

CHILD CUSTODY AND VISITATION INTRODUCTION:

1. Physical Custody is a term that refers to the individual with whom the child actually lives. The court is concerned with the "best interests of the child" and will go along with any living arrangement agreed to by you and your spouse, provided, that you two are looking out for the best interests of your child. It is usually in the child's best interest to maintain a healthy relationship with each parent and to spend as much time as possible with each parent. There are joint custody and sole custody.

2. Legal custody refers to who makes decisions about issues of health, education, and welfare and includes such things as schooling, religious training, summer camp, birth control information, medical care, and getting a driver's license. Joint legal custody is most common, but a court can award sole legal custody to one parent.

3. Visitation rights are granted to the parent who does not have physical custody of the child. Visitation agreements should help ensure frequent and continuing contact with both parents. Parents can agree to any schedule. A provision for payment of travel expenses should be included. A parent cannot deny visitation because of nonpayment of child support.

Custody and visitation can be modified, although it may be difficult and expensive. Modification by the court is allowed, if there is a change of circumstances that would make a modification in the best interests of the child.

FAQs:

1. Q. CAN A LEGAL ASSISTANCE ATTORNEY HELP ME GET A COURT DECREE FOR CUSTODY?

A. No. You will need to retain a civilian attorney for the preparation of the papers and the appearance in court. We can, of course, help you to find an attorney to help you obtain child custody.

2. Q. DO MOTHERS AUTOMATICALLY GET CUSTODY OF THEIR CHILDREN WHEN A SEPARATION OCCURS?

A. The courts of most states do not establish an automatic preference for either mother or father, but they do look very closely at which parent will best promote the welfare and interests of the children of the couple.

3. Q. WHAT KINDS OF FACTORS DO THE COURTS CONSIDER IN GRANTING CUSTODY?

A. The normal issue in a custody determination is the "best interest of the child." The court determines what is in the "best interest of the child." They usually look at who has primarily taken care of the child during the marriage (washing, feeding and clothing the child, for example, or helping the child with homework), who has the best approach to discipline, who has cared for the child since separation (if the couple has already separated), sharing of love and affection with the other parent, integration of the child into home and community, physical and mental health of the child and parents, what work schedules either or both parents have, and how each parent can provide for the physical, emotional, educational, religious and social needs of the child.

4. Q. CAN THE CUSTODY ORDER BE CHANGED?

As mentioned in the introduction, the custody award can be modified. In order to modify a child custody award, a parent must prove there is a substantial change in circumstances affecting the welfare of the child and that the change is in the best interests of the child or children. The court looks at the many factors such as those stated in the prior answer to determine who gets custody. No custody order is ever *permanent*.

5. Q. WHAT IS JOINT LEGAL CUSTODY?

A. Joint legal custody is when the parents share legal custody and the arrangement is approved by the court. Although one parent will likely have physical custody of the child, the decisions regarding the child's education, religious upbringing and care are made by both parents. This type of custody requires cooperation between the parents in order to work. If disagreements arise and the parents cannot resolve them, they must return to the court that approved the joint-custody agreement for resolution.

6. Q. CAN THE COURT ORDER AWARD ATTORNEY'S FEES TO ME IN A CUSTODY CASE?

A. If the person asking for attorney's fees is acting in good faith and is unable to afford the legal expenses of the lawsuit, it is possible (but not mandatory) for the court to award reasonable attorney's fees as part of the custody order.

7. Q. DO I HAVE TO FILE FOR CUSTODY IN CALIFORNIA?

A. No. While usually a custody suit is filed where the child is presently residing, a person can file an action involving custody of a minor child in the "home state" of the child (i.e., where the child has lived for the last six months) or in any state where the child and one parent have substantial and significant contacts and connections (such as former neighbors, teachers, doctors, relatives and so on).

8. Q. CAN I FILE FOR CUSTODY WHILE OVERSEAS (GERMANY, KOREA, ITALY, JAPAN, ETC.)?

A. You certainly can ask the courts in the country where you or your spouse is stationed to grant you custody of your son or daughter if he or she is living in that country. In almost all cases the physical presence of the child within the court's jurisdiction (i.e., in the area served by the court) is essential to consideration of a custody claim. But you probably shouldn't file there.

9. Q. WHY SHOULDN'T I FILE THERE?

A. Except for rare situations, such as when a child is physically in danger, you should not file overseas for custody of a child who is a U.S. citizen because the resulting court order is not binding on the courts back in the United States. If you or your spouse will be returning to the U.S., you will in all likelihood have to go to court again to ask for custody in the county where the child is living since no law requires a state court judge to recognize or obey another nation's court order for custody (just as no law compels a Korean or Italian judge to honor an American custody order).

10. Q. BUT IF I GET A U.S. CUSTODY ORDER, WON'T I HAVE TO GO THROUGH THE SAME ROUTINE WHENEVER I'M ASSIGNED TO A NEW DUTY STATION IN A DIFFERENT STATE?

A. No. Under the provisions of the Parental Kidnapping Prevention Act, a federal law, and also of the Uniform Child Custody Jurisdiction Act, a law passed by all 50 states, each state is **required** to recognize and honor the custody decrees of its sister states. The court must enforce the other state's custody order as if it were its own order. In addition, the above statutes require each state to set up a "custody order registry." This is a place where you can file or register the custody order you got in another state. That way, the courts in **State A**, where the child may be visiting a parent, will know that there is a custody order in **State B** giving the other parent legal custody of that child. Contact a lawyer or assistant court clerk in the second state about how to register one state's custody order in another state.

11. Q. IF THE OTHER PARENT DOES NOT LIKE THE PRESENT CUSTODY ORDER, CAN HE OR SHE FILE FOR CUSTODY IN ANOTHER STATE?

A. Under the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, the court in a custody case must always inquire into whether the child or children have been the subjects of custody litigation in any other state. When a judge finds that another court has made an award of custody, the judge should refuse to rule on the case. Only if the first court has released or transferred jurisdiction to the new state court may that court assume jurisdiction to hear the custody case (unless there is an immediate and clear emergency affecting the child's welfare).

12. Q. CAN THE COURT AWARD ATTORNEY'S FEES TO ME IN A CUSTODY CASE?

A. Under the law of some states, if the person asking for attorney's fees is acting in good faith and is unable to afford the legal expenses of the lawsuit, it is possible (but not mandatory) for the court to award reasonable attorney's fees as part of the custody order. This is not the rule in every state, and you would need to check with your legal assistance attorney or civilian lawyer to find a specific answer to this question.

13. Q. WILL MY SEPARATION AGREEMENT PROTECT ME FROM THE OTHER PARENT SNATCHING MY CHILD?

A. No. A separation agreement, which hasn't been incorporated into a court order or divorce decree, is **only a contract** between you and the other parent, not a court order. A court order is enforceable by contempt of court. Court orders of one state can be filed and registered in another state and thus be treated as if they were issued by the second state for purposes of enforcement. None of this applies to separation agreements which are not incorporated into a divorce decree. If, on the other hand, your separation agreement has been **incorporated into a court decree** in your home state, then it is a court order and is enforceable by contempt of court.

14. Q. IF MY SPOUSE IS GRANTED CUSTODY, WILL I GET VISITATION RIGHTS?

A. Ordinarily the noncustodial parent is entitled to reasonable visitation rights with a minor child except in extraordinary situations, such as when the noncustodial parent has a history of abusing the child. Visitation can be flexible and unstructured, assuming the parties can get along and agree on the times and terms of visitation, or it can be highly structured and rigid, with certain days and times set out with great specificity.

15. Q. WON'T CUSTODY BE SETTLED WHEN I OBTAIN A DIVORCE?

A. Divorce decrees do not necessarily settle custody matters. In some states, such as New York and Wisconsin, all issues concerning the marriage and separation -- custody, child support, visitation, etc. -- are handled at or before the divorce is granted. In other states, such as California and Delaware, the divorce is handled separate from these issues, and a custody order

can be entered before or after a final decree of divorce or dissolution. In those states, a custody or visitation order can be entered before or after a final decree of divorce. In any event, you should remember that you must file a request with the court (sometimes called a complaint, petition or motion) in order to get the court to consider the issue of child custody or visitation regardless of whether it's at the time of divorce or at another time.

16. Q. CAN I REGISTER A COURT ORDER FROM ANOTHER STATE HERE IN CALIFORNIA SO THAT CALIFORNIA CAN TREAT IT AS ONE OF ITS OWN DECREES FOR PURPOSES OF ENFORCEMENT?

A. Yes. You may file and register the other state's decree with the Clerk of Superior Court at any county courthouse. You may want to register the decree in the county where you reside or in the county where the other parent lives.

17. Q. IF THE OTHER PARENT DOES NOT LIKE THE PRESENT CUSTODY ORDER, CAN HE OR SHE FILE FOR CUSTODY IN ANOTHER STATE?

A. Under the Uniform Child Custody Jurisdiction Act, which has been passed and made law in almost every state, the court in a custody case must always inquire into whether the child or children have been the subject of custody litigation in any other state. When a judge finds that another court has made an award of custody, the judge should refuse to rule on the case and refer the parent to the court that originally entered the custody order. Only if that original court no longer has jurisdiction and has released or transferred jurisdiction to the new state court may that court assume jurisdiction to hear the custody case (unless there is an immediate and clear emergency affecting the child's welfare).

18. Q. IF I WANT TO GET A CUSTODY ORDER IN THE OVERSEAS COUNTRY WHERE I'M STATIONED, WILL THE COURTS THERE ALLOW IT?

A. As a general rule, yes -- so long as two conditions are met--

The child was physically present in that country when the court order was entered; and

The child continues to be present in that country.

A judge will **usually** refuse to enter a custody ruling if the child involved is **somewhere else**, rather than within the court's jurisdiction (the area served by the court). Thus if the mother is stationed in Heidelberg but the father and their daughter are back in Ohio, the German courts are not likely to allow mom to proceed with a custody case there. If, on the other hand, mom and her daughter were in Germany and mom wanted to file there for custody because of an emergency involving the father -- such as physical or sexual abuse, attempted kidnapping, substance abuse or domestic violence -- the courts there would probably allow it.

19. Q. WHAT IF I GET CUSTODY IN THE STATES BUT I GET "UNACCOMPANIED" DEPLOYMENT ORDERS OVERSEAS. CAN'T I JUST LET MY FOLKS LOOK AFTER MY DAUGHTER TILL I GET BACK? DO I HAVE TO TELL MY EX-WIFE?

A. It depends. You can certainly let your parents care for your child (unless your custody order says otherwise). The same goes for "telling your ex" -- you don't have to do this unless your court order requires it. If you assume that the other parent will not attempt to exercise visitation, will not try to phone and talk to your daughter, and won't find out about your absence in any other way, then you shouldn't have any reason for concern.

20. Q. BUT WHAT IF MY "EX" FINDS OUT I'M GONE? DOES THAT MEAN SHE CAN JUST TAKE MY DAUGHTER? THAT'S NOT FAIR!

A. First, let's remember that it's "our daughter" that's involved, not "my daughter." Unless your ex-wife's parental rights have been terminated by the court (or her visitation rights suspended), she has certain rights to see the child. And if there is a custody dispute, it will be up to the judge to decide "what's fair," not either of the parents. Your ex-wife will need a court order to get custody of your daughter if you leave. She will have to apply to the court for an order and, except in an emergency, she'll have to serve you with a copy of the motion or petition and a notice of hearing for the trial. As soon as you're served with legal papers, take them to the nearest legal assistance office so they can advise you on what to do.

21. Q. WHAT WILL THE COURT DO IF MY "EX" REQUESTS CUSTODY WHILE I'M DEPLOYED OVERSEAS?

A. It's impossible to tell. If you're only gone for a couple of weeks' TDY, there might not be a problem. If, on the other hand, you're sent to Korea for a year, the court is free to find that a substantial change in circumstances has occurred and award custody to someone else.

22. Q. MY EX-HUSBAND HAS LEGAL CUSTODY OF OUR DAUGHTER. HE SAYS HE'S GOING TO TAKE HER OVERSEAS WITH HIM TO HIS NEXT ASSIGNMENT. CAN HE DO THAT?

A. Yes - Unless a judge orders him not to take her. A parent with legal custody can take a child with him wherever he goes to live in the absence of a court order prohibiting this.

23. Q. CAN HE GET A PASSPORT FOR HER? SHE'S ONLY 11.

A. The U.S. Department of State issues almost 1 million passports annually to children under 18. These passports are valid for 5 years (as compared to an adult passport which is good for 10 years). He can get a passport for her as well as a military dependent ID card (you have to be 10 years old or above to get one of these).

24. Q. HOW DO I GET A PASSPORT FOR A CHILD?

A. Either parent can apply for a passport for a child who is a U.S. citizen. The parent who applies does not have to be an American citizen. The application is available at designated Postal Service offices. The parent must sign the form if the child is under 13 years of age. Issuance of a passport to one parent doesn't automatically stop the other one from obtaining a second passport for the child. Once it is issued, the passport's use is not "tracked" or controlled by the State Department. Either parent can request and obtain information as to the issuance of a passport for a child.

25. Q. I AM AFRAID MY WIFE WILL KIDNAP OUR SON. ISN'T THERE ANY WAY I CAN FIND OUT IF SHE'S GOTTEN A PASSPORT FOR HIM?

A. Every year the U.S. Department of State receives nearly 3,000 reports of actual or expected abductions. About 1,000 of these involve children of dual nationality. The State Department has set up a "Namecheck Clearance System" as a lookout system for the denial of U.S. passports. While it's not a passport use tracking system, it does provide information to a parent or court about when a passport application is submitted on behalf of a child.

26. Q. HOW DOES THE NAME CHECK CLEARANCE SYSTEM WORK?

A. It works in two ways. If the State Department has on file a court order that prohibits travel outside the U.S., grants custody to the parent who isn't applying for a passport, or grants joint custody to both parents, then the passport will be denied. If the State Department

has on file a written request for information for a parent, guardian or court, then the Department will notify that parent, guardian or court if a passport application has been submitted for a child. The Namecheck Clearance System remains effective until the child turns 18 or a written request is made to end it. Changes in address, phone number or name should be made in writing.

27. Q. HOW CAN I USE THE NAMECHECK CLEARANCE SYSTEM TO REQUEST INFORMATION ON THE ISSUANCE OF A PASSPORT TO MY CHILD?

A. Here's how it works: Your written request must include -- the child's full name, his or her date and place of birth, your name, address and telephone number. If there is a court order giving you custody of the child, include that also (a certified copy is not required). You should also include any of the following helpful information: other names by which the child is known; where the child is located at present; where the other parent resides; whether an American passport has been previously requested (and, if so, the previous passport number), and that status of any court case between you and the other parent.

28. Q. WHEN WILL THE STATE DEPARTMENT DENY A PASSPORT FOR MY CHILD TO THE OTHER PARENT?

A. In order to deny a passport, the State Department must be provided with a court order that --

- > Grants you full custody; or
- > Grants joint custody to both parents (in which case both parents must consent before a passport will be issued); or
- > Places limits on a child's travel, such as requiring that the child not leave the United States; or
- > Requires that both parents (or the court) agree to the child's obtaining a passport and/or traveling outside the United States.

29. Q. WHERE DO I SEND MY REQUEST?

A. The *Namecheck Clearance System* is located at:

Office of Passport & Advisory Services
1111 19th Street NW, Suite 260
Washington DC 20522-1705.

You may fax your request to: 202-955-0230.

30. Q. WHAT IF MY CHILD HAS DUAL CITIZENSHIP?

A. Sometimes an American child acquires citizenship in a second country. This occurs when one of his or her parents is a "foreign national" (not a U.S. citizen). It is important to remember this in the passport application process. Simply because a child can't get a U.S. passport does not mean that he or she cannot travel abroad on another nation's passport. If your child has another nationality, be sure to contact that country's embassy or consulate to ask about procedures for denial of a passport for that country (or notification of application). Please be advise that there is no requirement that other countries or their embassies comply with U.S. laws and regulations as to the issuance or denial of their passports to U.S. citizens who are children with dual nationality.

31. Q. WHERE CAN I GET MORE INFORMATION ABOUT THE ISSUANCE OR DENIAL OF U.S. PASSPORTS TO CHILDREN INVOLVED IN CUSTODY DISPUTES?

A. Call the State Department's Bureau of Consular Affairs at 202-955-0231 and ask for "the duty officer." In addition, if you have access to a computer and an on-line service, you can get information on the Internet at the following home page:

http://travel.state.gov/passport_assistance.html.

For information on international child abduction, contact the Office of Children's Issues at 202-736-7000, or go to their home page at <http://travel.state.gov>.

32. Q. MY SPOUSE HAS LEFT THE COUNTRY AND TAKEN OUR CHILDREN. WHAT CAN I DO?

A. The Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act (ICARA) provide remedies for a parent whose child or children have been taken to another country. The Hague Convention and ICARA establish the procedure for responding to these cases and the remedies available to the parent who is left behind. The Convention only applies between the forty or so member nations. The primary objectives of the Convention are to secure the prompt return of children wrongfully removed or retained and to ensure that rights of custody and visitation are respected. The Convention does not apply in all cases. The procedures for obtaining assistance are outlined below.

33. Q. WILL THE COURT ORDER THE RETURN OF MY CHILDREN?

A. The Convention does not require a court to order the return of children when a parent has consented or acquiesced in the removal or retention of children. The Convention does not apply to children over the age of sixteen or cases where proceedings are filed more than one year after the child is removed. When the child is old enough, the court may refuse to order his return if he does not want to go. The court may also refuse to return a child if the court determines that the child's return would create a grave risk of physical or psychological harm to the child.

34. Q. WHERE WILL THE CUSTODY DETERMINATION BE MADE -- HERE OR THERE?

A. The purpose of the Hague Convention is to ensure that custody and visitation rights are decided by the court in the appropriate country. The selection of the appropriate country requires a determination of which country is the child's place of habitual residence. The term "habitual residence" has been interpreted to mean "ordinary residence" or the child's customary residence prior to removal. Habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective. Application of this standard must focus on the child's circumstances and the parents' present shared intentions regarding their child's presence there.

35. Q. DON'T I HAVE TO HAVE A COURT ORDER OR A SEPARATION AGREEMENT TO KEEP MY SPOUSE FROM LEAVING WITH THE CHILDREN?

A. Rights of custody or visitation may arise from a court order or an agreement of the parties. When neither of these exists, the law of the country of habitual residence determines custody and visitation rights. In the absence of an order or agreement, in most countries the parents will have equal rights to custody. When one party removes a child without a court order or the consent of the other parent, or refuses to allow visitation, the removal or retention is wrongful and violates the Convention. The existence of an order or agreement can be very helpful in avoiding the removal of a child or facilitating a child's return.

36. Q. CAN I PREVENT MY SPOUSE FROM LEAVING THE COUNTRY WITH OUR CHILDREN?

A. There are things that you can and should do to reduce the risk of abduction or retention. If there is a substantial risk that your child's other parent will remove a child or refuse to return a child who is visiting in another country, you should obtain a court order or an agreement on custody. The order or agreement should prohibit the child's international travel without your consent or judicial authorization. You may also consider requesting that a bond be posted as a requirement for international travel. You should also contact the organizations listed at the end of this handout for additional information on how you can reduce the risk of abduction and facilitate return.

37. Q. CAN I ENFORCE MY RIGHTS TO VISITATION WHEN MY CHILDREN ARE IN ANOTHER COUNTRY?

A. The Convention also addresses visitation (access) rights. It permits, but does not require, the court in the country where the child or children are located to order that they be made available or sent for visitation with the noncustodial parent. It also does not require the parent who has wrongfully withheld access to pay for the innocent spouse's attorneys' fees and costs. It only requires the court to "take steps to remove, as far as possible, all obstacles" to the exercise of visitation rights. This may mean that the court will enforce visitation rights on the condition that they be exercised within the country.

38. Q. WHAT ABOUT ATTORNEYS' FEES AND TRAVEL COSTS?

A. Any court order requiring the return of a child pursuant to the Convention must order the other parent to pay the necessary expenses incurred by or on behalf of the innocent parent, including court costs, legal fees, foster home or other care during the course of the proceedings in the action, and transportation costs related to the return of the child. There is no similar authority in visitation cases. However, a state court properly exercising jurisdiction over the custody or visitation issues can impose these requirements.

39. Q. WHOM CAN I CONTACT FOR HELP?

A. Here are some sources of help:

> For specific California child custody and visitation information visit the California Bar Association website at <http://www.courtinfo.ca.gov/selfhelp/family/custody/>

> For help with initiating a Hague petition to the return of a child or enforcement of visitation rights contact: Office of Children's Issues, CA/OCS/CI, Room 4811, Department of State, Washington, D.C. 20520-4818, 202-736-7000, FAX 202-647-3000.

> For additional information on how to prepare for the risk of child abduction or search and recovery contact the Office of Children's Issues and the National Center for Missing and Exploited Children, 2101 Wilson Boulevard, Suite 550, Arlington, VA 22201, 1-800-843-5678.

40. Q. IF I HAVE OTHER QUESTIONS, WHAT SHOULD I DO?

A. See a legal assistance attorney or private attorney as soon as possible. Your lawyer can answer many questions and help you to make a fair and intelligent decision about your choices, options and alternatives. Our legal assistance office stands ready, willing and able to help you in these matters. Be sure to bring along with you to the interview a copy of any documents or court papers that might be helpful to your attorney. We are located in building 275, phone 242-5084.

