



# Custody and Visitation

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## What is custody?

To have **custody** (KUS-to-dee) means to be in charge of someone. There are two kinds of custody: physical and legal. The same person often has physical and legal custody – but not always.

**Physical custody** is when an adult is responsible for a child and takes care of the child most of the time. Usually the child lives with this adult.

**Legal custody** is when an adult has the responsibility of making important decisions – such as medical or religious decisions – about the life of a child.

## Who has custody of a child if there is no court order?

Unless a court makes another decision, parents have equal rights to physical and legal custody of the child.

## What is joint custody?

In Family Court, joint custody usually refers to **joint legal custody**. It means that both parents must agree on the important decisions being made about their children. They share this responsibility regardless of which parent lives with the children. The court rarely grants joint physical custody. Usually one parent will have physical custody, and the other parent will have **visitation** (vi-zi-TAY-shun). Visitation means you can see your child during certain times. This split between visitation and physical custody is sometimes called shared **parenting time**.

## How do I file (ask for) custody or visitation?



You file a **petition** (pe-TI-shun) **for custody** or a **petition for visitation** in the borough where the child has lived for the last six months. A petition is a written request. Judges often make decisions about custody and visitation at the same time. Custody and visitation decisions can be made in Family Court or Supreme Court. The cases usually begin in Family Court unless the parents are in the middle of a divorce. If the parents have a divorce case going on, then custody will usually be decided in Supreme Court along with the divorce.

Sometimes custody and visitation cases are heard by a referee. Referees are similar to judges. They make decisions about custody and visitation. Referees do not hear cases that involve orders of protection. In this guide, everything we say about judges is true for referees, unless the case involves an order of protection.

## Do I have to go to court to get custody or visitation?



No. Many times parents can come to an agreement without going to court. They often use **mediation**. Mediation is when someone called a mediator helps you and the other parent come to an agreement. However, mediation is not a good idea when there has been domestic violence. If you are interested in mediation, ask a LIFT staff member for the name of a center near you.

## More on going to court to get custody or visitation

Sometimes the court will send you to mediation after you start your case. If that happens, the mediator can help you come to a decision about your situation. If you are able to come to an agreement, you can let the judge know what it is. If the judge agrees with you, the judge can make it into an order.

## Who can file for custody?

Anyone who plays an important role in the life of the child may ask the court for custody. You do not have to be a parent of the child. But the judge will **review**, or look at, the case differently if you are not a parent. This is talked about later in the guide.

## Why would I file for custody?

There are many reasons why you might want to start a custody case. Here are some common reasons:

- If you are not living with your children and you want to
- If you believe your children are being harmed where they live now or are in danger of being harmed
- If you are not married to the other parent, and you want a court to say what your rights are

## I am a parent. How will a judge decide custody of my child?

When two biological parents want custody, a judge must determine what is in the **best interests** of the child. The judge will look at many things when figuring this out. The case will not be decided based on who



loves the child more or who has more money. The judge does not favor a mother over a father, even if the case involves a young child. The judge will look at who has been the main person taking care of the child up until now.

As part of the process, the judge may order that a report be written about the parents. This report is called a **Court Ordered Investigation (COI)**. A caseworker from the **Administration for Children's Services (ACS)** will visit the homes of both parents and write a report to the judge about what the homes were like and with whom the caseworker spoke. ACS used to be called BCW or CWA. Please note: Even though the caseworker is from ACS, it does not mean that someone has said that you have hurt your children.

## Will my child get a say in who gets custody?

Most children are given an **attorney** (lawyer) by the court to represent them in the custody cases. The attorney is called a **law guardian** or **attorney for the child**. The law guardian's job is to tell the judge what the child wants. If the child is old enough to say what he or she wants, it will have a lot of importance. However, the court and the law guardian will want to be sure that it is what the child really wants, not what one parent has asked the child to say. It is very important that you do not tell a child what to say.

## What if things change after the judge makes an order?

Things sometimes change after the court makes a custody or visitation order. That is called a **change of circumstances**. If this happens, you can file a petition to modify the old order. Modify means to change. The judge will hear the case and can make a new order.

## I am not a parent. How will a judge decide custody of the child?

When a judge is deciding a custody case between a parent and someone who is not a parent, different things will be considered. First, the judge will decide whether there are **extraordinary circumstances**. Examples of some extraordinary circumstances are: when a court has determined that there has been abuse or neglect; the child has been harmed by continued domestic violence; or when there is substance abuse in the home of the parent. It might also mean that the non-parent (a person who is not a parent) has been caring for the child for a very long time. It is automatically considered to be an extraordinary circumstance if a grandparent has been caring for a child for two years. To get this information, the judge may ask for a COI, similar to the report mentioned above.

If there are extraordinary circumstances, the judge will decide what is in the best interests of the child. If there are no extraordinary circumstances, the judge will give the biological parent custody.

## I do not want custody, but I want to see my child. How do I do this?

If you do not want custody, but want to visit with your child, you must file a petition for visitation. The court will almost always allow a parent to visit with the child.

## Why would the court NOT allow a parent to visit a child?

If there is **evidence** showing that your visits will put the child in danger (hurt the child). Evidence is information presented to the court to prove a case. Examples of things the court might consider dangerous are drug or alcohol problems, a prior history of sexually abusing the child, or the exposure of a child to domestic violence.

Often, if the court thinks the child would be in danger, it will order supervised visitation. This means someone else is there to watch while you visit with the child. This can be at an agency or by a person on whom both parents agree.

## Can I visit my child if he or she is in foster care?

Yes. Parents have a right to visit with their children at least once every two weeks if the children are in foster care. However, if a parent's rights have been terminated, he or she does not have the right to visit the child. For more information, please see LIFT's guide, "Termination of Parental Rights."

## Can I ask for visitation with a child if I am not the parent?

Grandparents and siblings can petition for visitation with children. The judge will order visitation if it is in the best interests of the child and if special circumstances have led to the person not being able to visit with the child. The following is an example of a special circumstance: You are a grandparent and your child died. Before your child died, you saw your grandchild often. Now you never see your grandchild.

## What happens if there is an order of protection and a visitation order?



Many times the court will order that the child has to be picked up and dropped off at a police station or some other safe place so that the parents will have no contact with each other.

If the court thinks there has been domestic violence in the home and the child would be in physical or emotional danger by spending time alone with the person, the judge can also order supervised visitation.

## If the parent without custody is not paying child support, can I stop the visits?

No. Child support and visitation are separate matters. The courts believe that it is best for children to spend time with both parents.



In fact, a judge may punish a parent who stops visits by the other parent without permission from the court. Many times the judge will keep the visits going, regardless of whether or not the parent is paying child support.

## What can I do if the other parent does not follow the visitation order?

You can file a **violation petition** in court. This lets the judge know what has been going wrong. Some examples of violations are: missing visits, arriving late to visits, acting inappropriately with the child during the visits, and bringing the child back late. Sometimes a judge will increase or decrease the visits as a result of the violation. In some cases, the judge will stop all visits. In other cases, the judge might even change custody.

## Can I choose who I want to take care of my children if something happens to me?

Yes. In New York State you can **designate**, or name, someone to take care of your children if you are sick and not able to do it. The person you designate is called a **standby guardian**. Standby guardians can be friends or relatives. You do not have to be sick to designate a standby guardian. You do not give up custody when you designate a standby guardian.

You can designate a standby guardian by filing a petition in either Family Court or Surrogate's Court. There is also a special form that you can fill out that lets you temporarily designate a standby guardian without going to court first.




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*This document should not take the place of a consultation with a lawyer. LIFT encourages all individuals involved with the Criminal and Family Court systems to consult with a lawyer.*