

# Custody and Visitation



This information has been adapted for the following New York Counties: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, and Wyoming.

## What is custody?

There are 2 types of custody: physical custody and legal custody.

**Physical custody** decides where the child lives.

Court orders for physical custody can work in many ways:

- Shared physical custody
- Primary or sole physical custody:  
This means that one parent takes care of the child most of the time and the other parent has visitation or parenting time with the child. **Visitation** means you can see your child during certain times.

**Legal custody** decides which adult has the responsibility for making important decisions (such as medical or religious decisions) about the life of a child.

Court orders for legal custody can work in different ways:

- Joint legal custody between the parents
- Primary or sole legal custody:  
This means that one parent makes the final decisions for the child.

## What is joint legal custody?

Joint legal custody means that both parents must talk to each other and agree on important decisions about their child. They share this responsibility regardless of where the child lives.

## 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 county where the child lives. A petition is a written request. Judges often make decisions about custody and visitation at the same time in Family Court. If the parents have a divorce going on, then custody will usually be decided in Supreme Court along with the divorce.



## Can I get a lawyer to help me?

Yes. You can hire your own attorney to represent you in a custody case. If you cannot afford one, you may apply for an assigned (or 18-B) attorney at no cost to you. You must submit your current financial information so the judge can determine if you qualify. If your case involves only visitation, generally you do not have the right to an assigned attorney, even if you qualify financially.

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

Parents share equal rights to physical and legal custody of the child when there is no court order.

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## 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 between the parents. If you are interested in mediation, ask a LIFT staff member for the name of a center near you. You can also ask the judge to go to mediation if you have started a case already.

## How does mediation work when I go to court?

Sometimes the court will send parents to mediation. The mediator may 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?

Any legal parent can file for custody of their child. Anyone else who plays an important role in the life of the child (such as a relative or family friend) may also ask the court for custody. If you are not a parent, the judge will **review**, or look at, the case differently to see if you have the legal right to file for custody. See page 3 of this guide for more information.

## 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 believe it is in your child's best interests to live with you
- If you believe your child is being harmed where they live now or is in danger of being harmed
- If you and the other parent are having trouble talking to each other about your child

## 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 one parent over the other, even if the case involves a young child. During the case, the judge will hear from all parties. Each case is different as each family is different. The judge's decision about custody and visitation will depend on the facts and circumstances of your family's case.

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

Your child may be given an **attorney** (lawyer) by the court to represent them in a custody case. The attorney is called an **attorney for the child**. The attorney for the child's job is to tell the judge what the child wants. If the child is old enough to say what he or she wants, the judge may consider it, depending on the child's age and maturity. The judge and the attorney for the child 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. Sometimes the judge will schedule a date and time to meet only with the child and the attorney for the child. You will be notified about any meeting between the judge, your child, and the attorney for the child.

## 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 ask to modify the order, called a **modification petition**. Modify means to change. The judge will hear the case and, if appropriate, can make a new order.

## I am not a parent but want to file for custody. 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 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. If there are extraordinary circumstances, then the judge will decide what is in the best interests of the child. If there are no extraordinary circumstances, the judge will dismiss the petition.

## 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 can file a **petition for visitation**. The court will almost always allow a parent to visit with their 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. You have the right to visit with your child at least once every two weeks if the child is in foster care. However, if a parent's rights have been terminated, they do not have the right to visit the child. For more information, please see LIFT's guide, "Termination of Parental Rights," available at [www.liftonline.org](http://www.liftonline.org).

## 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?



Sometimes 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 non-custodial parent is not paying child support, can I stop the visits?



No. Child support and visitation are generally 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 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, bringing the child back late, and not talking to the other parent about important decisions if the order gives you joint legal custody. The judge will hold a hearing to determine if the parent has violated the order and how to respond (for example, if a penalty should apply or if the order should change).

## 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.

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.

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