

CUSTODY

There are two types of child custody, physical custody and legal custody, (in other words: time and say so). **Physical custody** deals with which parent the child will reside with primarily. Within physical custody, there are four types of custody. **Legal custody** addresses which parent will have final say so or decision making on various matters related to a child's upbringing.

Physical Custody

There are **four types** of physical custody arrangements:

1. **Primary Custody**: primary custody refers to the arrangement where one parent has the majority of time with a child.
2. **Joint Custody**: refers to the arrangement where the parties split parenting time roughly equally.
3. **Sole or "Full" Custody**: refers to the arrangement where one parent has nearly all of the time with the child.
4. **Split Custody**: refers to a situation where one child spends the majority of his or her time with one parent and the other child spends the majority of time with the other parent.

Legal Custody

Legal custody may either be granted to one parent or may be granted to both parents in a joint legal custody arrangement. Although a court may award primary physical custody to one parent, it can (and usually does) award joint legal custody because it allows both parents to have equal rights and responsibilities for major decisions regarding their children which, in turn, provides both parents the opportunity to remain involved in their child's life and upbringing. However, just because joint legal custody is awarded, that does not end the discussion regarding legal custody. Instead, it merely starts the process because the court is required to designate one party as the final decision maker for major decisions concerning the child in the event of joint legal custody. Typically a final decision maker will need to be designated as a tie breaker in the following areas:

1. Health and non emergency medical
2. Extracurricular activities
3. Religion
4. Education

Split parenting or split custody is the situation where “there are two or more children of the same parents, where one parent is the custodial parent for at least one child of the parents and the other parent is the custodial parent for at least one other child of the parents. In a split parenting case, each parent is the custodial parent of any child spending more than 50 percent of the time with that parent and is the noncustodial parent of any child spending more than 50 percent of the time with the other parent. A split parenting situation shall have two custodial parents and two noncustodial parents, but no child shall have more than one custodial parent or noncustodial parent.” *O.C.G.A. § 19-6-15 (a)(21)*.

Generally, when people refer to joint custody, they are actually referring to joint physical custody. According to Georgia law regarding child custody, "Joint physical custody means that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents." *O.C.G.A. 19-9-6(6)*. In other words, joint custody is roughly a 50/50 custodial arrangement, where the child spends a roughly equal amount of time with each parent. For example, joint custody arrangements can involve parents alternating the weeks during which they enjoy parenting time with the child or splitting each week up in some form or fashion.

Generally, when people refer to joint custody, they are actually referring to joint physical custody. According to Georgia law regarding child custody, "Joint physical custody means that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents." *O.C.G.A. 19-9-6(6)*. In other words, joint custody is roughly a 50/50 custodial arrangement, where the child spends a roughly equal amount of time with each parent. For example, joint custody arrangements can involve parents alternating the weeks during which they enjoy parenting time with the child or splitting each week up in some form or fashion.

Alternatively, there is the concept of joint legal custody. This concept merely refers to decision making, not actual time with the child. To learn more, see our page on [joint legal custody](#).

Things to think about with Joint Physical Custody

1. Ideally, the parties need to live close to each other so the children do not have to face long rides to school
2. This system tends to work best with parties that work well together and communicate effectively as this arrangement will require them to interact more often for the benefit of the child
3. This arrangement helps to ensure that the child has adequate opportunity to build a strong and lasting bond with both parents
4. Some judges do not favor a joint custody arrangement because the child never has a stable home, but is constantly moving from one parent to another
5. This arrangement may interfere with a child's ability to consistently participate in school, social or extracurricular activities

6. [Moving out of state](#) (or any significant distance away) from the other parent would likely result in a need to modify the custody arrangement

Joint custody does NOT necessarily mean that child support will not be paid in a case. Instead, the party with the lower income is considered the primary custodian for purposes of child support and they may receive child support even though custody is shared equally by the parties. That said, the parent paying child support may have an argument that the amount of child support they have to pay should be lower because they could receive a parenting time deviation. Notably, a [parenting time deviation](#) is a discretionary deviation to child support that the court may elect to give or not to give in a particular case. To learn more see our page on how [child support is determined](#).

Sole custody refers to a custody arrangement where one parent has been “awarded permanent custody of a child by a court order.” *O.C.G.A. § 19-9-6(11)*. The term sole custody not only concerns the physical custody of a child but also concerns the legal custody of the child involved. Thus, the parent awarded sole custody of a child shall also “have the rights and responsibilities for major decisions concerning the child, including the child's education, health care, extracurricular activities, and religious training...” *Id.* Where one parent has been awarded sole custody of the child or children involved, the other parent, often referred to as the non-custodial parent, normally enjoys the right to visitation or parenting time with the child. *Id.*

It is uncommon in Georgia for one parent to be awarded sole custody of a child as it is Georgia’s public policy to ensure that the bond between parent and child continues even after a divorce. Instead, Georgia courts typically designate a [primary physical custodian](#) or elect to use joint custody to [evenly split time between the parents](#).

Sole custody is usually reserved for extreme circumstances and is generally only awarded in situations involving:

1. Drug abuse
2. Severe alcohol abuse
3. Physical or sexual abuse
4. Other situations of extreme conduct by one parent that would harm the child

Although an order granting one parent sole custody of a child does vest that parent with sole decision making authority regarding the child, to the exclusion of the other parent, sole custody does not terminate the other parent’s rights to the child nor does it bar the non-custodial parent from exercising visitation with the child unless otherwise ordered by the court.

In the event the parties cannot agree, the court looks to the best interest of the child to determine custody. Of course, in many cases, what is in the best interest of the child is often hotly debated. In these cases, Georgia law provides that the duty of a judge in a case concerning child custody is to determine what will best promote the child's welfare and happiness by considering any relevant factor including, but not limited to:

1. The emotional ties existing between each parent and the child
2. The emotional ties existing between the child and his or her siblings
3. The capacity and disposition of each parent to give the child love, affection, and guidance and to continue the education and rearing of the child
4. Each parent's knowledge and familiarity of the child and the child's needs
5. The capacity and disposition of each parent to provide the child with food, clothing, medical care, day-to-day needs, and other necessary basic care
6. The home environment of each parent considering the promotion of nurturance and safety of the child
7. The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity
8. The stability of the family unit of each of the parents and the presence or absence of each parent's support systems within the community to benefit the child
9. The mental and physical health of each parent
10. Each parent's involvement, or lack thereof, in the child's education, social, and extracurricular activities
11. Each parent's past performance and relative abilities for future performance of parenting responsibilities
12. The home, school, and community record and history of the child, as well as any health or educational special needs of the child

O.C.G.A. § §§ 19-9-3(a)(3)(A)-(Q)

What is a Parenting Plan

A parenting plan is a document that defines all child custody matters. Specifically, it is filed with the court and explains the parties' agreement (or the court's order) regarding visitation, legal decision making, transportation and many other topics related to the parties' children. Because it is what guides the parties on all post-divorce related matters related to their children, we consider it to be the most important child custody document in Georgia. Like most areas of Georgia law related to divorce, if the parties cannot agree, the judge will make the ultimate decision considering proposals submitted by each parent and the best interests of the child. O.C.G.A. §19-9-1 Visitation rights are normally granted to the non-custodial parent upon the final determination in a divorce or child custody proceeding. Although visitation rights are normally dealt with simultaneously with custody issues, visitation is not the same thing as custody. *O.C.G.A. § 19-9-22(a)*. Visitation, otherwise known as parenting time, includes set times during which a non-custodial parent may visit, either individually or in a supervised setting, with their minor child or children. This time normally is limited to certain intervals such as weekends and week nights.

It rarely occurs that a court will deny a non-custodial parent visitation. However, if a court finds that it would be injurious to a child or not in a child's best interest to have contact with the non-custodial parent, the court can deny visitation. This denial normally only occurs as a result of exceptional circumstances such as when the non-custodial parent is unfit or if the child's best interests would be harmed by having contact with the non-custodial parent. See *Schowe v. Amster*, 236 Ga. 720 (1976) and *Shook v. Shook*, 242 Ga. 55 (1978).

Like other matters concerning child custody, the parents may come to an agreement between themselves regarding visitation. Parents submit such an agreement to the court for approval and incorporation into the court's final order regarding child custody or final judgment and decree of divorce. In so doing, the visitation agreement may be enforced by the parents by virtue of the court's order. Please note that the visitation agreement must comport with Georgia's public policy concerning custody and visitation. *Truman v. Boleman*, 235 Ga.App 243 (1998).

Sometimes, the parents may choose to make an agreement between themselves without judicial incorporation. If this is done, the parents can agree to whatever they want concerning visitation. However, in the event these plans do not work out, please understand that the court can only enforce the formal custody arrangement entered into between the parties, not the informal one that was not incorporated into a final judgment and decree.

If visitation has been court ordered in a case, if either parent violates that court order, he or she may be held in contempt of court, and punished accordingly. *Griggers v. Bryant*, 239 Ga. 244 (1977). This punishment may include fines or even jail time. Therefore, it is important to honor any court order concerning child custody or visitation. If the circumstance of either you or your child have changed such that the court's order no longer fits your needs, seek a modification of child custody or visitation. See our sections concerning child custody modification for more information.

Frequently Asked Questions

As Georgia family law attorneys, the attorneys at Meriwether & Tharp often are asked questions concerning child custody. Below is a list of questions that we are most often asked, along with a brief answer. This list will give you some insight concerning child custody issues in Georgia. If you would like more detailed information concerning your child custody case, call and speak with one of our family law professionals today.

Q: What is the difference between legal and physical custody?

A: [Physical custody](#) refers to where the child lives and who has responsibilities associated with the child's daily care. [Legal custody](#) refers to the decision-making responsibilities associated with the [education](#), [extracurricular activities](#), [healthcare](#) and [religious](#) upbringing of a child.

Q: Are mothers more likely to be awarded custody over fathers?

A: No. In Georgia, child custody is determined based on the best interests of the child or children involved. Courts presiding over child custody matters will not presume that either parent is better suited for custody, nor will a court prefer one parent over the other based solely on gender. [Read More](#)

Q: What is joint custody? Is it better?

A: [Joint custody](#) is a 50/50 custodial arrangement, where the child spends an equal amount of time with each parent. Often times, joint custody also involves parents sharing decision making responsibility concerning the child's [education](#), [extracurricular activities](#), [healthcare](#) and [religious](#) upbringing. While no one solution is right for everybody, children benefit from the ongoing involvement of both parents and a joint custody arrangement may be a way to ensure that both parents maintain an active role in the lives of the children. However, a joint custody arrangement may be difficult to maintain if the parents are not living in the same area or if the parents cannot work well together.

Q: When parents cannot agree on custody, how does the court decide?

A: In Georgia, [courts determine child custody](#) by considering what would be in the best interest of the child or children involved. The factors a court may consider include: the parent's ability to provide a loving and stable home environment for the child, the pre-existing relationship between parent and child, which parent has been the primary caretaker of the child, the parenting abilities of each parent and whether either parent has a history of child abuse or neglect.

Q: What if the current custody arrangement is not fitting my family's needs?

A: It is not always easy to modify a custody arrangement that has been ordered by the court or agreed upon by you and your child's other parent. But, it is possible. It is typically more difficult to modify a currently existing custody arrangement than it is to create one in the first place. In Georgia, there must be a substantial change in circumstances before a court will grant a [modification of child custody](#).

Q: If my child's other parent is behind on child support payments, can I prevent his or her visitation?

A: Parenting time or visitation is not dependent on child support. Thus, one parent may not withhold child support in exchange for visitation rights, and the other parent may not withhold visitation in the absence of child support payments. If the non-custodial parent in your case is behind or refusing to pay child support, you have other remedies available to you, like going to court and filing a contempt action against the delinquent parent or visiting your local child support enforcement office to collect past-due child support payments.

Q: I want to [move to another state](#) with my child. Can I do that?

A: As with the initial custody determination in Georgia this issue is determined with the best interests of the child in mind. A court will weigh several factors, including but not limited to the child's ties to local schools and friends, the child's age, the custodial parent's reasons for relocating, and the stress and instability of relocation and the corresponding benefits of consistency and stability for the child.

Q: If the judge in my divorce case orders a custody evaluation, what should I do?

A: [Custody evaluations](#) are often a regular part of contested custody cases. It is important to cooperate with the custody evaluator as the evaluation is designed to find out what is in the best interests of your children. If any concerns arise during the evaluation, share them with your attorney.

Q: If my ex-spouse moves to another state, may he or she change the custody order there?

A: Many states, including Georgia have adopted a statute called the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). This act sets standards for when a Court may make a custody determination, when a court must defer to an existing determination from another state and when and how a state may enforce a preexisting child custody order from another state. This law helps standardize how custody orders are treated which in turn helps solve many problems created by disagreements over custody between parents living in different states. Generally, a state may make a custody decision, or modify a pre-existing decision, only if the following criteria are met:

- (1) The state is the home state of the child on the date the modification proceeding is initiated, or the state was the home state of the child within six months before the modification proceeding was initiated and the child is currently absent from the state but a parent or person acting as a parent continues to live in the state;*
- (2) A court of another state does not have jurisdiction under section (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that the state seeking to modify is the more appropriate forum ... and:*

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with the state other than mere physical presence; and

(B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under sections (1) or (2) have declined to exercise jurisdiction on the ground that the court seeking to modify is the more appropriate forum to determine the custody of the child; or

(4) No court of any other state would have jurisdiction under the criteria specified in sections (1), (2), or (3) above.

Additionally, the court of the state which entered the original order must have determined it no longer has exclusive, continuing jurisdiction over the matter under the UCCJEA; or that a court in the state seeking to modify the order would be a more convenient forum under the UCCJEA; or that a court of the state seeking to modify the order; or a court of the state which entered the original order determines that neither the child nor the child's parents or any person acting as a parent presently resides in the other state.

If the above mentioned criteria are not met, the state in which the non-custodial parent is seeking a modification may not enter an order modifying child custody. However, the court of that state may seek to modify a preexisting order if the child has been abandoned or a modification is necessary to protect the safety and welfare of the child involved.

Q: My ex-spouse has failed to return our children on time after taking them for a visit, and I am scared one day that he or she will not return them at all. What are my rights as the custodial parent?

A: If one spouse refuses to abide by the court ordered visitation schedule or custody arrangement, that parent is in [contempt](#) of court. In other words, it is illegal for either parent to disregard or disobey the court's order concerning custody and visitation. Thus, if the non-custodial parent in your case has failed to comply with your custody order, file a contempt action against that spouse. This action will allow you to seek the help of the court in enforcing your agreement. Alternatively, if your current custody arrangement is no longer suitable for your family's needs, consider seeking a modification of child custody.