

Custody + Visitation: Definition of Terms

- Custodial parent:** This term generally refers to the parent who has the physical custody of the child for the majority of the time. The other parent is the non-custodial parent.
- Custody Agreement:** An arrangement made by the parents regarding who will care for and supervise the kid/s. Parents have the right to come up with any agreement they see fit. This agreement can be made outside of court or at court-ordered mediation. It will only become an order if a judge signs it.
- Custody Order:** A custodial arrangement ordered by the court that can take the following forms: (a) sole custody, (b) joint custody, (c) “divided” or “split” custody (different custody arrangements for different children or periods of time), or (d) nonparent custody.
- Dependency case:** Cases in dependency court in which there is suspected abuse or neglect in the home and the kid/s may have been removed. In dependency cases, the state opens the case against the parent/s.
- Exclusive custody:** When one parent has sole legal and physical custody rights.
- Legal custody:** This refers to a parent’s right and responsibility to make decisions relating to the child’s health, education, and welfare. A parent could have sole or joint legal custody. *Sole legal custody* gives one parent this exclusive right and responsibility, while *joint legal custody* grants both parents a shared right and responsibility to make decisions regarding the child’s health, education, and welfare.
- Paternity action:** An action to establish that the parties are the legal parents of the children.
- Physical custody:** This refers to a parent the child resides with and is supervised by. A parent can have sole or joint physical custody. *Sole physical custody* grants one parent exclusive physical rights, while *joint physical custody* awards each parent with “significant periods” of physical custody that must be shared in a way that gives the child “frequent and continuing contact with both parents.”

CUSTODY + VISITATION: FAQ

1. If there is no custody order, what are each parent's rights regarding custody of the kid/s?

Without a custody order, both parents have the same, equal rights and responsibilities for the child. Neither parent can interfere with the other parent's rights to have the child with them. Ideally, parents who are no longer together will agree on a custody arrangement without court involvement.

If the parents are no longer together, and there is a disagreement regarding the kid/s, it is important to bring the issue before the court as soon as possible to get resolution. The police cannot assist if there is no order to enforce.

2. Does this answer change if the father's name is not on the birth certificate?

No, a biological father still has parental rights regardless of whether he is named on the child's birth certificate. In addition, even if not named on the birth certificate, the law will *presume* that the person who was married to the child's mother when the child was conceived or born is the legal parent. The father may also establish parentage by signing a voluntary Declaration of Paternity, by court order, by agreement of the parents, or by blood test proving he is the biological father.

3. How does a parent get a custody order?

When there are already two legal parents of a child, one parent can file an action to establish custody and support. In addition, custody can be ordered as part of a paternity action, in a divorce case, in cases where one parent is asking for a domestic violence restraining order against the other parent, or as the result of a dependency case.

4. How does a court determine which parent gets custody?

In the court process, the Judge will require the parents to make one more effort to work together. In all counties in California, parents must participate in mediation with a court employee prior to a hearing on custody. If the parents cannot agree with the help of the mediator, the Judge will make the final determination on all issues regarding the children.

The judge will make the decision based on the "best interest of the child," while trying to ensure that the child gets time to be with both parents. This is a pretty broad guideline, which means that the parent should be able to explain to the court why their custody plan is the best for the child, taking into account the child's school, community, the parents' ability to take care of the child, etc.

5. How is visitation determined?

Generally, a noncustodial parent has the right to "reasonable visitation" unless it is shown that such visitation would be detrimental to the best interests of the child. Among other things, courts have

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found that child abuse and domestic violence are “detrimental.” Courts have broad discretion in defining a parent’s “reasonable visitation” rights and establishing a visitation schedule, the main guideline being the child’s best interests. In addition to prioritizing the child’s health, safety, and welfare, courts will consider such practical factors as the child’s age, maturity, special needs, the parent’s physical proximity to the child’s primary residence, and if appropriate, the child’s own preference.

6. How does a parent modify a custody or visitation order?

If a court has already awarded custody or visitation, it will only modify the order/s upon a showing that such a change is “necessary or proper” in the child’s best interests. The parent seeking to modify the order must show the court that there has been a change of circumstances that would require a modification. This means that the court will have to find that something has changed in the life of the child since the last hearing.

The parent seeking modification will need to go to the Superior Court in the County in which the original order was entered to file a Request for Order. In this document, the parent will explain why he/she wants to change the court order. The parent will get a hearing date and will need to serve the Request for Order on the other parent prior to that hearing date.

7. If a parent has LEGAL custody, what does she have to consult with the other parent about?

If a parent has *sole legal custody*, she must still consult with the other as to where the child will live, what school they will attend, and what medical care they will receive. Even in the case of an exclusive custody order, the other parent’s parental rights are not terminated and he/she still has the right to visitation as ordered by the court and the right to seek and obtain a custody modification based on a proper showing of changed circumstances.

If a parent has *joint legal custody*, she shares decision-making responsibilities with the other parent, even if she has sole physical custody. This means that both parents have rights to decide where the child will live, which school the child will attend, what medical care the child can receive, etc. It is important that the parties work together to make life decisions for the child. Note, however, that *joint legal custody* does not require that the parents agree on all decisions on a daily basis. Unless a court has issued an order requiring mutual consent for specific decisions, either parent acting alone can exercise legal control of the child.

8. What happens if a parent does not consult with the other parent when he/she should?

If a parent is not being consulted when he/she has the right to be involved in the decision-making process, the parent may at any time ask the court to help by making the decision for the parties, clarifying who makes which decision, or changing custody of the child.

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9. What happens if a parent violates a custody or visitation agreement or order?

For minor violations of the custody order (for example, consistently not showing up on time or cancelling visits) the court can make orders to force the parent to comply, up to and including changing custody. The parent who wants the order enforced can return to court to ask for a change in custody. For major violations of the custody order, such as kidnapping, the party can be held criminally liable for their actions. If a parent has kidnapped a child, the other parent should contact the District Attorney.

10. What can a domestic violence survivor with shared custody do to allow her to leave without being accused of kidnapping her child?

If a parent is considering fleeing a home with the child in order to escape domestic violence and does not want the other parent to know where he/she is, it is important to file a "good cause" report with the local District Attorney. Upon the filing of this report, the DA will not attempt to arrest or prosecute the fleeing parent for kidnapping. The DA will also keep the location of the fleeing parent confidential from the abusive parent. However, this only gives the fleeing party 30 days in which to file a motion with the local court to establish custody and visitation.

11. Does custody impact which parent/s can claim a child on his/her tax return?

If the parents are divorced or separated, the custodial parent can claim the child as a dependent for tax exemption purposes. The other parent may only claim the exemption if the custodial parent signs a release. Often, the court will determine who gets to claim a child as a dependent each year if the parties cannot agree.

12. In custody and visitation disputes, when do you need a lawyer's help?

Each court in California has a Family Law Facilitator who will assist anyone with the filing of the necessary paperwork related to custody and visitation. The Family Law Facilitator does not represent anyone or provide legal advice, but they will ensure that your case gets properly filed and set for any necessary hearings.

A parent should seek legal advice or representation if the child's best interests are not being met in the absence of counsel. Obtaining a lawyer is advised if there is a lack of communication between the parents affecting the physical health, safety, and happiness of the child, particularly when domestic violence, child abuse, child neglect, or drug and alcohol abuse are at issue.