

New York

TRACEY BEE, THE DIVORCE SOLUTIONIST



Types of Custody in New York

When deciding custody, parents or a judge will have to determine both physical and legal custody rights. Within the physical and legal custody distinctions, parents may be awarded joint or sole custody rights over their children.

Physical Custody

"Physical custody" refers to where the child resides. A parent with primary physical custody (sometimes called "full custody") lives with the child. Parents can share physical custody (called "joint physical custody") or one parent may have sole physical custody rights.

Joint physical custody in New York means that both parents spend substantial parenting time with the child. However, parents with joint physical custody won't necessarily spend equal time with their child. For example, one parent may have three nights per week with the child, while the other parent has four nights per week.

Legal Custody

A parent with "legal custody" can make major educational, medical, religious, or legal decisions on the child's behalf. In most cases, it's in a child's best interests for parents to share legal custody.

Where one parent has a history of domestic violence or the parents simply have a volatile relationship, a legal custody arrangement may not be workable. Ultimately, your family's unique circumstances will determine the type of arrangement most suited to your case.

Understanding a Child's Best Interests

Whether parents reach their own divorce settlement agreements or argue about custody until trial, a judge won't approve a custody agreement unless it serves the child's best interests.

A judge must evaluate the family's overall circumstances to determine what kind of custody arrangement best meets a child's needs. Specifically, a judge may evaluate the following factors:

- each parent's relationship with the child
- the child's relationship with siblings and extended family members
- the child's ties to school, home, and the community
- each parent's role in caring for the child
- the child's special needs, if any,

- each parent's age, physical and mental health
- the parents' geographical proximity (when evaluating joint custody arrangements)
- each parent's stability
- each parent's willingness to foster a relationship between the child and the other parent
- either parent's history of domestic abuse, and
- any other factor relevant to the child's well-being.

Notably, a parent's gender is not relevant to a custody decision. If you're a dad, you might wonder, "how can a father win custody in New York?" The answer will depend on your family's unique circumstances and your child's needs.

Either parent can "win" custody, regardless of gender, by showing the judge that he or she is the most suited to serving the child's educational, social, physical, and emotional needs. A parent with a history of domestic violence, will have a major burden to overcome to obtain joint or full custody in New York.

In most cases, a judge won't award custody to an abusive parent and in some cases, that parent may have limits put on his or her visitation rights in New York. See N.Y. Dom. Rel. L. § 240 (2020).

Modification of Child

The court is unlikely to grant your request for a change in custody unless you could show that you or the other parent has experienced a substantial change in circumstances that has profoundly affected the efficacy of the original divorce agreement. Some of these "substantial changes" could include remarriage, job loss, criminal conduct or a change in lifestyle. The judge may also be willing to hear requests from children over the age of 12 who want to spend more time with one parent. **Common reasons for seeking a modification of child custody include:**

- One parent is battling a substance abuse problem
- One parent has committed acts of domestic violence
- One parent's home environment has become unstable
- One parent has developed a serious medical condition
- One parent is interested in moving away with the child
- The child (over 12 years old) is requesting a change
- One parent has abandoned or neglected the child



Leading Case in Best Interest of a Child

Eschbach v. Eschbach, 56 NY 2d 167 - NY: Court of Appeals 1982
MATTER OF TROPEA v. Tropea, 665 NE 2d 145 - NY: Court of Appeals

Rules For Conduct in New York.

[http://ww2.nycourts.gov/rules/chiefadmin/100.shtml#:~:text=\(A\)%20A%20judge%20shall%20respect,judge's%20judicial%20conduct%20or%20judgment.https://www.nycourts.gov/legacypdfs/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdfhttps://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ibcbfb820bbec11dd8529f5ff2182bffa&originatationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](http://ww2.nycourts.gov/rules/chiefadmin/100.shtml#:~:text=(A)%20A%20judge%20shall%20respect,judge's%20judicial%20conduct%20or%20judgment.https://www.nycourts.gov/legacypdfs/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdfhttps://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ibcbfb820bbec11dd8529f5ff2182bffa&originatationContext=documenttoc&transitionType=Default&contextData=(sc.Default))

Attorney Ethics.

<https://www.nycourts.gov/ad3/AGC/Forms/Rules/Rules%20of%20Professional%20Conduct%2022NYCRR%20Part%201200.pdfhttps://nysba.org/attorney-resources/professional-standardshttps://www.nycourts.gov/legacypdfs/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf>

<https://thedivorcesolutionist.com>

New York

TRACEY BEE, THE DIVORCE SOLUTIONIST

- The custodial parent frequently moves
- The custodial parent frequently changes jobs or has unpredictable working hours
- The custodial parent has experienced a significant change in income
- The custodial parent routinely fails to make the child available for visitation with the other parent

Certainly, if there has been a finding of child abuse, a modification will be made in the best interests of the child. Here is an interesting case where modification was ordered:

"Consent order entered granting parties joint legal custody with respondent mother receiving primary physical custody and petitioner father receiving visitation. Father seeks primary physical custody alleging that mother refuses to permit him visitation. Mother appeared pro se. Child suffered from "bottle rot," which required extensive dental care at an early age, and engaged in sexualized behavior attributed to mother. Family Court awarded father sole legal custody and primary placement with visitation to mother."

Other Avenues to Modification

To have your case for modification heard in court, you must prove a substantial change in circumstances and then show that it is in the best interest of the child to make the requested changes. However, there are two ways in which you can avoid going to court.

1. **The first method is through a settlement.** You and the other parent can negotiate a change on your own through your attorneys and submit it to the court. The court must approve it, but as long as it appears reasonable, the court will generally rubber-stamp it. You can go through mediation or simply negotiate directly via your attorneys. This provides for a wide variety of discussions and exchanges, which can include modification of alimony, child support, or property distribution in exchange for a modification in custody. Settlement talks provide the freedom to discuss a wide variety of issues and concerns, which can be very convincing and assist in working out a new custody order.
2. **The other process is through the use of a private judge.** You can initiate a case and both parties then agree to have it arbitrated by a paid private judge outside the court system. The judge's decision will be binding, and the procedures will be completely private and slightly less formal than in court. This can be an excellent avenue to pursue if there are sensitive matters that will be brought up.

New York state is designed to keep a custody order in place unless there has been a significant shift in the situation involving the parents and/or the child. With a skilled New York child custody attorney, you are more likely to be able to present a convincing case that a change has occurred and that the custody order should be modified.

Guardian ad Litem

SECTION 1202 Appointment of guardian ad litem Civil Practice Law & Rules (CVP) CHAPTER 8, ARTICLE 12.

1. Rule 1202. Appointment of guardian ad litem.
 - (a) By whom motion made. The court in which an action is triable may appoint a guardian ad litem at any stage in the action upon its own initiative or upon the motion
2. of:
 - 3.1. an infant party if he is more than fourteen years of age; or
 - 4.
 - 5.2. a relative, friend or a guardian, committee of the property, or
 6. conservator; or
 - 7.
 - 8.3. any other party to the action if a motion has not been made under
 9. paragraph one or two within ten days after completion of service.
 - 10.
 11. (b) Notice of motion. Notice of a motion for appointment of a guardian
 12. ad litem for a person shall be served upon the guardian of his property,
 13. upon his committee or upon his conservator, or if he has no such
 14. guardian, committee, or conservator, upon the person with whom he
 15. resides. Notice shall also be served upon the person who would be
 16. represented if he is more than fourteen years of age and has not been
 17. judicially declared to be incompetent.
 - 18.
 19. (c) Consent. No order appointing a guardian ad litem shall be
 20. effective until a written consent of the proposed guardian has been
 21. submitted to the court together with an affidavit stating facts showing
 22. his ability to answer for any damage sustained by his negligence or
 23. misconduct.



Recusal of a Judge

N.Y. Judiciary Law §14
N.Y. Judiciary Law §9 .
People v. Moreno, 70 N.Y.2d 403 (1987)
22 NYCRR 122.11
22 NYCRR 100.3(E)-(F)



<https://thedivorcesolutionist.com>