

Child Custody

An excerpt from the Community Education booklet *Family Law in Oregon*

**The laws on custody of children apply to both married and unmarried parents.
For unmarried parents, paternity must be established before custody can be ordered.**

(See Questions 50 through 63 of the *Family Law in Oregon* booklet for information about establishing paternity.)

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If I am married, how can I get a court order that gives me custody of my children?

If you are filing for divorce, you can ask in your petition that permanent custody be awarded to you in the divorce judgment. Once you have filed for divorce, you can ask for a temporary order that gives you custody until the divorce is final. See Questions 25 and 47 of the *Family Law in Oregon* booklet*.

If you are afraid of your spouse because of physical abuse or threats of physical abuse against you within the last six months, you should be able to get temporary custody as part of a Family Abuse Prevention Act restraining order. See Questions 9, 10, 12 and 78*.

In a divorce or restraining order case, the court can make custody decisions only if your children have lived in Oregon for 6 months, need emergency protection, or in some special situations when they have ties to the state.

If I am not married to the other parent of my children, how can I get a court that gives me custody of my children?

You can file a lawsuit to get a court order that will establish custody as well as parenting time and child support. Forms are available at the OJD Family Law website.**

Once the lawsuit is filed, you can ask for a temporary order that gives you custody until a final order is entered.

If you are afraid of the other parent because of physical abuse or threats of physical abuse against you within the last six months, you should be able to get temporary custody as part of a Family Abuse Prevention Act Restraining Order. See Questions 9, 10, 12, and 78*. Forms are available at the OJD Family Law website**.

In custody or restraining order cases, the court can make custody decisions only if your children have lived in Oregon for 6 months, need emergency protection, or in some special situations when they have ties to the state.

How is custody decided?

Legal custody means having the legal responsibility for caring for a child. The divorce judgment or court order will usually say who gets custody. Either parent (or both) can get custody. If the parents agree between themselves on custody, they can avoid a long and expensive court case. But if they can't agree, the judge will hear both sides and decide what's best for the child, not the parents. The judge will consider many factors such as:

- 1) Which parent has been the children's primary caregiver;
- 2) Emotional ties of the children to parents and other family members;
- 3) Attitude of the parents towards the child;
- 4) Whether one parent has physically or sexually abused the other. The law assumes it is not best for the child to be in the custody of a parent who has abused the other parent;
- 5) Whether one parent is more likely to help the other parent keep a close relationship with the children. The judge won't consider this if one parent shows that the other parent has been abusive and that a continuing relationship with the children would be dangerous for either the parent or the children;
- 6) Any criminal record of the parents;
- 7) The parents' emotional stability;
- 8) Home environment;
- 9) The child's age, sex, and health; and

- 10) Whom the child wishes to be with (if the child is old enough to make a good decision).

If one parent has abused the other, the court must assume that the abusive parent should not have joint or sole custody of the child. That assumption can be challenged with evidence that it is in the best interests of the child that the abusive parent have custody.

Judges will often award permanent legal custody to the parent who has had physical custody of the child. Judges do not like to change the living situation of a child who is doing well.

What kinds of custody arrangements are possible?

- One parent gets legal custody of the children. The other gets parenting time (visitation) rights. This is the arrangement in most cases.
- Both parents have joint custody. With joint custody, all or most decision-making about the child is shared. Joint custody does not mean that the child must spend equal or substantial time in each parent's home. A joint custody order can say that one parent's home is the child's primary home and that the other parent gets parenting time. Child support can still be awarded if there is joint custody. In Oregon a court cannot order joint custody unless both parents agree to all the terms.

- In families with more than one child, one or more children live with one parent and one or more children live with the other parent. (This is sometimes called "split" custody.) Judges usually don't order this kind of custody arrangement. They are worried that it may be harmful to the children to separate them.
- Rarely, a nonparent can be awarded custody in a divorce, or in a separate lawsuit. See "[How can a nonparent get legal custody of my child?](#)" below.

What is "parenting time?"

"Parenting time" is a term that courts use in place of "visitation." Parenting time means court-ordered contact between the parent who does not have custody and the child.

What is a "parenting plan?"

A parenting plan is the part of a court order that deals with custody and parenting time. All orders about custody must include parenting plans. Parenting plans may have detailed terms or general terms. Parenting plans usually must establish a minimum amount of parenting time for the parent who does not have custody.

What if my spouse and I can't agree about custody of our children?

The judge usually will order both of you to participate in mediation services. In general, mediation means one or more private counseling sessions in which a trained person tries to help you and your spouse reach an agreement about your children. A separate mediation orientation is sometimes required as a first step and is where the mediation process is explained.

When mediation is required, a waiver of the requirement can be requested if there is a good reason such as domestic violence. You also can talk to the mediator about abuse. Mediators should take the family abuse into account when deciding whether and how to mediate a case.

For more information about mediation and any costs involved, contact the family law clerks at the courthouse in your county.

What is a custody study?

The judge might also order a custody or parenting time study. This is an evaluation of the parents by a trained counselor or psychologist who will make his or her recommendations available to the judge. Very few counties offer a free evaluation. Usually, a custody or parenting time study is not ordered unless one or both parents can afford the cost. The judge can order either parent or both parents to pay for the cost of the custody study.

Without mediation or a study, it is up to you and your spouse (or your attorneys, if you have them) to settle on custody terms. If you cannot agree, the judge will decide at a trial.

My opposite-sex partner and I have a child together. If we split up, what are my rights concerning our child?

With unmarried couples, the answer depends on whether the father is legally recognized as the child's parent. If paternity has not been established, the mother has legal custody but she cannot get a child support order. The father has no enforceable custody or parenting time rights. See Questions 50 through 63* for information about paternity. If paternity has been established, unmarried parents usually have the same rights and responsibilities toward their child that married parents have — custody, parenting time, and child support. See Questions 64 through 135*.

At the time you and your partner separate, you may want to file a court case to determine who has custody, a parenting time schedule, and child support terms. Forms and instructions are available at the OJD Family Law website**.

My same-sex partner and I have a child but I am not the biological parent. What are my parental rights?

In same-sex partnerships, the non-biological parent of a child born during the relationship can have parental rights in certain circumstances. To determine whether such rights exist, or how they may be established, you should consult with an attorney.

Can the judge deny a parent custody just because he or she is a homosexual?

No. A judge cannot consider a parent's lifestyle in making a custody determination unless the lifestyle causes emotional or physical damage to the child. If you or your partner's homosexuality will be brought up in a custody case, you should consider hiring a lawyer.

How can a nonparent get legal custody of my child?

Sometimes a judge will grant legal custody to a nonparent, usually a relative, such as a grandparent or stepparent who has been living with your child and providing day-to-day care on a regular basis. Judges tend to award custody to third parties only if the judge finds that there are very good reasons not to give custody to the natural parents.

A nonparent can request custody in your divorce case, any other court case involving the child's custody (such as guardianship, or where juvenile court or the Child Welfare Program of the Department of Human Services is involved), or in a separate lawsuit. These are sometimes called "psychological parent" cases. Usually, a judge cannot award custody to a nonparent unless that person has filed legal papers that ask for custody. Because the law in this area is complicated, it is a very good idea to talk to an attorney for advice.

Without a custody order, what rights do I have?

Married parents have equal rights to have custody of the child until a court order changes this. If your child lives with you, you may be able to work out many day-to-day issues about your child. You cannot force your spouse to return your child after a visit, or enforce any other agreement, unless you have a court order.

When parents are unmarried and paternity has not been established, the mother has legal custody and the father has no custody or parenting time rights. When parents are unmarried and paternity has been established by signatures on the birth certificate or in a lawsuit (often handled by the Division of Child Support or the District Attorney), custody might have been granted by the law to the parent who is the child's physical caretaker, even though no court order says so. If paternity has been established and there is no law or court order giving one parent custody, both parents have equal rights to custody. See Question 58*.

Can I get legal custody before my divorce or other custody case is final?

Maybe. See Question 47*.

Can I represent myself in a custody dispute?

Yes, but it is a good idea to get a lawyer. If the other parent has a lawyer, you probably will need one.

Can I get custody without filing for divorce or bringing a separate custody case?

If you have been a victim of abuse within the last six months, you may be able to get an emergency restraining order with custody under the Family Abuse Prevention Act. The court can make a custody decision only if your children have lived in Oregon for 6 months, need emergency protection, or in some special situations when they have ties to the state. See Questions 9, 10, and 12* for more information about restraining orders. These orders usually last for one year. But if the other parent requests a hearing, the judge might change custody or parenting time terms, depending on the evidence. You will eventually need a permanent decision about custody in a divorce or other custody lawsuit.

What rights do I have if I don't have legal custody of my children?

Unless a court orders differently, a parent without legal custody has the right to know about how the child is doing in school and to have information about the child's health. This is in addition to any court-ordered parenting time.

Can I get the police to help me get my child back if I had an agreement with the other parent about child custody?

Usually, the police will help you only if you have a court custody order. If you have filed for a divorce and reached even a temporary agreement, it is a good idea to have the judge approve the agreement and make it a court order.

If I have legal custody, do I have to tell the other parent that I'm moving?

Not if you're moving less than 60 miles farther from the other parent (unless a court order says you have to give notice even for this short move). Usually, custody orders other than restraining orders require a parent moving more than 60 miles farther away to tell the other parent and the court. But you don't have to give this notice if you can show the judge that you have a good reason not to.

If I have legal custody, can I move out of Oregon with my children?

You should be able to move out of state with your child unless a custody order or protective order (see Question 47*) says that you cannot. If a court order gives the other party the right to visit the child and moving means those visits cannot happen, you could be in violation of the court order. But even if there are no restrictions in your orders, the other parent can stop you from moving the child by getting a new court order at the time of the move. A judge will order a parent not to move the child if the judge finds that the move would not be in the best interest of the child. You must still allow court-ordered parenting time to the other parent if you move. Some adjustments may have to be made, and a court will need to decide if the parents can't agree.

Can a custody order be changed?

Yes, if the parent without custody proves something happened to make it necessary to change custody — for example, the child was neglected or abused since the time of the last custody order. If there are no new problems in the child’s home, the judge probably will not change a custody order even if the parent without custody can now provide a “better” home.

Can I do anything to prevent my child from going to the other parent when I die?

Your child’s custody usually goes to the other parent if you die. However, if another person files for guardianship of your child after your death, the judge may consider your wishes. Often this is done in a will. You can speak to a lawyer about the best way state your wishes about custody.

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* See the [Family Law in Oregon](#) booklet on www.oregonlawhelp.org.

** See the OJD Family Law website: <http://courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/familylaw/index.page?>