

In Deciding Custody, Current Possession Matters

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Statistics compiled by [Divorce Peers](#) tells us in two out of three cases children stay with their mother in the marital home when couples split up. The vast majority of couples (sixty-five to eighty percent depending on the source) either agree at the outset how custody will be arranged or settle the matter during the pendency of their divorce. About sixty percent of couples agree for the mother to have primary physical custody.

Theoretically, courts abandoned the ‘mother is best’ mindset years ago, but it has taken time for the idea to sink in. In our experience, a mother is still more likely than a father to be awarded primary physical custody of the children if a case goes to mediation or trial, but fathers have steadily gained ground in the last twenty years. More fathers who want to be an active part of their children’s lives are fighting for that right.

The ultimate goal in a custody proceeding is to determine what is best for the children. A child needs the love and attention of both parents as long as they are fit to be parents. In deciding what is best for the children under California law, judges will consider many factors, including:

- The ages of the children,
- The emotional ties between the parents and the children,
- The ability of the parents to care for the children,
- The health of the children,
- Any history of family violence or substance abuse, and
- The children’s ties to school, home, and community.

Practically speaking, family court judges will also consider where the children have lived since the couple separated. For instance, if a father voluntarily left his children with their mother in the marital home and the children have lived with the mother continuously since the separation, a judge may decide the mother is the best primary custodian.

Why? Because a father who holds his children’s best interest above all other matters would not leave his children in a bad situation. Since he left his children with their mother and allowed them to reside there continuously, she must be a fit and suitable person to care for the children. In other words, the father’s actions support the mother’s claim that she is the best parent.

The point is to take care not to make the other person’s case for them. If you believe the children should live with you, then take steps to get temporary custody at the outset.