

Kentucky

TRACEY BEE, THE DIVORCE SOLUTIONIST



Different Types of Child Custody that Kentucky Courts Can Award

There are several types of custody that Kentucky Courts routinely decide.

First, custody can be "physical" or "legal." Physical custody simply refers to the parent who has physical care and control of the child on a day-to-day basis, which includes daily, hands-on care, such as bathing or feeding a child. (Ky. Rev. Stat. Ann. § 403.800 (14).) Legal custody, on the other hand, is the right to make important decisions on behalf of a child regarding matters like education, culture, religion, and health.

Second, custody can be temporary or permanent. As a preliminary matter, the court usually awards temporary custody to one parent during paternity or divorce proceedings. (Ky. Rev. Stat. Ann. § 403.280.)

An award of temporary custody will eventually lead to a contested hearing (similar to a trial) in front of a judge, with witness testimony and other evidence, after which the judge may decide to give permanent custody to one or both parties. Finally, custody in Kentucky can be sole or joint. In a joint legal custodial situation, both parents make decisions together on behalf of their child. When a child's parents have joint legal custody, they often agree to designate the parent with whom the child spends more time as the "primary residential parent" or "primary residential custodian"—which is just a way of saying that the parents have equal decision-making rights, but the child spends more time at one residence than the other.

By contrast, in a sole legal custodial situation, only one parent has the right to make medical, educational, religious, cultural, and other important decisions for the child without having to consult the other parent.

In a joint physical custodial situation, the child lives with both parents but may spend a little more time with one than the other

Best Interest of a Child

The Kentucky appellate courts have established that judges must consider a child's "best interests" when determining how to allocate custody. (Ky. Rev. Stat. Ann. § 403.270 (2).)

It's always best when parents can work together to decide custody matters. That said, it's common for parents to disagree, which leads to a contested custody hearing in front of the judge. During a custody hearing, both parents will have the opportunity to call witnesses, present other evidence, and testify.

But the law allows the court to gather its own evidence. The court may decide to call the child as a witness to determine whether the child has a preference in custody. Depending on the child's age or emotional state, this conversation may occur in open court or privately in the judge's chambers. The court may or may not elect to appoint a person or agency of its own choosing as a "friend of the court" to investigate the child's situation and make recommendations to the judge. (Ky. Rev. Stat. Ann. § 403.290.)

Kentucky custody law requires judges to begin all custody hearings with a presumption that joint custody is in the child's best interest. However, the presumption is "rebuttable"—meaning that either parent can present evidence that convinces the court that joint custody is not in the child's best interest. The presumption does not apply in cases where the court finds that there is a history of domestic violence. (Ky. Rev. Stat. Ann. § 403.315.) Instead, judges evaluate custody using only the best interest factors listed below.

Additionally, judges must consider all of the following factors before issuing a writing custody recommendation:

- the child and parent's wishes for custody,
- the child's interaction and interrelationship with parents, siblings, and any other person who may significantly affect the child's best interests
- the child's adjustment to home, school, and community
- each parent's motivation for requesting a contested custody hearing
- the likelihood that a parent allow the child frequent, meaningful, and continuing contact with the other parent
- the mental and physical health of all individuals involved, and
- information, records, and evidence of domestic abuse. (Ky. Rev. Stat. Ann. § 403.270 (2).)



Leading Case law on Best Interest of Child Pennington v. Marcum, 266 SW 3d 759 - Ky: Supreme Court 2008

Rules of Conduct for Judges.

<https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/201803.PDF>

<https://govt.westlaw.com/kyrules/Document/NECC46170D2B611E2B778A49DB0DF1A18?contextData=>
<https://kycourts.gov/Courts/Judicial-Ethics/Pages/default.aspx>

Attorney Ethics

<https://www.kybar.org/page/attdis>
<https://www.kybar.org/page/opinsethics>



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The law also requires the judge to consider any other relevant factors. For example, if either parent or an investigator presents evidence that a parent is abusing or neglecting a child, say, by abusing drugs, then the judge can consider that as a factor in making a ruling.

But in the end, the judge must base custody decisions on all of the factors, not just one or two of them. The critical question is, what custodial arrangement best serves the child?

De Facto Custodians

There are some cases where a parent has proven unfit to care for a child, and a nonparent must step in to provide care and love. Under the Kentucky unfit parent law, a nonparent can gain legal rights by showing that the biological parent is unfit, which can be difficult to do. The nonparent must prove that the parent is unsuitable and harmful, has signed an agreement to surrender custody, or that the parent is otherwise unqualified to claim custody.

Alternatively, nonparents may become the de facto custodians of a child if the child is under the age of three and has lived with them for six months or lived with them for a year if the child is over the age of three. They must have actual possession of the child and must stand in the place of a parent. If they can establish this, de facto custodians enjoy the same standing in custody matters as a biological parent. (Ky. Rev. Stat. Ann. § 403.270)

Modification of Custody

Kentucky law requires that parents wait at least 2 years after the initial order before requesting a modification. You can overcome the court's time restriction if you can prove that the child's present environment may endanger the child's physical, mental, moral, or emotional health, or the parent placed the child with a de facto custodian.

Also, the parent requesting a modification must demonstrate to the court that, since the last order, there has been a change of circumstances that make the current orders ineffective. As with an initial custody determination, the court will evaluate the best interest factors when deciding a proper custody or visitation order for your case. (Ky. Rev. Stat. Ann. § 403.340.)

Reasons for Requesting a Modification

Here are some reasons the court may grant a modification:

- Change in circumstances has happened that will negatively impact the child or parent's life
- Proposed modification would be in the best interests of the child

Some examples of these instances might include but are not limited to the following:

- Death of a custodial parent
- Domestic violence has occurred
- Parent relocates
- Child's needs change (an example would be a child that requires special education classes)
- Co-parent refuses to follow custody agreement

GAL In Kentucky

According to KRS 26A.140(1)(a), courts may implement measures to accommodate the special needs of children, including a trained guardian ad litem ("GAL") or special advocates to serve in circuit and district courts to offer consistency and support to the child and to represent the child's interests when necessary. Therefore, guardians ad litem may be appointed for various types of cases to protect a child's welfare.



Recusal of a Judge

<https://casetext.com/rule/kentucky-court-rules/kentucky-rules-of-the-supreme-court/judicial-conduct-commission/rule-scr-4300-kentucky-code-of-judicial-conduct/canon-2-a-judge-shall-perform-the-duties-of-judicial-office-impartially-competently-and-diligently/rule-211-disqualification#:~:text=1%2F31%2F2018.&text=%5B1%5D%20Under%20this%20Rule%2C,with%20the%20term%20%22disqualification.%22>



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