

# Custody and Visitation

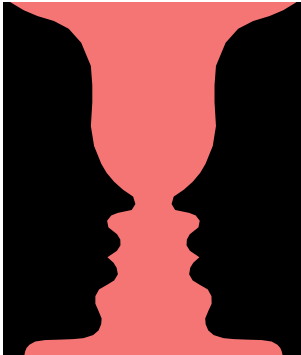
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# Custody and Visitation

## Introduction

In all legal matters concerning child support, custody, and visitation the main consideration will always be: What is in the best interest of the children? Courts universally recognized that even after a divorce or separation, both parents have a duty to provide for the support and well-being of their children. In deciding which parent will have custody, when visitation will be allowed, and how much child support should be paid, the court has two goals: to allow each parent to maintain a relationship with the children, and to require each parent to contribute to the care and upbringing of their children.



The parent who does not have physical custody of the children is called the non-custodial parent. He or she usually will be ordered to provide a set amount of money each month as child support, and usually will be allowed reasonable rights of visitation with the children. The parent who has custody is called the custodial parent. He or she provides the everyday care and maintenance.

Divorce is a difficult situation for many children. They suffer most when they are used as weapons in continuing battles between their parents over custody, support, and visitation. The principle that guides Nebraska judges in making their decisions is – "What is in the best interest of the children?"– This principle should guide parents as well.

## Custody

### Who will get custody of the children?

In many cases, custody is agreed upon by the parents before the divorce hearing. The court usually accepts the parents' agreement as long as it meets the test of being in the best interest of the children. If the parents cannot agree, the issue goes to trial and a judge decides.

The law states that the judge shall not give preference to either parent based on the sex of the parent or children, and that the court shall not presume that either parent is more fit than the other to have custody.

A judge considers many factors determining custody.

These include:

- who actually takes care of the children most of the time;
- who has the closest relationship with them;

- each child's age
- the character and stability of each child and each parent;
- the mental and physical health of the parents and the children;
- the wishes of the children, if they are mature enough to express their wishes;
- the effects on the children of continuing or disrupting their existing situation;
- certain elements of the parents' and children's lifestyles, such as neighborhood, school, church, employment and relatives.

### At what age are the children's wishes considered?

There is no set age. If the children are old enough to understand and discuss the situation, the judge may take their wishes into consideration regardless of how young they are.

In contested cases, Nebraska judges often appoint a lawyer to serve as a "guardian ad litem" to represent the interest of the children in a custody dispute. The guardian ad litem's role is to evaluate the situation and make a recommendation to the judge regarding custody. The judge may order one or both parties to pay the fees of the guardian ad litem.

At the request of either parent the judge may decide to visit personally with children. In those instances, the visit will generally be in the judge's chambers or office, and the attorney for each party may or may not be allowed to be present. However, the parents will not be present, and the children will have an opportunity to express their feelings regarding custody.



### Is joint or shared custody allowed?

A joint custody arrangement gives each partner more involvement in the day-to-day decisions about the children. Joint legal custody often is accompanied by shared physical custody in which the children live part of the time with one parent and part of the time with the other. Child support may still be ordered in a joint custody arrangement.

Joint custody requires divorced persons to work together closely, and so may not be the right arrangement for everyone. However, joint custody may be awarded after a hearing in open court. Both parents must agree to joint custody, and both parents must have demonstrated to the court that they have the ability and the commitment to work together in the best interest of their children.

### Is the custody decision final?

Custody of minor children is never "final" because the court has legal authority over the children until they reach the age of majority (19 in Nebraska). Custody can be changed, but judges do not like to shuffle children back and forth between parents by repeated custody changes. Courts are reluctant to change a custody order unless there

has been a significant change in circumstances that makes it in the best interests of the children to do so. If you want to seek a change in custody, first talk to your lawyer. He or she will help you evaluate your case based on the facts and the law.

Parents sometimes agree between themselves to a change in custody. In this situation, the parent who was originally ordered to pay child support must continue to do so unless he or she obtains a court order authorizing termination or suspension of support payments. Informal agreements between the parents will usually not be recognized in the event that one spouse later asks the court to order the payment of past due child support.

## Visitation

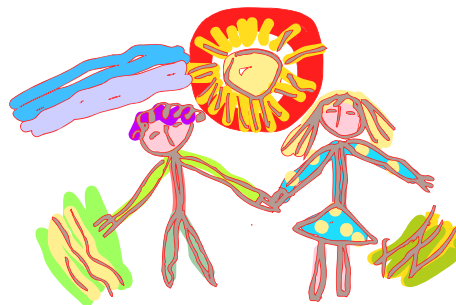
### How is visitation determined?

In many cases, the parents agree on a visitation arrangement before the divorce hearing is held. If the parties reach an agreement, the judge will usually approve it as long as it is in the best interest of the children.

Every visitation schedule is different, and the court and the parents have a great deal of flexibility in establishing a schedule that meets the special needs of each parent. A typical visitation schedule might allow the non-custodial parent to have the children every other weekend and one day during the week. The non-custodial parent is also generally allowed from two to four weeks of extended visitation during the summer. Holidays and special occasions are often shared or alternated between the parents.

### Can the parents change the visitation schedule?

The purpose of visitation is to encourage an ongoing relationship between the child and the non-custodial parent. The court relies on the parents to work out a specific schedule. The Nebraska Supreme Court has said that the unique problems that arise with visitation are best worked out between the parents. They can agree to changes in the visitation schedule as their family needs change. As a last resort, if arrangements between the parents cannot be worked out, either parent may ask the court to order a specific visitation schedule.



### Can the children be moved out of state?

If the custodial parent wishes to move out of state with the children, he or she must request and receive the court's approval. The non-custodial parent must be notified and may appear and give evidence at a hearing. The court will generally allow the move as long as it is in the best interest of the children and as long as the non-custodial parents' "reasonable rights of visitation" are adequately preserved. In the event that one parent moves, visitation is often set in blocks of time, such as part of summer or winter vacations, depending on what is possible financially and what is reasonable in terms of the distance to be traveled.

### Can visitation rights be eliminated?

The right of visitation with one's children is an important right, and one which the court will deny only in extraordinary circumstances. (Before a court would terminate any right to visit, supervised or limited visitation or other restrictions might be tried.) If visits with the non-custodial parent are believed to be harmful to the children, the custodial parent may ask the court in which the divorce was granted for limited or supervised visitation. The custodial parent must be able to prove the need for this restriction.

### May a parent withhold visitation if the other parent doesn't pay child support? May a parent withhold support if the other doesn't allow visitation?

No. Child support and visitation are separate matters. A non-custodial parent does not have the right to stop paying support if visitation is withheld. Likewise, the custodial parent does not have the right to withhold visitation if child support is not paid. The children should not suffer because of a conflict between parents.

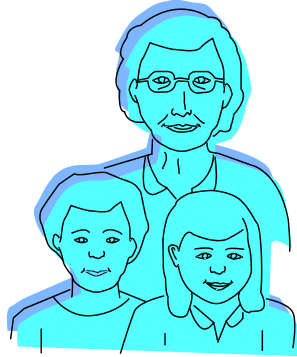
If disagreements over visitation or child support cannot be worked out between the parents, the correct way to resolve them is to take the matter back to court. When either parent refuses to follow the orders of the court, the judge may find that person in contempt of court and may impose penalties ranging from fines to imprisonment for up to six months. Under Nebraska law, a person found in contempt of court for failure to allow visitation may be ordered to pay the other person's attorney's fees. Instead of withholding child support or denying visitation the parent should first try and work out an agreement with the other parent; if this is not successful, the parent should ask his or her lawyer to request enforcement of the court's orders.

### Can grandparents be awarded visitation?

In rare instances, grandparents may be awarded visitation rights with their grandchildren. Nebraska law gives the authority to award visitation to grandparents if either or both of the child's natural parents have died, or if the parents are divorced or in the process of getting a divorce, or in the case of an unmarried couple if paternity has been legally established.

Before awarding visitation, the court must find that the grandparents had previously established a significant, beneficial relationship with the children, and that it is in the best interest of the children to continue that relationship. The court must also determine that allowing visitation with the grandparents would not interfere with the parent-child relationship.

In situations that do not meet all of these special requirements, Nebraska courts are unlikely to order visitation rights for grandparents.



### Rights of Custodial and Non-custodial Parents

#### Must the parents give notice of any change of address?

Because the court continues to have legal authority over all minor children in a divorce, state law requires both parents to keep the Clerk of the District Court advised of their current address or employer. This helps in the enforcement of child support orders and visitation rights.

#### Who takes the children as an income tax deduction?

In divorce decrees entered after January 1, 1985, the law is clear. The custodial parent is allowed to claim the children as dependents for purposes of federal and state income tax returns, unless the property settlement or decree provides that the non-custodial parent may claim them. If the decree or settlement agreement allows the non-custodial parent to claim the children, the custodial parent must sign a waiver of his or her right to claim them so that the waiver can be attached to the non-custodial parent's tax return.

If there is no agreement allowing the non-custodial parent to claim the children, the court will generally not involve itself in a tax determination and the custodial parent will be allowed to claim the children as dependents.

### Can a child's last name be changed without the other parent's permission?

The district courts in Nebraska have the authority to change a person's name, upon application. The court will not automatically grant such a request; there must be proper and reasonable cause to do so.

When a father supports the children and exercises his visitation rights, requests to change the child's last name to the mother's maiden name or to her new married name are usually denied. Even in situations where the father has not paid child support or visited the children, courts may not be willing to sever this tie between father and child. However, the district court will consider all circumstances relating to the welfare of the child in determining whether to grant a change of name.

### Can children be adopted by a stepparent?

In some instances, a non-custodial parent will agree to the adoption of his or her children by a stepparent. Such a voluntary adoption means that the non-custodial parent's obligations and rights with respect to those children, including the obligation to pay child support, are ended. Without the natural parent's consent, a court would first have to terminate the parent's rights before an adoption would be allowed. Except in unusual cases where abandonment or neglect can be shown, courts are extremely reluctant to take that step. Consult with a lawyer to learn more about stepparent adoption in Nebraska.

### Does the non-custodial parent have any say about how the children are raised or how support money is spent?

If the non-custodial parent feels that the children face some potential harm from the way they are being raised, the parent may ask the court to grant a change in custody, or to give some instruction to the custodial parent regarding how the children are raised. However, courts do not wish to become involved in family disputes, which are based only on a difference of opinion between the parents about how the children are being raised. The court will generally take action only if custodial parent's actions can be proven to be harmful or contrary to the best interest of the children.

If the non-custodial parent believes that child support is being spent for purposes other than the health, education and welfare of the children, that parent may ask the court to order the custodial



parent to provide an accounting of how the money is spent. The non-custodial parent cannot force the other parent to make such an accounting without a court order.

Unless the non-custodial parent can prove that the custodial parent seriously and continuously misuses child support money, it is doubtful that the court would be willing to step in. If the case is extreme, and the judge finds that the child support money is being spent improperly, he or she may order a reduction in child support, order that some or all of the support be paid to a trust for the benefit of the children, or order the parent to make reasonable use of the support payments. Failure to do so could subject the custodial parent to contempt of court proceedings.

### **If the custodial parent dies, who gets custody of the children?**

Nebraska courts have determined that the natural parent has a superior right to custody unless proven unfit or unless his or her parental rights have been terminated. The custodial parent may write a will stating a preference for someone else to be named as guardian of the minor children, but a court will give preference to the surviving natural parent to take custody of the children.

### **A reminder to parents**

Most divorces are the result of problems between husbands and wives. They are rarely "caused" by the children. Unfortunately, however, it is the children who suffer the most by being caught in the middle when their parents continue to disagree over such matters as child support, visitation and custody.

Divorce is often a frightening and sad experience for children. Parents can ease this difficult time by allowing and encouraging the children to have a positive relationship with each parent, by providing needed support — both emotional and financial — and by keeping the welfare and happiness of their children uppermost in their minds at all times.

Nebraska judges base their decisions in these matters on the principle of "what is in the best interests of the children." Parents should be guided by this principle as well.

*This pamphlet, which is issued to inform, not to advise, has been prepared and published by the Nebraska State Bar Association. It is distributed by those who want to help you obtain your rights under the law.*



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