

## Child Custody Issues

Defining Habitual Residence  
in the Hague Convention

Child Custody Survey Results

Military Parents & Custody

Best Practices for Child  
Estrangement Cases

Documenting Sobriety  
During Parenting Time

The GAL in Contested Custody Cases

The Contractual Approach to A.R.T.

Access to Justice for Immigrants

Modifying “Irrevocable” Trusts

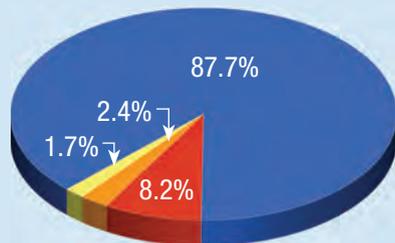
Are You Learning to Fail  
or Failing to Learn?

How to Become Invisible

6 Secrets to Securing More  
Clients with Your Website

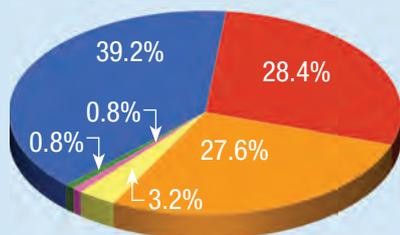
Over the last 5 years, your contested custody cases result in?

- Joint legal custody
- Sole legal custody to the mother
- An Assortment & Guardianships
- Sole legal custody to the father



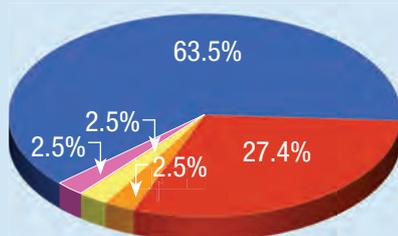
Over the last 5 years, what is the most common parenting time/custody arrangement you have seen?

- Joint Physical Custody (e.g., 60/40)
- True Shared Parenting (50/50)
- Father every other weekend + midweek
- Parenting Time Varies Due to Schedules
- Mother every other weekend + midweek
- Birdnesting (i.e., kids remain in the home, Mom and Dad alternate)



Do you think the starting point of legal and physical custody should be:

- No presumption: each case is unique
- Joint (50/50 to 60/40 with adjustments based on the circumstances)
- Sole custody to the children’s primary caretaker pre-divorce
- Joint legal custody, no presumption regarding physical custody
- The best interests of the child(ren)



# Child Custody Survey Results

Family law professionals answer the question: “Do you think the laws related to child custody need to be changed?”

By Diana Shepherd, CDFA®, Editorial Director of *Family Lawyer Magazine*

Our original plan was to take a “2020” look at custody across the nation by sharing responses to a survey in our Spring issue. When lockdowns started, we switched gears and created a special COVID-19 issue instead. Conducted from February to April, many of these survey responses pre-date COVID-19, but the insights are no less valid.

Of the 120 respondents, almost all were family lawyers (117), some of whom were also mediators (38). We received too many responses to share in these pages; to read them all, go to [www.familylawyer magazine.com/articles/child-custody-2020-survey-results](http://www.familylawyer magazine.com/articles/child-custody-2020-survey-results). Here is a sampling of the written responses.

### Is a 50/50 a Good Presumption?

“We should start with a presumption that both parents will be sharing time and responsibilities.

~ Amanda Bradley, Family Lawyer

The notion that 50/50 is the starting point needs to be either codified or renounced by statute.

~ Amy Goodblatt, Family Lawyer & Mediator

The presumption of true joint physical custody leads to unjust results.

~ Leigh Carson, Family Lawyer

The presumption of shared 50/50 custody would be a great place to start – then let cases deviate from there as needed based on circumstances. The current system whereby the parents either have to agree on 50/50 or go to court and risk losing custody is terrible.

~ Karen Leiser, Family Lawyer

When the default order is a 50/50 timeshare, many children experience substandard parenting much of the

time and a chaotic life no adult would tolerate (having to move between two homes all the time). Courts should focus on determining which home better suits the children’s needs. The emphasis on fairness to the parents shortchanges children of divorce.

~ Christopher F. Emley, Family Lawyer

We need a preference for joint legal and shared physical custody, and a default statute on parent relocation.

~ Anonymous, Family Lawyer

There’s such a strong leaning toward joint parenting right now that even when there are issues of the children’s safety, the court [favors] shared parenting. This may not be appropriate when one parent is involved with drugs or alcohol, or has never provided appropriate care for the children.

~ Christy Collins, Family Lawyer

Set ideas relating to the importance of equal time with each parent often result in failure to fully examine each parent’s ability to parent, the relationship between parent and child, an examination of the child’s feelings toward and desire to have contact with the parent, and the lifestyle of each parent.

~ Anonymous, Family Lawyer & Mediator

The whole notion of a “tie-breaking authority” in joint legal custody is nothing but sole legal custody.

~ Vincent D. Sowerby, Family Lawyer

A presumption of joint legal custody is a good idea – as is 50/50 physical custody with consideration given to the primary caretaker pre-divorce. But not too much consideration: just because one parent did the most of the childcare does not mean that the child did not

learn important skills and habits from the other parent.

~ Stacy Albela, Esq., Family Lawyer

Although each custody case is unique, the reality in the Bay Area is that there is a strong presumption in favor of 50/50. If that is the de facto law, then actual law should state that expressly.

~ Vanessa Hierbaum, Family Lawyer

### The Best Interests of the Child

“Best interests” is a very vague standard. The elements should be codified and more overt.

~ Joy Rosenthal, Family Lawyer

There should be clearer guidance beyond “what is in the best interest of the child.” A presumption of 50-50 shared physical custody – without a hard-and-fast rule to mandate it – would help.

~ Lawrence Rothbart, Family Lawyer & Mediator

### The Language of Custody

The statutory language needs to be updated to reflect modern concepts, using terms such as “physical custody” instead of “visitation.” Parents don’t “visit” their children – they exercise physical custodial periods or parenting time.

~ Moura Robertson, Family Lawyer

We need to focus less on labels (e.g., sole, primary) and more on a shared custody agreement based upon the particular facts of each case.

~ Martin Charlton, Family Lawyer

We need to codify custody law and the best interests of the child standard, update language, and strengthen custody law for when DV/child abuse is alleged.

~ Anonymous, Family Lawyer

We don’t have a definition for “Custody” in the statute. The small changes have not been child focused, and there is not enough understanding of children’s developmental needs.

~ Rose Hubbard, Family Lawyer

Maryland has no legislation on custody “factors” – it is all case law. However, our Court of Appeals now requires parties to

provide Parenting Plans with guidance as to factors the court might consider. If the parties agree on all issues, the the Court will adopt the Plan. If they disagree, they will offer testimony on the areas of disagreement.

~ Keith N. Schiszik, Family Lawyer

### Judicial Discretion

Judges have too much discretion and the rules should be tightened to permit appeals to review abuses. When making permanent custody arrangements, judges should be discouraged from relying upon pre-court filing custody arrangements as this almost always favors a non-working parent.

~ Anonymous, Family Lawyer

Depending on which judge is hearing the case, a father may or may not have a fair shot at shared custody. Current research and common sense support the idea that shared custody should be the starting point when feasible and in cases not involving domestic or drug abuse.

~ Taylor Fontenot, Family Lawyer

The application of the laws need changing. The law presumes judicial neutrality, but the reality can be quite different. This is not the case in every jurisdiction, but gender bias regarding custody does still exist.

~ Byron Morgan, Family Lawyer

The current “alphabet soup” of determining factors is overly long, and tasks the lawyers, GALs, and the judges with too many miniscule details. It also prevents the GALs and judges from making good and clear decisions in the best interests of the minor children, who are the only ones in the dissolution case who are without a voice.

~ Rebecca Amster Cantor, Family Lawyer & Mediator, GAL

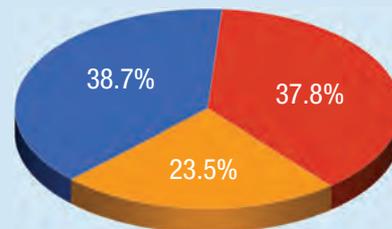
### Child Support and Custody

We need more clarity regarding the interplay of parenting time and child support, and we need to better articulate a standard so that there is neither a “penalty” nor a “bonus” involved when parents are sharing physical custody.

~ Francine Cohen, Family Lawyer

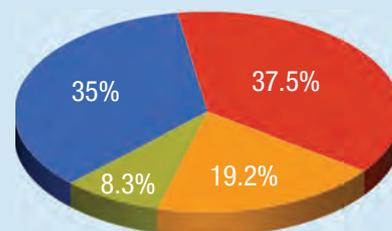
### Do you think the laws relating to custody in your state need to be changed?

- Yes, they require a major overhaul
- Yes, they need minor adjustments
- No change is needed



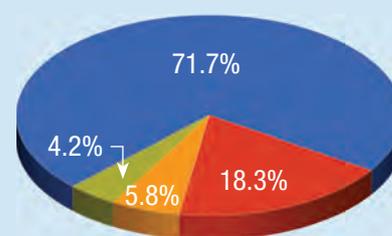
### What percentage of your custody cases have been high conflict?

- less than 25%
- 25 to 50%
- 51 to 75%
- more than 75%



### In what percentage of your contested custody cases do you use a parenting evaluator?

- less than 25%
- 25 to 50%
- 51 to 75%
- more than 75%



### Do you recommend any apps or software to help your clients co-parent during and after divorce?



There always seems to be a fight over overnights because it affects child support. I had a case where the father cared for his child from after school to bedtime on weekdays, but because he didn't have overnights, he paid support as if he only had his child every other weekend. We should be able to arrange creative parenting plans that help both parents and the children *without* the fear of affecting child support.  
~ *Natalee Picillo, Family Lawyer*

### **Domestic Violence, Mental Health, and Special Needs Issues**

The opioid crisis has created an overload in our custody courts and more grandparent custody cases. But grandparents get old, and some will die with minor grandchildren in their custody. The statute makes it difficult for other family members to pitch in because there's a presumption that the petitioner is a bitter sibling – not a caring aunt or uncle who has actually been involved with the children for years. The courts give too much weight to the natural parents and not enough to what has actually been going on in the family.  
~ *Anonymous, Family Lawyer & Mediator*

Current laws are insufficient in addressing domestic abuse, chemical dependency, and reunification.  
~ *Anonymous, Family Lawyer*

Mental health issues cloud the "usual" plans and don't seem to have a good path to be part of the resolution of the issues.  
~ *Anonymous, Family Lawyer & Mediator*

The statutes do not take into account the needs of special needs children and the judges do not seem to have any clue about how to handle these cases.  
~ *Rebecca Fischer, Family Lawyer & Mediator*

### **Other Suggestions**

Issues regarding parenting do not belong in an adversarial system. The Santa Clara County Superior Court has a program called the Young Children's Settlement Teams in which a team consisting of one lawyer and one mental health professional can be assigned to parents with children 5 and under. The parents meet

with their team up to four times a year to discuss parenting plans that evolve over time as their children get older. The teams are volunteers and the program is voluntary for the parents.  
~ *Karen D. Russell, Family Lawyer*

The children's preferences should be given some legal standing.  
~ *Maryann Conway, Family Lawyer*

There should be a statutory framework for better meeting a child's needs based upon maintaining the status quo.  
~ *Melissa Atteberry, Family Lawyer & Mediator*

We should always be open and willing to amend or create new laws when we realize (e.g., as a result of psychological

studies on how various types of parenting schedules impact children at certain stages of development) that changes in the law are necessary to safeguard children's rights to grow up in safe and nurturing environments with consistent parenting.  
~ *Rachel Elovitz, Family Lawyer & Mediator*

The legislature should pass laws that alter the move-away presumption on behalf of the moving parent.  
~ *Anonymous, Family Lawyer*

We could divide decision-making between parents (e.g., one handles education, the other handles medical) to give more balance and speak to each parent's strengths.  
~ *Anonymous, Family Lawyer* ■

## **Pitfalls in PA's Proposed Presumption of Shared Custody Bill**



*On Dec. 9, 2019, Pennsylvania family lawyer Maria Cognetti testified before the House Judiciary Committee about the pitfalls in the presumption of shared custody bill. Chair of the joint state "Domestic Relations Advisory Committee on Custody," Maria is also a past-president of the AAML. Here are a few excerpts; you can read her complete testimony at [www.bit.ly/presumption-of-shared-custody-bill](http://www.bit.ly/presumption-of-shared-custody-bill).*

"[One] huge problem with this bill is the burden of proof for a parent seeking primary custody. It would be difficult – if not impossible – to get past the burden in this bill. For 42 years, my practice has focused on custody; most of my custody clients are men, and I can tell you that they would not like this bill. Good dads want and deserve the ability to ask for primary custody. This bill would basically take away their ability to do that, based on how hard the presumption is to overcome.

"My clients don't want shared custody with an unfit parent. I do a lot of appellate work, and the Superior Court regularly knocks down any opinion where there was not a total review of custody factors.

"The bill purports to take out both partial and primary physical custody – perhaps because the assumption is that it will be shared. But if a parent cannot actually get past the burden of proof, that creates a huge void. Grandparents often got partial custody – but with partial gone, they would get shared or supervised. This would probably remove about 95% of grandparent cases.

"The bill also removes sole legal and sole physical custody; I'm not sure why, because they are rare cases. In my 42 years, I have had three cases where my clients have gotten sole legal – but it does happen, and in those cases, it was really justified.

"Our current statute calls for no presumption: which gives parents equal footing while protecting the rights of the child and putting the child's best interests first. This proposed bill should be child-focused. Instead, the bill is parent-centric: it puts the parents' rights ahead of what is best for the child." ■