

What happens to children when their parents divorce or separate?

Whether they are married or not, both parents have a duty to care for their children. Care includes day-to-day activities like making meals; helping little ones bathe and dress; making sure older children go to school and do their homework; getting medical care for the children, deciding whether to give them religious training, and choosing recreational activities for them. Care also includes providing financial support.

When parents separate, they must divide these duties fairly. If they cannot decide together, the district court will decide where the children will live and with which parent, how much time the children will spend with each parent, and how much child support one parent must pay. (***For more information, see LawHelp topic “Child Support”.***)

How does a custody case start?

One or both parents may file a petition in district court asking it to decide. If the parents are married, the court will consider custody and visitation as part of the parents’ divorce or legal separation.

The court will usually refer the parents to court-sponsored mediation

to try to work out a plan for sharing time with the children. Many people are able to agree on a plan with the help of mediation. They then present their plan to the court, which usually will agree to it.

Sometimes mediation is unsuccessful. In those cases, the court will decide whether to give one parent sole custody of the children or to give both parents joint legal custody.

What is sole custody?

Sole custody means that one parent makes all the major decisions about the children: where the children will live; religion; school and child care arrangements; medical, dental, and psychological care; and extracurricular activities.

In New Mexico, courts generally give a parent sole custody only in a few situations:

- The other parent is absent or missing
- The other parent is in jail or prison
- The other parent abuses alcohol or uses illegal drugs
- The other parents has been violent toward the parent who wants custody and it is unlikely that the parents will be able to work together in making decisions about the children.

For most other cases, the court will order joint legal custody.

What is joint legal custody?

Joint legal custody means that the parents have equal decision-making power over where the children will live; religion; school and child care arrangements; medical, dental, and psychological treatment; and extra-curricular activities.

Joint legal custody does *not* necessarily mean equal time with the children. Nor does it mean that the parents will have equal financial responsibility, either. Joint custody does not take away the duty to pay child support.

What does the court look at when it decides custody?

The goal of the court is to do what is in the best interest of the children. In doing that, it considers several factors:

- Mental and physical health of the parents and the children
- The children's adjustment to their home, school, and community
- The wishes of the parents
- The wishes of the children, with more attention to the wishes of children over age 14
- The relationship of the children with the parents, siblings, and others who may have a large

impact on the best interests of the children.

How does the court evaluate the mental health of the parents?

In most cases, the court relies on testimony of witnesses. In some cases, the police or medical professionals may have important information for the court to consider. The court also can order a parent to undergo sophisticated psychological testing.

Some parents will participate in a formal custody evaluation. These evaluations, conducted by professional social workers or therapists, are sometimes helpful to the court. They are generally very expensive.

Can a court in New Mexico make a decision about custody of children who live somewhere else?

As a general rule, a New Mexico court has the power to decide custody only when the children have lived for at least six months in this state. In rare cases, a child may not have lived anywhere for six months, and the courts of several states may have to figure out which one of them is in the best position to get the facts to make a good decision.

Once there is a court order for custody and visitation, can the parents change it?

The court will never force parents to follow the custody and visitation order if the parents can cooperate in sharing time with their children successfully. If the parents have a dispute over their informal arrangement, however, they cannot get the court to enforce their side agreement. For example, the father may have planned informally to have the children at his home for his birthday; the mother may have agreed to this but then changed her mind. The police cannot help and neither can the court. The court can enforce only the plan in its own order, unless there is a signed written agreement between the parents to prove that they had a different arrangement.

If they are in agreement, the parents can ask the court (by filing a legal motion) to change their official arrangement to be the same as their informal agreement.

What if something happens that makes the parenting arrangement stop working?

Sometimes after a court signs a custody order, circumstances change. One parent may develop a drug problem; a parent may need to move further away for a job, so that the child doesn't get to spend the same

amount of time with the parents as before; a parent may start a relationship with someone who is abusive. In cases like these, one of the parents may want the custody arrangement to be different. In such a case, that parent will have to convince the court that there has been a substantial change in circumstances since the court's first custody order that would make it important to change custody.

Example: If one parent was a practicing alcoholic at the time of the divorce, and the other parent now says that the alcoholism is the reason for a change of custody, a court will likely not agree to the change. The alcoholism alone is not a change of circumstances; the other parent knew about it before. If the alcoholism was now causing extended blackouts or violence that it did not cause before, those problems might make the court look at the situation differently.