and good environment and the need to maintain what the child is used to;
- 8) the permanence of the proposed custodial home. For example, does the mother or father have a new boy or girl friend? If they live together, how long has it been? Is it likely to last?
- 9) the mental and physical health of everyone involved;
- 10) the ability and willingness of the parties to give the child love, affection and guidance, and to keep educating and raising the child in his/her culture or religion;
- 11) the child's cultural background;
- 12) if there is, or has been, domestic abuse by one parent against the other. How has that affected the child?
- 13) the willingness of each parent to support and allow the child to spend time with the other parent (unless there is, or has been, domestic abuse).

### Custody Evaluations

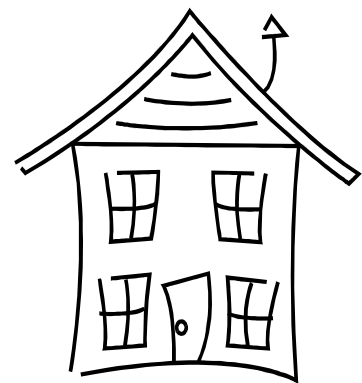
If parents do not agree about custody, the court may order an investigation. The investigator will report about what kind of custody and parenting time are in the child's best interests. These reports are usually called "custody evaluations." Judges rely heavily on "custody evaluations" in making their decisions.

Custody evaluations may be done by:

- court services, a department of the county that is assigned to complete these reports (typically in larger counties) or
- a guardian ad litem or
- a private custody evaluator.

You may have to pay for a custody evaluation. Custody evaluations usually take at least 4 months to do. They might do things like:

- interview both parents,
- make a home visit with each parent,
- observe the child with each parent,
- do a records check (criminal, child welfare, mental health, and school records of the child), or
- do a psychological evaluation or chemical dependency assessment, if needed.



After getting all the information, the evaluator makes a detailed report to the court. The evaluation will look at each of the 13 best interest factors listed. If a parent is asking for joint legal or joint physical custody, the evaluator will also look at 4 other joint custody factors. Judges take these evaluations very seriously because the evaluator has investigated and analyzed the case. If a parent does not agree with the custody evaluator's suggestions, the parent can usually ask for a trial. At the trial, the parent can have evidence and witnesses to show why they think the evaluator's suggestions should not be followed by the judge. But it can cost a lot of money and is generally hard to win custody with an evaluation that is not in your favor.

**Once a court order deciding custody is final, any future court actions about custody have to be requests to change (or modify) custody.** This includes a paternity order that sets custody. A request for a change in custody is harder to win than your first request for custody. See section on **Changing Physical Custody**.

## Changing Physical Custody

Once the court makes the very first custody decision, it is generally very hard to change it later unless there is harm to the child or the parents agree.

To change custody, the court can only look at facts that have happened since the very first custody order was made. They can also look at facts that were not known to the court at the time of the first court order. The change of custody must be in the best interests of the child.

**IMPORTANT—There are time limits on asking to change custody.** The court can only consider a motion to modify custody if at least 1 year has passed since custody was first set by a court order. If you asked for a change already and had a decision from the court, then you have to wait 2 years. In emergency situations, these time limits can be waived.

If the time limits have passed, and there is a change in facts since the last order, **the court can change custody only if:**

- (1) **Agreement:** Both parents agree to the change of custody; or,
- (2) **Integration:** The custodial parent has let the child become part of the other parent's home; or,
- (3) **Harm:** There has been a big change in the child's situation, and the child's present custody harms or puts the child in danger, physically or emotionally. The benefits of changing custody have to be greater than the harm likely to be caused by a change in environment; or,



- (4) **Custodial Parent Moves Out of State, Even Though The Court Said They Could Not Move:** If the court said the primary custodial parent could not move out of state with the child, but they did anyway. See page 23.

It's not hard to BECOME a father, but it is hard to BE a father. Having a child doesn't make you a man—but taking responsibility as the father of your child will.



*Lee Fisher,  
Center for Families & Children*

- (5) **Parenting Time Interference:** In some cases, denial or serious interference with parenting time may be good cause to change custody. This means that the custodial parent is not letting the other parent see the child, or is making it very hard for that parent to spend time with the child. Using this to try to change custody is often a last resort. It would be used only after trying other ways to get the custodial parent to follow a parenting time order have not worked.

Just because you file the motion to change custody does not mean that the court will okay it. It is not enough to say that you are “the better parent” in a motion to change custody.

### Two-stage hearing process

There is a 2-stage process for changing custody. In the first hearing, the court will decide if what you have told them is enough for the court to change custody. “What you have told” the court means what you put down in your written affidavit of your motion to change custody. In the affidavit it is very important to tell the court everything you want them to think about in looking at your request to change custody. **Make sure you put everything in your affidavit or in supporting affidavits from witnesses. The court does not have to consider anything that you say at the hearing that is not in the affidavit.** If the court decides that your affidavit gives good reason to ask for a change in custody, there will be a second hearing. In the second hearing, you have to prove the facts that you wrote about in your affidavit. The court may order a custody evaluation to get updated information between the first and second hearing.

## What if I want joint physical custody?

Joint physical custody is where the daily care, control and home of the child are shared between the parents. If no custody order has ever been decided, then the very first request for joint physical custody is decided under the **best interests of the child** standard (see page 14). In addition to the “best interests factors,” the court looks at some other factors when a parent asks for joint physical custody:

- If the parents can work together in raising their children; and,
- The ways for settling arguments with any major decision with the life of the child, and whether the parents are willing to use those ways; and,
- If it would be harmful to the child if one parent were to have all the control over the child’s life; and,
- If domestic abuse has happened between the parents.

Father-child interaction has been shown to promote a child’s physical well-being, perceptual abilities and competency for relatedness with others, even at a young age.



*Krampe and Fairweather  
Journal of Family Issues*

When parents cannot agree about joint physical custody, the court will not usually order it. They will only order it in special situations. An important factor in getting the court to order joint physical custody is if the parents are able to show that they can work together. Another concern is whether the parents can easily move the child back and forth between their homes. The court looks at things like how close the parents live to one another, if they both have a car or another way to get the child around, and where the child’s school or day care is located. Courts will look at how the parents have worked together on things in the past.

If the court finds there has been domestic abuse between the parents, then the court assumes that joint physical custody is not in the best interests of the child. The parent asking for joint physical custody must prove otherwise.

Joint physical custody is **NOT easily granted** in a custody case where the parents do not agree to it.

### What things may make it more possible for me to be given joint physical custody?

- You and the child's mother have already been sharing physical custody, but you have never had a court order giving you both joint physical custody;
- You and child's mother can get along well when it comes to planning and/or making decisions for your child;
- You had the child in your home for long periods of time (for example, the child's mother left the child with you while she moved out of state and then returned a year later) or you took care of the child as much as the mother did;
- You can show in other ways that it is in the best interests of your child to have joint physical custody.

Remember, you and the mother can *agree* to joint physical custody.



### What happens to child support if I am granted joint physical custody?

You may still have to pay child support if you are given joint physical custody. See the section on child support, page 26.

### What happens if I was given parenting time by the court but now I want joint physical custody?

Most orders that give parenting time also set physical custody. If custody has already been decided by a court order, but now you want to ask for joint physical custody, you must make a **Motion to Change Custody** of the child. For the motion to be heard by the court:

- 1) you must meet the time lines (see section on **Changing Physical Custody**),
- 2) you must be able to give facts that show good reason to change custody, and,
- 3) These facts must be ones in the list of what the court can look at. See the section on **Changing Physical Custody**.

Just because you file the motion does not mean the court will make the change. If the child's mother does not agree to joint physical custody, and the child's mother has not let your child start living with you, then a change of custody can only be done by proving that the child is "endangered" by living in the mother's home. The danger can be physical or emotional. In general, if there is a case of endangerment in the current custodial parent's home, then joint physical custody would not be right anyway. In other words, you are likely to be granted **joint** physical custody after custody has been decided in only one situation: where the mother agrees.