

Read more at www.lynchowens.com/blog/.

How Do Courts Decide Child Custody Cases?

By Jason V. Owens | June 10, 2019

Child Custody

Family Law Attorney Jason V. Owens explores how family court judges analyze and decide cases involving child custody and parenting time.



If you are [getting divorced](#) and have children, or if you're an [unmarried parent](#), you may be wondering how [child custody](#) is determined by courts. In this blog, I will review the factors that courts consider to decide whether a parent should be awarded primary custody or [shared custody](#), and how parenting time in general is analyzed and determined.

The Best-Interests of the Child Standard

Above all else, courts consider the “best interests” of a child when determining custody orders. Courts generally use the following factors to make a [child custody](#) decision:

- The age of the children
- Each parents' wishes
- The history of each parent's relationship with the child(ren), positive or negative
- Each parent's ability to communicate with the other parent on child-related issues
- Whether the parents still have a good relationship with each other at the time of the hearing
- The quality of the relationship between the children and both parents
- Whether each parent is mentally and physically fit to care for children
- The mental and physical health of the children
- How willing each parent is to facilitate the children's relationship with the other parent
- Which parent has been providing the majority of physical care for the children before the divorce/separation

- Each parent’s historical participation in child-related activities, such as medical appointments, sports, and educational activities
- Whether each parent can provide a stable, loving environment for the children
- The distance between the two parents’ homes
- Each parent’s work schedule, to the extent it impacts the amount of time the parent can spend with the children
- The living accommodations at each parents’ home, including whether one parent resides in the home where the children were raised
- If the parents can adequately provide for the children's physical needs, emotional wellness, and medical care
- How much the children would need to adjust their lives at home, at school, and in the community
- The wishes of the children, if they are old enough to state their reasoning
- If there is evidence of either parent committing domestic violence, abuse, or neglect
- A history of substance abuse, criminal activity, or mental health concerns involving either parent

A frequent criticism of the “best interests of the child” standard is that the list of factors judges consider is so broad that it is nearly impossible to define the standard in specific terms. What happens, after all, if ten of the above factors favor one parent while five favor the other? How do courts prioritize competing factors? The answer simply isn’t clear. A brief search of Massachusetts appellate cases that include the phrase “[best interests of the child](#)” reveals that appellate courts generally defer to the wisdom of the lower court judge who determined custody. Why? In part, because appellate courts are reluctant to suggest any specific formula that Probate & Family Court judges should follow when determining custody.

Back in 2003, the Supreme Judicial Court announced an important decision in the case of [Custody of Kali \(2003\)](#). In the decision, the SJC offered some rare commentary on how the “best interest of the child” standard should be applied in child custody cases, holding:

*[I]t is in the “best interests of the child” to preserve the current placement with a parent, if it is a satisfactory one, and that **stability and continuity with the child’s primary caregiver is itself an important factor in a child’s successful upbringing**. See, e.g., [Catania](#), supra at 1260-1261 (describing primary caretaker presumption as “fair,” “gender-neutral,” “creat[ing] a legal norm that encourages nurturing behavior,” and “serving as a concrete model for the kind of fiduciary conduct that members of a reordering family should continue to expect from one another”); [Roen v.](#)*

Roen, 438 N.W.2d 170, 174 (N.D. 1989) (“Continuity in a child’s relationship with the closest, nurturing parent is also a very important aspect of stability”); *Davis v. Davis*, 749 P.2d 647, 648 (Utah 1988) (“considerable weight should be given to which parent has been the child’s primary caregiver”). Echoing this view, the American Law Institute’s *Principles of the Law of Family Dissolution* (2002) (ALI Principles) state that a judge “should” allocate custody in proportion to the amount of time each parent previously spent providing care, subject to eight listed exceptions. ALI Principles, *supra* at § 2.08(1). [The law] cautions against rearranging a child’s living arrangements in an attempt to achieve some optimum from all the available permutations and combinations of custody and visitation, when it is generally wiser and safer not to meddle in arrangements that are already serving the child’s needs. **If the parenting arrangement in which a child has lived is satisfactory and is reasonably capable of preservation, it is ordinarily in the child’s best interests to maintain that arrangement, and contrary to the child’s best interest to disrupt it.** Stability is itself of enormous benefit to a child, and any unnecessary tampering with the status quo simply increases the risk of harm to the child. There may be serious shortcomings in the primary caretaker’s parenting to date, or evidence that a previously exemplary caretaker will not be able to continue providing adequate care. Or, even assuming that the primary caretaker has been providing good care, and all indications are that that parent would continue to do so, it is possible that the other parent may offer some extraordinary advantage to the child that makes the disruption in the child’s life worth the risk. **In most cases, however, if the child has been living with one parent for some time, the child’s needs are being adequately met under that parent’s care, and that parent is capable of continuing to care for the child, it is not in the child’s best interests to disrupt that successful arrangement. Rather, it is in the child’s best interests to preserve it. Belief that the other parent might be a little better in some areas ought not suffice to disrupt a child’s satisfactory home life with the caretaker parent.** [Emphasis added.]

Although the Kali decision arose out of an adoption case, Massachusetts courts have applied its reasoning to divorce cases in recent years. For example, in [Prenaveau v. Prenaveau \(2012\)](#), the Appeals Court cited the Kali case in support of preserving “the benefits of stability and continuity” of children by granting custody to the child’s historical caretaker, when clear evidence suggests one parent had historically held that role.

With respect to shared physical custody, the Prenaveau Court referred to another decision, Mason v. Coleman (2006), in which the SJC held:

Where physical custody is shared and neither parent has a clear majority of custodial responsibility, the child's interests will typically 'favor protection of the child's relationship with both parents because both are, in a real sense, primary to the child's development.'

In addition to the historical relationships between the parents and children, the Prenaveau Court pointed to another, more practical consideration, focused on the logistics of pickups, drop-offs, and drive-times that children must undergo in custody cases:

A third objective visible in the cases is the reduction of disruptive shuttle transport of children between custodial parents. See Custody of Kali, supra at 846 ("Because of the temporary order, by the time the judge rendered his findings, the benefits of the stability and continuity that should have been a major focus of the judge's analysis were eviscerated by the two years of shuttling Kali from one parent to the other on a weekly basis"); Mason v. Coleman, supra at 185-186(judge must consider "travel time between households" as a factor affecting parental performance and children's development); Prenaveau I, supra at 137 ("During the proceedings, the judge expressed his view that the constant shuttling of the children between Stoughton and Gonic was 'absurd'"). The reduction of shuttling may constitute a corollary of the need for stability and continuity or may amount to an independent consideration. It can inflict on the children and parents substantial logistics, the consumption of time, emotion, and expense, and the occasion for friction.

The Prenaveau decision strongly suggested that courts should attempt to identify the child's "primary caregiver" prior to the divorce and separation, and attempt to preserve this relationship through its custody order. Thus, if one parent was the child's primary caregiver before the divorce separation, that parent should be granted primary physical custody. If the parents shared caregiving responsibilities, then shared custody is more important. Regardless of the parents' historical relationships with the children, however, courts must also consider practical issues such as the distance between the parents' homes, each parent's work schedule, and other common sense issues and impediments that limit the available parenting schedules.

Shared Physical Custody vs. Primary Physical Custody

Shared physical custody is a custody arrangement in which each parent shares equal or approximately equal time with the children, with parenting time often measured by the number of overnights each parent has every two weeks (14 days). A typical shared custody arrangement involves each parent having the child for 7 overnights out of every 14 days. Depending on the judge, the jurisdiction, and the non-overnight schedule, some courts may consider a parenting schedule when a parent has as few as 5 overnights out every 14 days to be “shared” custody.

In roughly [ten U.S. states](#), there is a general presumption in favor of shared physical custody in child custody cases. In these states, if the parents cannot agree on parenting time, a court will order shared physical custody unless one parent can present evidence to overcome the presumption, such as evidence that one parent has a history of domestic violence, the special needs of the children, or other evidence that shared custody is not in the best interests of the children.

Approximately five other states, including California and Connecticut, have a presumption of shared physical custody if the parents can agree. These states are best understood as having a presumption that [favors shared physical custody](#), but does not automatically impose shared custody if a parent fails to present strong evidence against shared parenting.

In 2016 and 2017, [20 states across the U.S.](#) considered bills to make shared physical custody presumptive, including the Massachusetts legislature, which ultimately [declined to approve](#) a presumptive shared custody standard. As I wrote in my [2017 blog](#):

In the last ten years, family law attorneys across the United States have seen a surge in shared physical custody arrangements, particularly as more states ([not including Massachusetts](#)) have adopted laws making [shared \(50/50\) custody presumptive](#). This shift in the law moves things away from courts reflexively assuming that a child’s mother should be granted primary physical custody. More women are in the workforce, and the nature of the roles that adults play in a family, has been evolving for decades. Additionally, social science research has found that a [child benefits in numerous ways](#) when both parents are involved in their life after a divorce.

The majority of states, including Massachusetts, have no presumption favoring or disfavoring shared physical custody vs. primary custody for one parent. Judges in these states decide custody in each case based on the best interests of the child standard.

When is Shared Physical Custody Not Appropriate

In some cases, [shared custody is simply inappropriate](#). In addition to fundamental parenting issues like substance abuse and domestic violence, Massachusetts law requires judges to examine whether parents have a history of cooperative behavior and the ability to communicate before granting shared physical custody. Parents who demonstrate overt hostility towards the other parent, dishonesty to the Court, or a failure to prioritize their children's needs over their own are [typically not granted custody by a court](#) (either shared or primary).

Even if parents are awarded shared physical custody, a court may modify the custody arrangement to assign primary physical custody if [one parent demonstrates an inability to co-parent](#). A frequent complicated factor in shared custody cases involve parents who [move to a new town](#), city, or state that makes following a shared custody schedule difficult. In such cases, judges have the difficult task of weighing the parent's needs to move against the clear difficulties faced by children who must "commute" long distances between parents' homes on a frequent basis. In many such cases, a judge will modify a shared custody arrangement to primary custody, not because one parent did anything wrong, but simply because shared custody becomes impractical if parents do not live close to one another.

Custody for Divorced Parents vs. Unmarried Parents

In Massachusetts, the law surrounding custody and parenting time is generally the same for children of divorced parents and those of [unmarried parents](#). An important difference applies to children of divorced vs. unmarried parents, however, with respect to shared custody. The Massachusetts child custody statute that applies to divorced parents, [Ch. 208 s. 31](#), expresses no limitations on a judge's ability to order "shared" or "joint" custody, beyond the "best interests of the child" standard.

However, the custody statute for children of unmarried parents, [Ch. 209C s. 10](#), explicitly provides that unmarried mothers shall have primary custody of a child until there is an adjudication of parentage:

Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgment of parentage.

In addition, the [statute](#) limits the ability of judges to order shared custody (also known as “joint custody”) unless the court makes several important findings:

In awarding the parents joint custody, the court shall do so only if the parents have entered into an agreement ... or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interests.

Finally, when courts are awarding primary physical custody, the unmarried parent [statute](#) provides:

In awarding custody to one of the parents, the court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent. The court shall also consider where and with whom the child has resided within the six months immediately preceding proceedings pursuant to this chapter and whether one or both of the parents has established a personal and parental relationship with the child or has exercised parental responsibility in the best interests of the child.

The combination of factors above creates important differences between how courts handle custody in cases of married vs. unmarried parents, particularly at the crucially important [temporary order stage](#) at the beginning of the case.



L&O
DIVORCE & FAMILY LAW ATTORNEYS

Need a family law lawyer? Hire the Best

Need a Child Custody Attorney?

CONTACT JASON TODAY!

Jason V. Owens
Partner & Senior Counsel

Physical Custody vs. Legal Custody: What Is the Difference?

In 2016, Lynch & Owens Attorney [Nicole K. Levy](#) guest-blogged a [4-part series on legal custody](#) on Skylark Law's [Scaling the Summit Blog](#). In those blogs, Attorney Levy explored the surprisingly complex and ambiguous law surrounding "legal custody" in Massachusetts. In brief summary, legal custody represents a series of rights and privileges that parents have, separate and apart from the parent's court-ordered parenting time. Broadly speaking, legal custody is widely understood to include a parent's right to participate in major decisions affecting the child's life, as well as their ability to communicate and participate with professionals and third parties in connection with a child's education, medical care, and religious upbringing.

As noted by Attorney Levy in her [first legal custody blog](#):

Under the Massachusetts divorce statute, "shared legal custody" is defined as the "continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development." Meanwhile, the statute defines "sole legal custody" as when "one parent shall have the right and responsibility to make" the same "major decisions" regarding the child. (The Massachusetts unmarried parent statute references "legal custody", but does not separately define the term.)

Notably, the divorce statute does not define what constitutes a "major decision" in the context of legal custody, nor have any major Massachusetts cases provided a reliable definition of what constitutes "mutual responsibility and involvement" or "major decisions" under M.G.L. c. 208, § 31. All of which begs the question: what has a parent who has been awarded legal custody really received?

As Attorney Levy noted in her blog, there is a commonly held assumption that a parent who lacks physical custody (either primary or shared) lacks the right to access the educational or medical records of their child, or to communicate with the child's doctors or educators. Massachusetts law is surprisingly thin in this regard, and there are several arguments available to parents who lack legal custody and seek to access such records. Regardless of what the law says (or does not say), however, as long as most educators and medical

providers believe a parent must have legal custody to access their children's records, parents without legal custody will struggle to gain access.

As noted in the previous section, Massachusetts courts must determine that unmarried parents "have the ability to communicate and plan with each other concerning the child's best interests" before granting joint custody. This elevated standard applies to orders for legal custody, as well as physical custody, for unmarried parents. Regarding divorced or separated parents, however, the custody statute includes a strong presumption in favor of shared legal custody, at least at the temporary order stage:

*[U]ntil a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, **the parents shall have temporary shared legal custody of any minor child of the marriage**; provided, however, that the judge may enter an order for temporary sole legal custody for one parent if written findings are made that such shared custody would not be in the best interest of the child. Nothing herein shall be construed to create any presumption of temporary shared physical custody.*

Interestingly, the presumption in favor of joint/shared legal custody for divorced parents only applies to temporary orders. No presumption favoring shared legal custody applies to judges making a final ruling on legal custody.

About the Author: [Jason V. Owens](#) is a Massachusetts divorce lawyer and family law attorney for Lynch & Owens, located in [Hingham](#), Massachusetts and [East Sandwich](#), Massachusetts.

Schedule a consultation with [Jason V. Owens](#) today at (781) 253-2049 or send [him an email](#).

© Lynch & Owens, P.C. and [www.lynchowens.com](#), 2019. Unauthorized use and/or duplication of this material without express and written permission from this site's author and/or owner is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given to Lynch & Owens, P.C. and [www.lynchowens.com](#) with appropriate and specific direction to the original content.