



# CUSTODY GUIDE

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DIVORCE & CUSTODY ATTORNEYS

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Custody cases arise in three situations. Married couples with children will need to settle custody and support along with the division of assets, and spousal support. Post divorce custody cases involve modifications of custody or child support. Non-married couples with children need a custody agreement, or modification of the current order.

In this guide we are going to discuss the common areas of all three types of cases; time spent with children, amount of support provided for the children, and modifying current orders.

1. Types of Custody—There are two types of custody; joint and physical. We discuss the differences.
2. Joint and Primary Custody— The fight over primary or joint physical custody is the main battleground. We discuss what these labels really mean and what the courts are looking for when it comes to the “best interests” of the child.
3. Child Support Calculations—With children and custody typically comes support. We explain the how support is calculated.
4. Modifying Custody Orders - How do you change custody orders? Children are living growing things, and often times prior orders need to be modified.
5. Relocating With Children— A parent cannot leave the state without the other parent’s permission or the court. Let’s explain how you ask for a relocation.
6. Court Process— What are the steps for custody orders.

# Types of Custody



## **Legal Custody and Physical Custody**

Two types of custody exist; legal custody, and physical custody. Legal Custody is a parent's role in making decisions regarding the child's health, schooling, and religion and general well-being. Physical custody establishes the actual living arrangements of the children, including the amount of time they will reside with each parent.

## **Primary vs. Joint**

For both legal custody and physical custody there are two types: joint or primary. Joint means both parents have an equal timeshare. Primary means one parent is the main parent. The labels can be mixed. For example; you can have a situation where the parents have joint legal custody, and father has primary physical custody. You could also have the situation where both parents have joint legal and joint physical custody.

In Nevada joint custody for both legal and physical is the standard. For a parent to request primary they have the burden to provide why primary is in the best interest of the children. This is not always an easy claim to prove. We discuss the best interest of the child in this guide.

Asking for primary legal custody is much harder than primary physical. Actually, both are difficult, but asking to make all legal decisions is a serious burden to prove.

One term you may hear is "sole" custody. Many parents confuse this with "primary". It is very different. This label is a step higher than "primary" and is used when a judge feels one parent is not a good influence on the child, but doesn't have enough reason to terminate their rights. When judges give a parent sole custody, either legal or physical, they are making a statement that the other parent is not fit, at this time, to deal with the custody of a child.

# Types of Physical Custody



## **Primary Physical Custody or Joint Physical Custody**

Joint physical custody is where both parents have between 41% and 59% physical custody of the child. Parents do not need exactly 50/50 equal timeshare to have joint physical custody. Unless the schedule is a week-on week-off is often difficult to be 50/50, given a seven day week, and the variations inherent in child rearing, such as school schedules, sports, vacations, and parents' work schedules.

Joint physical schedules come in a few variations. You have a week-on week-off schedule, which is the simplest and some feel the best for children, especially in high conflict situations because it limits the exchanges. Some parents think this schedule is too long in between visitations. Other parents love having a whole week to themselves to focus on work, and household chores.

The rest of the main joint custody schedules break-up a 14 day schedule into equal parts. You have the 2-2-3, with mom for 2 days, then dad 2 days, back to mom for 3 days, then to dad for 2 days, back to mom for 2 days, and then dad for 3 days. Another variation is the 3-3-4-4 rotating. Starting on Sunday with mom for 3 days, then dad for 3 days, then mom for 4 days, then dad for 4 days.

Primary physical custody is where one parent maintains physical custody of the child(ren) in excess of 60% of the time. Primary custody is not "Sole" custody. Sole custody is where one parent controls the visitation. They may not even allow the other parent visitation, or may limit it to supervised visitation. Sole custody is not easy to obtain and is only used in the most severe situations.

Primary custody schedules are typically where the non-primary parent, called the parent with visitation, gets two nights a week. Most common schedule is every other weekend, and a every other Tuesday or Wednesday evening. Every weekend is something parents try, but it seems to eventually change.

# Best Interests of the Child



## Best Interests Factors

When parents are looking to go to court for primary custody they are required by law to show the judge why primary custody would be in the best interest of the child. The parent wanting joint custody does not have the burden to prove this. Joint custody, by Nevada law, is the presumptive arrangement and doesn't need to be proven.

To help the judges determine when to order primary custody the Nevada legislature has listed "best interest" factors for the judge to review before making custody decisions:

- The wishes of the child if of sufficient age.
- Which parent is more likely to facilitate a relationship with the other parent.
- The level of conflict between the parents.
- The ability of the parents to cooperate to meet the needs of the child.
- The mental and physical health of the parents.
- The ability of the child to maintain a relationship with any sibling.
- Any history of parental abuse or neglect of the child or a sibling of the child.
- Whether either parent has engaged in an act of domestic violence

As you can see these factors are subjective and do not favor mothers over fathers. In fact these factors are counter-intuitive to the way most mothers feel. Most mothers are primarily responsible for feeding, bathing, clothing the children. Mothers are natural nurturers. This is not included in the best interest factors and is a source of frustration for many moms looking for primary custody.

## Why Primary Matters

Generally speaking, mothers want primary custody because they feel this is the natural order of things. Fathers are not as interested in winning primary custody and most are comfortable with sharing custody with mothers. For fathers, joint custody is important to them because allowing the mother primary custody means an increase in the amount of child support to be paid.

# Modifying Custody



## Can Custody Be Changed?

Nevada Courts believe changing custody arrangements only when the two prong test of *Ellis v. Carucci* and *Truax v. Truax* have been met. If the factors discussed in these two cases are not met then the court will not change or modify custody orders.

In *Ellis v. Carucci* the court ruled a current custody arrangement should only be changed if there has been a substantial change in the circumstances affecting the welfare of the child. In *Truax v. Truax*, the Nevada Supreme Court ruled that a custody arrangement can be modified from if it is in the child's "best interest."

Under this two pronged test, the party seeking a modification of custody bears the burden of satisfying both prongs. We are only talking modification of custody. Child support can be modified anytime a custody order has been modified. Child support also can be modified any time the payee—parent's income changes by 20%.

We have seen the best interest factors before. These are the factors looked at during the initial custody hearing. The change of circumstances is sometimes the big test in modifications case. The court wants to know what has changed since the last custody order? Has the other parent lost a job, have they stopped seeing the child, or did they move out of state? There needs to be a substantial change for the court to even look into whether changing custody would meet the best interest factors.

# Relocating with the Child



## Can You Relocate To Another State With The Child?

Prior to a new law, passed by the Nevada legislature, the court used the rulings from two cases, *Schwartz v. Schwartz* and *Potter v. Potter*, to determine whether a parent should be allowed to relocate with the children.

In these cases the court established six factors to consider in allowing a relocation. Those factors are;

- The extent to which the relocation is likely to improve the quality of life for the child
- Whether the motives of the relocating parent are honorable and not designed to frustrate
- Whether the relocating parent will comply with any substitute visitation orders
- Whether the motives of the non-relocating parent are honorable and the extent any opposition to the relocation is intended to secure a financial advantage
- Whether there will be a realistic opportunity for the non-relocating parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship
- Any other factor necessary to assist the court in determining whether to grant permission to relocate.

*Schwartz* was used when the relocating parent has court-ordered primary physical custody. *Potter* was used in cases where there was no custody order.

The new law codified *Schwartz* and *Potter* and also established the definition of relocating. In the past the relocation decision was only used when moving out of state. What about when a parent moves in-state, but more than a couple hours away? The new definition of relocation is defined as “at such a distance that would substantially impair the ability of the other parent to maintain a meaningful relationship with the child”.

Another principal frustration with the existing case law was parents relocating without getting permission from the other parent. The case law lacked any teeth in regards to parents relocating without permission. The new custody law requires a “compelling excuse” for relocating without permission.

## Child Support



Child support laws are applicable to all parents, whether or not the parents of the child are married. Child support must last until the child reaches 18 or graduates from high school. Parents of a handicap child may be required to support the child beyond the age of 18 or becomes self supporting.

Nevada's child support formula has two main features; 1) the child support formula is a tiered system based on gross monthly income, and 2) the child support formula does not have caps.

Gross Monthly Income (GMI) – GMI includes hourly wages, salary, tips, overtime, investment income, periodic payments from pensions or retirement, and unemployment proceeds

Tiered System – Once GMI is determined, the income is multiplied by a specific percentage. There is a percentage applicable for the first \$6,000 per month of the paying party's GMI, another for the amount above \$6,000 but equal to or less than \$10,000, and the last tier for GMI greater than \$10,000. The percentage multiplied will also depend on the number of children.

The court can deviate from the child support formula. The following reasons are the most common to increase or decrease the amount of monthly child support.

The easiest way to calculate child support is to use our online calculator. Visit [www.rightlawyers.com](http://www.rightlawyers.com) to run different scenarios based on incomes, number of children and custody schedules.

Modifying Child Support— Child support is not written in stone. It can be modified if the an payor's income changes by 20%, if the custody scheduled changes or if it has been three years since the last child support order was filed with the court.

# Custody Process



## **Court Process**

A court process for child custody is not much different than a divorce case. One parent files a complaint for custody, the other parent files an Answer. If an Answer isn't filed the judge makes a ruling in favor of the parent who filed.

The first time a custody matter is before a court, the judge will typically order the couple to the family mediation center. Here a social worker will attempt to mediate the dispute. The mediation is free, or a minimal charge for those who have high incomes. Additionally, a COPE class attendance is required if this is a parents first time in court on a custody matter.

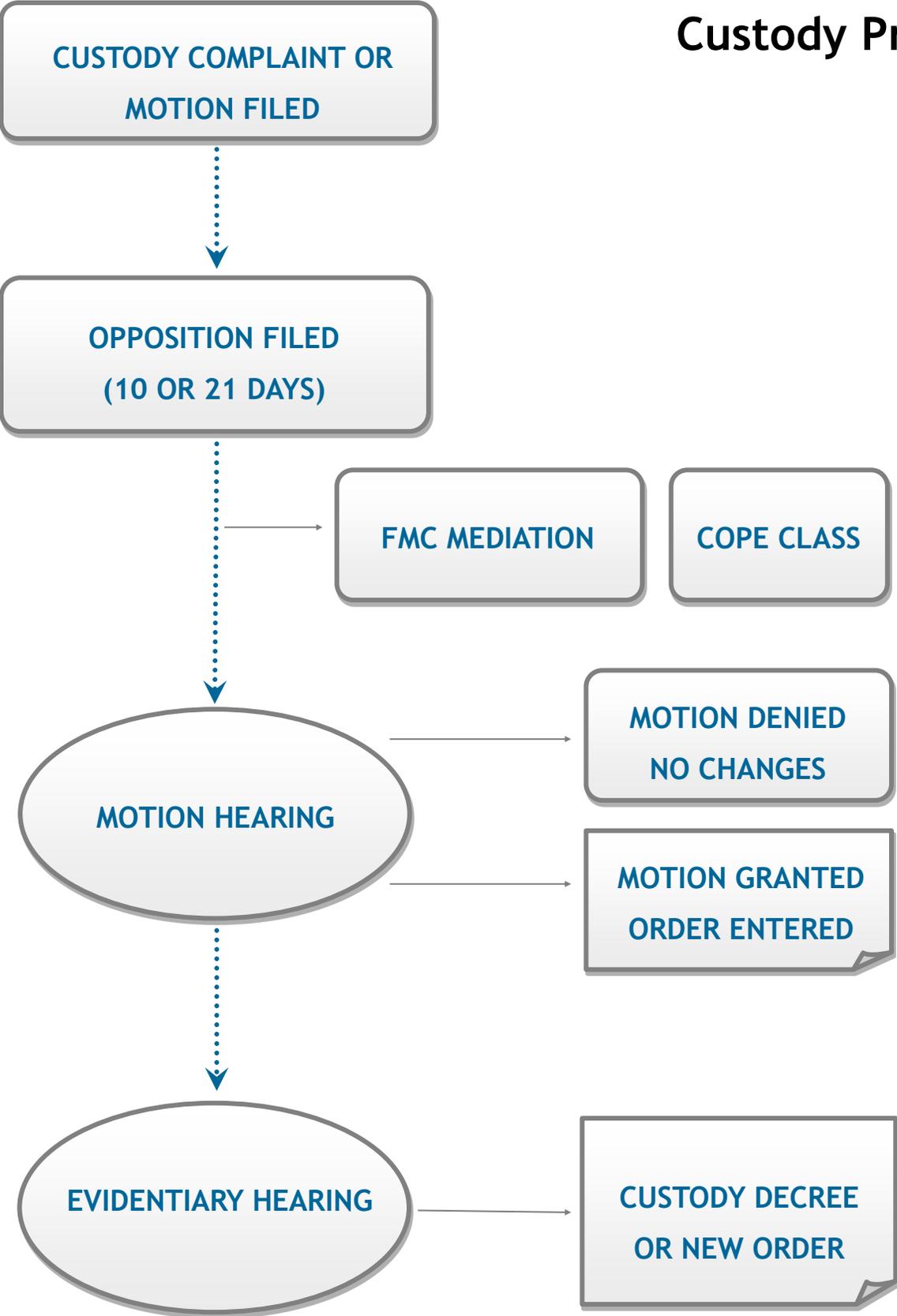
If the parents have not been married, the father will need to have a paternity test before mediation is required.

If this is a post decree issue then the parents file a motion, not a complaint. The main difference is a complaint will almost always end in a evidentiary hearing (aka trial). Motions don't always need a trial. Some motions are required by law to have a trial. It all depends on what is being requested in the motion.

In the cases where an evidentiary hearing is required the judge can't make a final decision at the motion hearing. At a motion hearing the court will review the attorneys filed papers, take oral argument, and then either grant or deny the motion.

Trials or a motion hearing in family court are not like trials in criminal or civil court. There is never a jury. A judge, in family court, makes all final decisions.

# Custody Process



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