



Custody and Parenting Time FAQs

Should I ask my children where they want to live after the divorce?

It is almost NEVER a good idea to speak to your children about where they want to live after the divorce is final. Involving children in this manner puts them in the situation of having to choose one parent over the other. Even if you believe your children would prefer to live with you, asking them to verbalize that brings them into the emotional turmoil.

My child says he wants to live with me. What should I do?

First, consider the possibility that the child is saying what he thinks you want to hear. We often hear clients say that children have expressed a strong desire to live with one parent...but it is not unusual for children to make that statement to both parents. Divorce is very difficult for children. Almost all children just want their parents to stay together. Many children are pleasers, and make comments to make their parents happy. Children are also very smart and can easily determine how to manipulate their parents---especially in a divorce situation when the parents are often not communicating between themselves to realize what is happening.

Regardless of the reason, it is important to understand that these types of statements from children are not uncommon, and you should be careful in accepting these sorts of statements at face value.

Assuming that you determine that it really IS your child's desire to live with you, you should next consider whether it really *is* in the child's best interests to live with you. Where your child *wants* to live is not always what is in your child's best interests. You are the parent and you are the best to determine your child's best interests. In determining whether you are the person most suitable to have custody of your children, you should consider whether your work schedule permits you to be available to your children, whether you will be able to set down rules and enforce them, what type of school your child would attend if in your primary physical custody, etc.

My spouse and I simply cannot agree on who should have custody of our children. What can we do?

There are all kinds of options that you and your spouse can try before resorting to a "custody battle" to determine who should have custody of your children. Sometimes counseling can be helpful. Mediation is also a helpful tool in assisting people reach resolutions through compromise. The most important thing to remember is, if you can reach an agreement in any way, it is important to do that. Reaching an agreement will likely mean that you will have to make some compromises and your spouse will have to do the same. The beauty of an agreement is that you get to decide. When you ask the judge to determine the custody of your children, you lose all of the power. Someone who does not know you, your spouse or your children will be making a decision that will substantially impact all of your lives. Further, having a judge decide custody issues means that you will have to go

into the courtroom, say negative things about your spouse and your spouse's parenting; and you spouse will do the same thing to you.

Custody battles take a long time, are expensive, and are often emotionally very painful, not just for you and your spouse, but for your children as well. Although you may be very angry with your spouse, saying those things to your best friend is very different than saying those things in open court, in front of your spouse, and "on the record." Regardless of how upset you are at your spouse right now, you have to co-parent with this person for the rest of your life---not just until you child turns 18 or 21---forever! You will both be at your child's wedding, the birth of your grandchildren, your grandchildren's birthday parties, etc. What you say in court cannot be taken back. And what you hear in court, you may never be able to forget or forgive. Starting off this way makes future co-parenting very challenging. When you can avoid custody battles and resolve matters yourself, it is best to do so.

That being said, it is sometimes just not possible to avoid seeking the court's assistance in making a custody determination. If you find yourself in this situation, it is important that you put together your case such that you present the best possible case to the judge to convince him or her that it is in your child's best interests for you to have primary physical custody. An experienced custody attorney will discuss all of this with you, and will assist you in framing your case in the best, most concise way to convey to the judge your position on your child's best interests.

How does a judge decide which parent should have physical custody if the parents can't agree?

A judge must decide custody based on the best interests of the child. Indiana law requires that the judge considers all relevant factors, including but not limited to, the age and gender of the child, the strength of the child's relationship with each parent, the wishes of each parent, the wishes of the child, any history of domestic violence or other abuse, and so on. Judges have broad discretion in making custody decisions.

At what age can my child decide where he wants to live?

People often have misunderstandings about this issue. The simple answer is that a child's wishes are never enough for a court to make a custody determination. It is true that Indiana's custody statute includes a child's wishes as one of the factors that a judge should consider in deciding the child's best interests. It is also true that the wishes of children who are at least 14 years of age are given more weight by the judge in making such custody decisions. However, the child's wishes do not control the outcome of the case. Preferably the parents decide where a child will live, but if the judge decides, the child's wishes are only *one* consideration.

Should I have a custody evaluation done in my case? Will it help my case?

You should go through the specific pros and cons of a custody evaluation with your attorney, as your case has specific facts that need to be considered when making this decision. Generally, custody evaluations can be expensive, take a substantial amount of time (and can delay reaching a final resolution). However, they can also be wonderful tools in giving the court an inside view of what is going on with your family. Depending on the age of your children, a custody evaluator may be a good way to address your children's wishes.

What is DRCB [Domestic Relations Counseling Bureau]?

The Domestic Relations Counseling Bureau is a Court agency that assists families experiencing disagreement about the custody and visitation (parenting time) arrangements for children. After receiving an order from the Court to provide services, the DRCB will complete an evaluation of the family through a series of interviews and the review of collateral information regarding the family. A report is prepared and submitted to the Court with recommendations regarding what type of custody and parenting time arrangement would serve the child's best interests, along with additional recommendations for services which would enhance the family's functioning.

Can my child testify at the custody hearing to tell the court what he wants?

Children *can* testify at custody hearings, but it is exceptionally rare. In order to testify, a child must be "competent" to testify, meaning that the child must understand the difference between the truth and a lie, and must promise to tell the truth in court. However, even if a child *IS* competent to testify, children do not testify at custody hearings very often because most parents and attorneys think it would be too difficult for a child to testify in court in a custody case. Our team at Hollingsworth & Zivitz, PC is very sensitive to the issue of putting children in difficult emotional situations, and accordingly, we keep children off of the witness stand at all costs. That being said, sometimes it is appropriate for a child to speak privately with the judge (not in open court, not in front of either parent or other witnesses to the custody hearing). Even this type of child involvement is not encouraged, for all of the same reasons of there being a strong preference to keeping the children out of the custody battle as much as possible. However, in certain circumstances, depending on the age and maturity level of the child as well as the specific issues alleged between the parents, a private conversation between the judge and the child may very well be appropriate.

How can my child speak to the judge privately?

In Indiana, it is possible for the judge to speak privately to a child to hear what the child's wishes are in a custody or visitation case. Courts can consider the wishes of a child when deciding custody, especially if the child is at least 14 years old. One way for the court to find out what the child wants is for the judge to speak to the child. Usually, one of the parents (or the parent's attorney) will ask the court to speak with the child privately. This is sometimes called an "in-camera interview." The court then decides whether or not to speak to the child. Whether or not the judge will agree to conducting an in-camera interview with the child depends on any number of factors, including the allegations made between the parties, the age and maturity level of the child, etc. However, it is important to note that some judges feel very strongly that children should not be involved in the process whatsoever, and accordingly, are generally opposed to speaking with children for that reason.