

**Frequently Asked Questions:
Child Custody and Visitation**

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Children Come First

It is still common for parents to stay in bad marriages or cohabitation relationships “for the children.” Other parents decide they must divorce for the sake of the children.

Whatever your position, children are the most important part of your relationship. We all have some appreciation (from personal experience, from friends, from TV and movies) for how divorce can harm children. For this reason many people stay in relationships they probably should have left years before.

Wherever “child” or “children” are used here, we are referring to minor children, that is, children 18 years old or younger, or 19 years old who are still in high school and living with a parent.

There are ways, however, to minimize the harm to children of divorce and to insure that you have a continuous and important place in their lives.

The California legislature and courts also recognize that children come first and take this very seriously. The phrase that is found throughout the Family Code is making decisions in “the best interest of the child.” (Fam. Code §3011.) The best interests of the child are evaluated considering the health, safety and welfare of the child as well as history of abuse (against a child or the other parent). Common sense tells us there is a great deal of latitude in these definitions and the Court has a great deal of discretion in determining what is in the best interests of the child.

The laws and legal procedures focus on children, at times leaving the parents wondering about how important *they* are to the Court in divorce.

While parties that cohabit and have children outside marriage or domestic unions do not fall under the Family Code as far as spousal support or property issues, the Family Code applies to these parents regarding custody, visitation and child support for minor children of the parents. While there will be many references to divorce, these laws and concepts also apply to non-married parents who are splitting up and working out issues of co-parenting and support.

This FAQ will attempt to address common questions and give other information parents often do not consider.

Legal and Physical Custody

“Legal custody” refers to the parents’ rights to make decisions on issues like health care, education and general welfare of the child. (Fam. Code §3003.) Joint legal custody is common

here, unless there are extenuating circumstances which argue that one parent should not have a right to decide for the child (such as alcohol or substance abuse, abandonment, or child or spousal abuse). With joint legal custody parents must confer with each other (as well as notify each other) about all major issues facing the child, and must jointly agree on things like which school the child attends. If there is a disagreement about, for example, which church the child attends, the parents may exercise their preference when they have physical custody of the child.

“Physical custody” can get a little complicated. On its face, physical custody means which parent has the child live with them most of the time. (Fam. Code §§3006, 3007.); the other parent has visitation rights. Often, however, Family Court Services (“FCS”; more about this important department later) and the Court will dodge this wording and instead say that one parent has “primary physical custody” while either expressly stating that there is joint physical custody or not even mentioning it.

If the parents have joint physical custody, the default is that both parents have the children with them for about half the time. There are a variety of ways to accomplish this to spread out the child’s time with a parent and fairly allow the parents to have equal weekend and vacation time. You can also have joint physical custody with an unequal timeshare (one parent has the kids more than the other).

One primary consideration in visitation and custody plans is minimizing the disruption in the children’s routines and schedules. Having them bounce back and forth may satisfy a parent’s desire to spend time with their child but may not be in the best interest of the child. Longer periods with each parent may be the best way to minimize stress on the child. A schedule can be as simple as a week with one parent, then a week with the other, or as complicated as three days with one parent, four days with the other, then four days with the first and three days with the second, etc. Often visitation schedules are driven by parent work schedules.

Often, one parent has primary physical custody and the other parent has a visitation schedule. This visitation schedule is usually expressly set out in writing (“Father has child Monday, Wednesday and Thursday from pickup after school to 8 PM, and every other weekend from Friday after school to Monday start of school.”). Sometimes this schedule is flexible (“Mother has reasonable visitation rights, up to 30% of the week, to be arranged between the parties.”).

The Unfortunate Monetizing of Timeshare

“Timeshare” is the legal term for the amount of time each parent gets with the child or children, expressed as a percentage or fraction (35% or 30/70). The timeshare for multiple children in a family can be different; one child may spend more time with a parent than the other child spends with that parent in a two-child family, for example.

Theoretically, parents should realistically balance their desire to spend time with their children and be a part of their lives with work and activities to implement a flexible and rational schedule which minimizes the disruption on the lives of the children and maximizes each parent’s time to guide and nurture their kids.

Life is rarely so neat.

One of the most significant factors in setting child support is timeshare, the percentage of time the children are scheduled to spend with the supporting and supported parents. Basically, the more time that the children spend with the parent who is paying support, the less support the parent has to pay. How this is calculated is discussed in a separate FAQ on Child Support.

This often leads to the supporting parent trying to maximize timeshare - not to spend quality time with their children but to lower their support payments. They may push for an impractical timeshare arrangement whereby they “get” the kids while they are at work, so the kids are really with a sitter or family member. This may not be in the children’s best interest.

Experience shows that often (usually?) when the supporting parent gets a timeshare agreement that is based upon their desire to minimize support rather than a true desire to spend time with their kids, after a while their actual timeshare changes to a much more reasonable plan. They get tired of paying for a sitter, and start asking the other parent to take the kids more and more. Sometimes they find that caring for the kids (of any age; each age presents unique challenges to a parent) is more than they bargained for or expected, and they again ask their former spouse to take the kids off their hands more often.

Supported parents have the option, after a few months of living with such a changed “real life” visitation schedule, of asking the Court to modify support based upon the new, realistic timeshare. You can ask for a change in child support whenever there has been a significant change in circumstances which you can document. (Fam. Code §3680.) Records, here as always, are important – you want to be able to show the judge a calendar or diary showing when you had the kids as opposed to what the schedule was supposed to be.

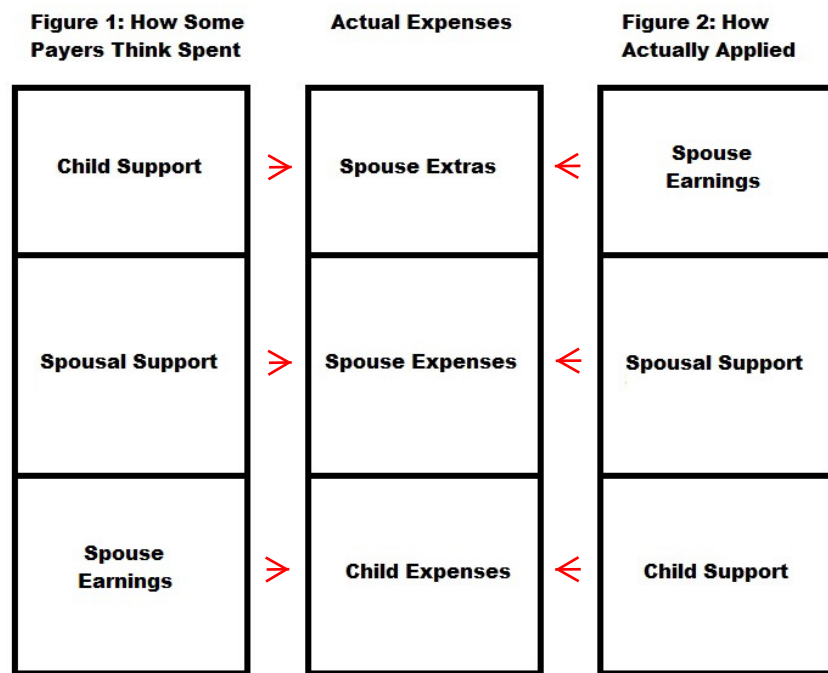
You also need to make the calculation of whether it will be financially worth filing a motion for changing support; if you are going to pay more for filing and arguing the motion than you are going to get in increased support for six months or a year, it is probably not worth filing. As this is being written (October 2015) a motion to modify support costs about \$90 just to file the motion in Marin County, and costs are going up fairly regularly. This does not count attorney fees which will be many times this to pursue this request.

In addition, you have to consider the possibility that the other parent will go back to the original timeshare as a defense; if you value your time with the children, you may wish to stick with the original agreement because the possibility of getting a little more money will not be worth the possibility of losing time with your children.

If you are the party paying support, you are naturally concerned about costs but have to keep in mind what is best for the children and what is best for your relationship with the kids. It doesn’t help your relationship with the kids if your time with them is spent with them staying with a relative or with a sitter. It is better to have less time that is the over-used phrase “quality time” with the kids. If money is a concern, try to make adjustments elsewhere (in spousal support). Don’t harm your relationship with the kids out of a desire to save money.

Supporting parents also need to accept that their child support is really for the benefit of the children, not the spouse. This avoids going to Crazy Town. You not only have a legal obligation to support your kids (Fam. Code §4053(a)), you want to make sure they do not go without their needs being met if financially possible.

Too often those paying child support think that child support money is going to the spouse to improve their lifestyle (to pay for extras); in fact, it should be thought of as going to care for the kids. Some money has to pay for food, clothing, and shelter; it is the child support that goes first to these items for the kids, not spousal support or the supported spouse's earnings. It is not money on top of spousal support or earnings that can be used by the supported spouse for their personal lifestyle enhancements.



Of course this is not a dollar-for-dollar exchange, but odds are the actual pro-rated expenses for the children's food, clothing, shelter, activities, entertainment, etc. exceed what the child support is.

Calculating Timeshare

The temptation is to count hours spent with children and divide that by the hours in a month to determine what percentage of time the kids spend with a parent (timeshare). The courts generally do not want to get into such nit picking, and have developed a generous rounding system that sets some standards to be used for calculations.

The standard calculations work to the advantage of the parent having visitation for the most part in terms of increasing their determined timeshare percentage versus actual time spent with the kids. Having the kids one weekend a month is considered a 7% timeshare (close to

reality, if pick up is 5 PM Friday and return is 5 PM Sunday for 48 hours; the average month has 30.42 days (365/12), so 2 days / 30.42 days a month = 6.57% or rounded up to 7%. However, if a parent has the child for an evening it is considered a half-day (equivalent of 12 hours). Thus if the parent gets a child after they get off work at 5 PM and have them until 7 or 8 PM they still get credit for a half day for support calculation purposes, which is also a 7% timeshare for the year.

This can actually work against the parent having the visitation if they are trying to maximize the time with the kids. A parent who has the kids for three afternoons or evenings a week every week in a month plus two weekends will appear to have the kids 38% of the time, but their actual time with the kids may be 120 hours out of 720 hours in a month, or 17%.

How is this fair? In part, it is because the Court does not want to get into advanced math and arguments over “You picked the kids up 15 minutes late so your timeshare is reduced...” In part it is because those two or three hours in an evening may well represent better quality time with the kids than all the other hours of the day with the other parent, who is waking the kids and feeding them and bathing them and getting them to school and putting them to bed. The primary custodial parent’s time also includes school time and sleep time.

This system is not as skewed as it appears to be.

It should be noted, as a corollary to the above, that if your custody or visitation time includes time kids are in school or daycare that counts as your time and cannot be made up; you cannot claim, “The kids weren’t with me so I should get more time to offset the time they were in school!”

You can play around with calculations for timeshare using the “Advanced” function of the California State website Guideline [Child Support](#) (link good as of 10/14/2015) calculator. Some of the standard timeshare percentages are also listed in Appendix 1 at the end of this FAQ.

Parents with Custody Call the Shots with the Kids Unless it is Unsafe

Obviously, *you* are the better parent. Your former spouse lacks your insight and understanding into the kids, and has a number of bad habits and ideas on child rearing that you disapprove of.

Too bad.

Unless the other parent does something that physically, emotionally or psychologically harms the children (and that another reasonable person – meaning in particular a judge - would agree is physically, emotionally or psychologically harmful), you cannot control what that parent does with the children while they are in his or her care.

Some parents remain on the same page about raising their kids after they separate, which is wonderful. But often they do not. They find it impossible to separate out their personal feelings for the other parent from their judgment of their parenting skills. Sometimes things

which went unnoticed when parents were together become big issues when they are apart.

Two examples from real life:

1. A father refuses to let his 5-year-old son wear the Thomas the Tank Engine t-shirt he wears when visiting because it is not made from “organic cotton.” Ridiculous? Perhaps. But the child is in his father’s care. His father’s rules apply. This action, while perhaps petty and extreme, is nonetheless not harmful to the boy to any real extent. So long as the father returns the t-shirt with the boy at the end of the visit the mother has no real complaint.
2. A father leaves his 5-year-old son to watch his 1-year-old son while father goes up on the roof of the house to work on it for an hour. Few would argue that this “choice” by the father was bad and placed the younger child (and probably the older child as well) in physical danger. Mother has every right to address the issue with the father. It may rise to the level of seeking the Court’s intervention (or perhaps Child Protective Services), or it may simply require a discussion with the father and an agreement – written is best – wherein the problem is acknowledged and the pledge is made never to repeat it.

Most conflicts over how children are being raised are in a grey area. The father likes to have the kids to bed by 8 PM while the mother wants them in bed by 9 PM. The father takes a 10-year-old to a PG-13 movie which the mother does not approve of. Or the big one, the mother introduces the kids to her boyfriend after they have been dating for six months.

Are any of these really harmful? At some level it can be argued that they are, but the harm is probably so minimal that it is not worth mentioning or at least fighting over. Kids are amazingly resilient and parents (especially those going through divorce) are often over-protective of the little things (they cannot protect them from the big thing – the fact of the divorce itself, which is the most damaging to the children). It may be enough for the worried parent to indicate concern and move on, or discuss how you think this presents a problem (or not). That is how you would handle it if you were still together, and wherever possible you want to keep such communication open after you are apart (although the lines of communication are longer).

Lawyers often get asked by their clients to ask the Court for direction in such matters; “I want the judge to order him to stop!” Good lawyers (and those not seeking just to increase their fees) will try to calm their clients down and have them consider for a moment how the judge will view their issue. While such “problems” may loom large and carry great emotional charge for the parent, they are actually so small in reality that all they can expect the judge to do after a cost of hundreds of dollars is say, “Get over it! You’re adults. Work it out. Get out of my courtroom!”

Judges quickly get impatient with both sides in a custody battle where relatively trivial issues are repeatedly brought before them. They are like the parent driving two squabbling kids on a road trip, where each kid is constantly complaining, “Mom! John just pulled my hair!”

“Mom! Suzy just stuck her tongue out at me!” “Mom! John just hit me!” At some point Mom (the judge) will say, “Don’t make me pull over and come back there!”

When a judge gets fed up with squabbling parents, they have more power than to just give kids a time out. Parents (and even their lawyers) can be fined or have other sanctions ordered. At the very least it can make the judge form an unfavorable opinion of one or both parties that can last throughout the divorce proceeding – judges tend to have *very* good memories about their cases and the parties. When parents demonstrate to the Court that they are trying to get past their emotional baggage and work together for the welfare of the children the Court will often work with them to help them craft a mutually-agreeable settlement; if the parties are constantly squabbling and demonstrating to the court that they cannot set aside their personal feelings for the sake of the kids the judge may well decide that she has to arbitrarily make orders to protect the children that neither parent will be happy with.

You need to accept that, just as you do not want the other parent telling you how to raise the children when you have them in your care, so you too must refrain from trying to control how the other parent raises the kids when in the other parent’s custody and care. At the very least, you will have plenty of opportunity over the years to instill your values and provide your framework to the kids to offset any child-rearing practices by the other parent you disapprove of.

Exchanging the Kids

Depending on how contentious your relationship is with your ex-partner, exchanging the children for visits can present a problem. In most cases it is simply a matter of one parent dropping the kids off (or picking the kids up) at the other parent’s house.

Where there is a history of confrontation or even violence, the parties may decide to choose a neutral or public place. This can be a parking lot of a store or even in front of a police station.

Exchanges are not times to discuss any matters other than the immediate welfare of the kids. “I’ve packed Suzy’s cold medicine.” “Don’t forget Ahmed has a soccer game tomorrow at 9 AM.” “Rosario has a project due Wednesday.”

It is not appropriate to discuss support (or pay support) at exchanges. It is not appropriate to discuss any matter relating to the divorce or property issues in front of the children, no matter their age. Children of all ages are sensitive to the demeanor of their parents and can sense anger or fear. Parents should at least be personable and courteous and never demeaning or abusive in word or manner at any point.

Come to exchanges prepared. If the parent picking up the child needs a car seat, either have one installed in the car or have previously made arrangements with the other parent to transfer the car seat prior to the exchange. Do not depend upon working out that arrangement at the time in front of the children. Buying a second (or third) car seat is a small investment.

Exchanges can be hard on kids, and parents should not make it more difficult. If your

child is reluctant to go with the other parent, be loving but supportive and firm. “Honey, daddy will call you tonight. Mommy misses you and wants to spend time with you. I know you will have lots of fun with her. I’ll see you in two days, but you can call me any time you want. OK?”

Punctuality

Traffic happens. When it consistently happens, and your former spouse can document it to the court, you might find yourself on the losing side of a court order restricting your time with your kids.

If you are constantly late, or frequently cancel or postpone visitation, it can be viewed by the Court as an indication that you really do not want or need the amount of visitation you have asked for. It may indicate that your schedule is such that the visitation order is not realistic in the face of the demands of your life. Rather than place the children in the position of having expectations constantly being disappointed, the judge may diminish your ordered visitation.

If you are paying support, this may mean increased support. If you really want more time with your kids, this will mean you lose something even more precious than money – irreplaceable time participating in the lives of your growing children.

At the very least take advantage of technology and text or call the other parent as soon as you know you are late. This will not excuse frequent tardiness but is common courtesy and will soften the blow. Nothing will excuse you if it happens every day – that demonstrates a lack of planning or discipline on your part. If you see a pattern emerging with late exchanges, work with the other parent to modify exchange times or dates to avoid the bottlenecks that precipitate the tardiness. You may have to cut down on time or you may be able to arrange a trade; even if you lose an hour here or there you may save yourself a trip back to court where you may end up losing more timeshare in the long run.

Flexibility is Key

Often, the last feelings a parent has towards the other parent during or after a divorce or custody battle is the willingness to compromise. To make life work going forward, however, you will find that there will be times when you could use some help from the other parent, whether you want to ask for it or not.

Most parents understand this. The mother calls the father up and says, “Can you take the kids this weekend? I know it’s my time, but a client is coming in from Oregon and I promised to take him and his wife to the wine country. I’ll give you your choice of time where I’ll cover for you.”

Some parents, however, insist on jealously guarding the timeshare schedule. When the other parent asks for a variance, they decline, pulling out the order and waving it in the air, proclaiming that that would be a violation of the order.

Such a position is short sighted. Life always happens, and there will always come a time

when both parents need a break, sometimes in an emergency when there is no time to make other arrangements – the other parent may be the only option. If you have refused to accommodate the other parent in their requests for flexibility, then when you need it you may be refused as well.

You are not “giving in” to the other parent when you are flexible in working with them for requests to exchange or make one-time modifications to timeshare – you are essentially banking future goodwill for when *you* will need such an exchange yourself.

Appendix 1

Examples of Timeshare Percentages

1 weekend per month (7%)
1 3-day weekend per month (10%)
1 2½-day weekend per month (8%)
2 weekends per month (13%)
1 weekend per month & 1 evening per week (14%)
Alternate weekends (14%)
Alternate weekends + 2 summer weeks (18%)
Alternate weekends, ½ holidays & 2 summer weeks (19%)
Alternate weekends, ½ holidays & 2 summer weeks (Parent 2 also has 2 summer weeks) (18%)
Two 3-day weekends per month (20%)
Two 2½-day weekends per month (16%)
Alternate weekends & 1 evening per week (21%)
Alternate weekends & 1 overnight per week (28%)
Alternate 3-day weekends (21%)
Alternate 2½-day weekends (18%)
Alternate weekends, ½ holidays & 4 summer weeks (alternate summer weekends with makeups) (21%)
Alternate weekends, ½ holidays & 4 summer weeks (no alternating summer weekends) (21%)
Alternate weekends & ½ holidays & ½ summer (with/without alternate summer weekends) (22%)
Alternate 3-day weekends plus 1 evening per week (28%)
Alternate 2½-day weekends plus 1 evening per week (25%)
Alternate 3-day weekends plus 1 overnight Weekend per week (36%)
Alternate 2½-day weekends plus 1 overnight weekend per week (32%)
Alternate Weekend, 1/2 Holidays, 1 Evening/Week, 4 Summer Weeks (alternate summer weekends with makeups) (28%)
Alternate Weekends, 1 Evening/Week When School is in Session, & 1/2 School Vacation (28%)
3 days per week (43%)
First, third, & fifth weekends (15%)
First, third, fifth, 3-day weekends (23%)
First, third, fifth, 2½-day weekends (19%)
First, third, & alternate fifth weekends (14%)
First, third, alternate fifth 3-day weekends (21%)
First, third, alternate fifth 2½-day weekends (18%)