

**ESTABLISHING OR MODIFYING
CHILD CUSTODY OR VISITATION
ORDERS**

Topics Covered:

- To understand what is custody and visitation
- To understand what the court looks at in making orders
- To understand how such orders can be changed

WHAT IS “CUSTODY?”

- **Custody refers to who has “responsibility”**
- **2 types:**
 - **Physical custody**
 - **Legal custody**

PHYSICAL CUSTODY:

- Who is *responsible* for the child on the day-to-day level?
- Based on how much time the child spends with each parent
- Determines where the child will live

PHYSICAL CUSTODY:

- **Joint:** Each parent has *significant* periods of physical custody
 - Does *not* need to be 50:50 to be joint
- **Sole:** The child lives with and is under the supervision of one parent and the other parent has “visitation”

VISITATION:

- Times when non-custodial parent has the children and is fully responsible
- Ex.: Every other weekend and one evening during the week
- “Supervised” visitation means that a neutral third party is present during visitation:
 - Done by court order
 - Due to drug, alcohol or physical abuse; mental health problems; or long period of no contact with children

LEGAL CUSTODY:

- Who is *responsible* for making important decisions regarding the children's "health, education and welfare":
 - Ex.: What kind of treatment will the child get for a medical condition?
 - Ex.: Where will the child go to school?
 - Ex.: What religion, if any?

LEGAL CUSTODY:

- **JOINT:** Both parents share the right and responsibility to make the decisions about the child's health, education and welfare
 - Success depends on communication and cooperation
- **SOLE:** One parent has the sole right and responsibility to make the decisions

GOAL OF CUSTODY AND VISITATION ORDER:

- To create a parenting plan that is in the *best interest* of your children:
 - Looking at your child's basic needs
 - Looking at your child's age, personality, experiences and abilities
 - Looking at the nature and amount of contact with each parent
 - Providing frequent and consistent time with each parent
 - Providing a clear statement of parenting times and responsibilities

CUSTODY AND DOMESTIC VIOLENCE

- Rebuttable presumption *against* custody to domestic violence perpetrator
- Violence within the past 5 years
- *Sole or joint physical or legal* custody to the perp would be detrimental to the child's best interest (Fam. C. §3044.)

DRUG OR ALCOHOL TESTING: CUSTODY & VISITATION ORDERS:

- Court can order testing if preponderance of evidence shows “habitual, frequent, or continual use”
- Can consider prior convictions in past 5 years
- Test results are confidential & may be used only in custody/visitation hearing
- Positive test alone does not determine custody (Fam. C. §3041.5)

HOW TO GET YOUR FIRST CUSTODY ORDER:

- Create a **voluntary agreement** by yourselves or through mediation that is signed by a judge, *or*
- **Go to court** and have a judge decide the custody/visitation issues
- Either way needs to be based on the *best interest* of the child

FAMILY CUSTODY SERVICES

MEDIATION:

- ***Free*** service through the court when you have a court case
- Uses neutral 3rd person to help you and the other parent resolve custody/visitation problems

FAMILY CUSTODY SERVICES

MEDIATION:

- ***Goals:***
 - To help communication between the parties
 - To develop a parenting plan agreement that gives both parents close and continuing contact or other other levels of contact with the children, according to what is in the *best interest* of the child

HOW FCS MEDIATION WORKS:

- You, the other parent and each child over 5 years old speaks individually with the mediator
- You and the other parent then meet together with mediator
- **Agreement?** It's put in writing, parties sign, then it's ordered by the court
- **No agreement?** You'll need to go to court for the judge to make an order

CHANGING A CUSTODY ORDER:

- **Temporary orders** (made by stipulation or “agreement”): Can be changed at any time by looking at the *best interest* of the child
- **Permanent/final judicial custody determinations:** Can be changed **only** if the court *first* finds a “*change of circumstances*” now exists

“PERMANENT” OR “FINAL” CUSTODY ORDER:

- Can be the result of the court’s decision following hearing on the merits, or
- Can be based on an agreement between the parties (“stipulation”) *if* it’s shown in writing and by actions that the parties have clearly & affirmatively intended a permanent and final result

IF THE ORDER IS PERMANENT: YOU NEED TO SHOW A “CHANGE IN CIRCUMSTANCES”:

- You *first* must prove a “material change in circumstances” to the judge: How significant facts are different from when the court last decided the custody issue
- If you *can't prove this*: The court will *not hear* your case

EXAMPLES OF “CHANGE OF CIRCUMSTANCES”:

- New unfit parenting
- New abuse
- Frustration of visitation/parental alienation (courts can't agree)
- One parent moving away?

MOVING AWAY: JOINT PHYSICAL CUSTODY CASE:

- Court will use “best interest” of child test
- Moving parent needs to give adequate notice of intention to move away
- Both parents need to be able to do mediation prior to move-away
- Both parents need to have opportunity for formal custody evaluation

MOVING AWAY: Parent with SOLE PHYSICAL CUSTODY:

- **Rebuttable presumption: “Primary” custodial parent has the right to move with the children**
- **To stop the children’s move, left-behind parent must show that the move would cause “detriment” to the children**

FACTORS TO CONSIDER AS POSSIBLE “DETRIMENT”:

- Child’s need for stability and continuity
- Distance of the move
- Children’s ages & community ties
- Children’s relationships with both parents
- Quality of relationship between parents
- Children’s wishes (“sufficient age & capacity”)
- Reasons for the move
- Scope of shared parenting

“DETRIMENT” :

- Ex.: Impact of the move away on the left-behind parent’s relationship with the children (10; 100; 1000; 10,000 miles away)
- Ex.: Senior in high school
- Ex.: Developmentally disabled child
- Ex.: Child with special medical needs

IF DETRIMENT IS FOUND...

- The court can then look at all the relevant factors to determine if a change of custody is in the child's best interests
- It's nevertheless **very hard to overcome the custodial parent's presumptive right to move**

CHANGE IN VISITATION:

- Do ***not*** need to show a “change in circumstances”
- Can always ask the court to make minor changes in the parenting schedule
- New plan needs to be in child’s best interests

TO ESTABLISH OR MODIFY CUSTODY OR VISITATION:

- YOU NEED TO:
- Have or open a court case in Santa Barbara
- Attend the Children in the Middle parenting class
- Attend Family Custody Services mediation
 - Sign an agreement, *or*
- File papers to get a hearing in court

NEEDED COURT PAPERS:

- Notice of Motion or Order to Show Cause
- Application for Order
- Declaration
- Notice of F. C. S. Mediation
- Notice of Required Attendance at Children in the Middle

OTHER REQUIREMENTS:

- Type your legal papers
- File the proper documents
- Pay your filing fee or get a fee waiver
- Get the other party properly served

FINAL STEPS:

- Attend the Children in the Middle parenting class
- Attend Family Custody Services mediation
 - Sign an agreement, *or*
- Go to court

FAMILY LAW FACILITATOR:

- Can help with legal papers
- Can help with service
- Can help with filing
- Does ***not*** go to court with you
- Does ***not*** represent you