



A Child Custody Guide

Nothing is more precious than our children—it is our natural instinct to want to protect and provide for them, is it not? When thinking of separating or getting divorced it can be overwhelming to navigate child custody issues, but we're here to help. Read on to learn more about how child custody works in New York state, and how you can use this information to your advantage when finalizing or modifying your child custody orders and keeping the best interest of your child/children in mind.

All too often, the biggest victims of separation and divorce are our children. Not only are they completely innocent in the matter of our relationships, but it's not uncommon for separating parents to wage war against each other and use the children as emotional weapons. If you have done this or are doing this, you likely want to stop. This is why knowing the basics of New York child custody laws can help you make better, healthier decisions for you and your children in the event of a divorce proceeding.



The Basics of Child Custody in New York

Like many other states, New York can only make child custody orders until the child is 18 years old.

The state creates these orders according to the “best interests of the child,” or their welfare, emotional health, and personal desires and needs. Interestingly, both parents will automatically share both legal and physical custody if the court does not explicitly issue a child custody order.



What’s the Difference Between Legal and Physical Custody?

Legal custody refers to the decisions made on behalf of the child’s general welfare, including but not limited to, education, healthcare, religion, and extracurricular activities. Physical custody, on the other hand, only refers to the parent with whom the child primarily lives.

There is a presumption that parents will share joint legal custody of a minor child. A parent who asks a court to grant sole legal custody must prove that the other parent is unavailable, unfit, uncooperative or so lacking in judgment that joint legal custody would be inappropriate or unworkable. This is a very high burden to meet, and because the right to participate in raising one’s child is constitutionally protected, courts do not liberally award sole legal custody to one parent. Please read that again, if you need to. A reminder, just because you are angry, hurt, or burdened by challenges with your soon to be ex-spouse, does not mean they are unfit as parents.

More often than not, they are not at all unfit as parents, just unfit as your spouse. However, if there is abuse occurring that will factor into their overall assessment with the courts and will need to have a proper amount of documentation.

There is also a presumption that it is in a child’s best interest to have regular and frequent contact with both parents. That means that if the parents cannot agree on a custody and parenting schedule, the court will impose a schedule that allows for parenting time that is fairly balanced, taking into consideration the parent’s work schedules and the wishes and habits of the children. In such cases, we say that the parents “share physical custody.” In cases where a shared custody arrangement is not in the child’s best interests, one parent may have primary physical custody of the child and the other parent would have more limited parenting time or visitation periods with the child. In rare instances, a parent may be

awarded sole physical custody if it is shown that visitation with the other parent would be dangerous or detrimental to the child.

Deciding Factors for Child Custody

Seeing how these child custody orders are determined with the child's best interest in mind, there are a number of important external factors that play into a judge's final decision. For the most part, these factors concern the parents, their parenting abilities, their individual employment situations, their health (i.e., physical, mental, and emotional), and if there is a history of domestic violence in the family.

Previous domestic violence incidents may be one of the biggest deciding factors for child custody orders, as it will significantly affect who gets legal and physical custody. The non-custodial parent (who's usually the parent with the domestic violence charges or convictions) may also have their visitation rights severely limited, or at the very least, supervised by someone from your local social services department.

New York Courts have consistently pointed to a factor they call "willingness to foster" a healthy relationship between the child and the other parent as an important consideration in custody and visitation cases. Parents who denigrate or disparage the other parent, or who take actions that tend to alienate the child from the other parent are considered to be acting against their child's best interests. This factor alone has been the justification for denying or severely limiting a parent's contact with their child.

However, the parents aren't the only people who get a say in the matter; judges care about how the child feels about all of this, too. Therefore, judges will also consider a child's relationships with their immediate family members, their teachers, and peers at school, how well they're currently doing in school, and whether or not uprooting them from their life to go live with one of their parents will negatively impact their physical health or emotional wellbeing. If you go to court to address custody, your child will be assigned a court-appointed "Attorney for the Child" who is paid for by the state. Your child's attorney will advocate for your child's stated wishes unless the child's preference would place the child in imminent danger. If your child is too young to express an opinion or take a position, the Attorney for the Child will formulate a position for the child based on the known facts of the case and advocate accordingly. It is important to know that a child never gets to decide his/her own custody, even if they are almost 18 years old. That being said, the older a child is and the more mature the child's reasoning is for their stated position, the more weight a court is likely to place on the child's position in deciding the final outcome of the case.

What Are Visitation Rights?

Courts generally want the child to have a relationship with both parents, save extreme cases of violence or abuse. If one parent has sole custody, then usually the other parent will enjoy visitation rights, or a schedule outlining when they can and cannot visit with their child. Even though visitation differs slightly from custody, they're usually lumped together in a single divorce proceeding.

Parents aren't the only people who can enjoy visitation rights, though. Siblings, aunts, uncles, and grandparents can also petition a court for visitation rights. For children in foster care, parents have visitation rights to see their child unless their parental rights have been terminated, at which point they are not legally allowed to see their child.

Parents are encouraged to work out a mutually beneficial schedule on their own, but it's not uncommon for judges to make this decision for them if they can't reach an agreement. Usually, this decision is announced in a hearing regarding visitation rights. Unless there's a good reason for the non-custodial parent to not have visitation rights (e.g., past history of violence or abuse), then they'll most likely still get some kind of visitation rights.



Modifying Child Custody Orders

It's possible to change your child custody order in New York, but you must satisfy a few requirements first. To change your child custody order, you'll need to prove that there has been a substantial change in circumstances since the date of your last custody order. What constitutes a substantial change is very fact-dependent, but the change(s) must be substantial and not trivial. You will not be permitted to bring up facts or circumstances that existed or occurred prior to your current custody order. Only new information can form the basis of a custody modification.

Parents usually want to modify the existing order if one of them remarries, has new living arrangements, has new financial problems, or is running into more serious issues, like drug problems or criminal charges.

If you're hoping to modify your current child custody order, it's wise to first consult the other parent and share your thoughts with them. Many times, parents are able to reach a new agreement amicably, which will save you both time and money in the long run. Using a family mediator is a great way to get help coming to an agreement on a new custody arrangement. Once you consensually draft a new

agreement, a judge will likely approve the change.

If you can't work it out with your ex-spouse, though, then you'll need the help of an experienced family law attorney who can help you navigate this process as smoothly as possible.

How WhitsonLaw Can Assist You

Our team of knowledgeable, empathetic family law attorneys at Whitson & Tansey are here to help you mediate and resolve your custody issues if you desire to stay out of court and in control of your outcomes. If the Court is where your custody issue will be decided, we will fiercely advocate for you and help you obtain the best possible outcome in court. Moreover, we can help you with any problems related to child custody, such as spousal support and child support. We understand the sensitive nature of these cases, and we want to help educate and empower you so that you can make the most pragmatic decisions for yourself.

Call or email us today and WhitsonLaw's team of understanding, caring, and compassionate advocates are ready to support and guide you at **518.412.4111** or info@whitsonlawfirm.com