

## Should Little Johnny Play Football or Take Piano Lessons? Allocating Legal Custody

All custody orders in cases between parents must allocate custody rights and responsibilities in a way that meets the best interest of the child. [GS 50-13.2](#). “Custody” is a term that is not well-defined in North Carolina law but clearly refers to both physical care and control of a child as well as to the authority to make decisions regarding the child. Physical care and control is referred to as physical custody while decision-making authority is referred to as legal custody. [GS 50-13.2\(a\)](#) requires the court to consider “joint custody” whenever requested by a parent. What does joint legal custody mean? What can a court do when the parents simply cannot agree on whether little Johnny will play football or take piano?

### What is Legal Custody?

“Legal custody” is not defined in the general statutes, but the court of appeals has held that it refers generally to the right and responsibility to make decisions with important and long-term implications for a child’s best interest and welfare. *Hall v. Hall*, 188 N.C. App. 527, 655 S.E.2d 901 (2008); *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006).

Examples of decisions a parent with legal custody can make include:

- (1) The child’s education, health care, and religious training *Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2002); and
- (2) Discipline and other matters of major significance concerning the child’s life and welfare. *Diehl*.

### What is Joint Legal Custody?

While [GS 50-13.2 \(a\)](#) requires the court to consider ‘joint custody’ if requested by either parent, the statute contains no definition of ‘joint custody,’ nor does it distinguish between ‘joint legal custody’ and ‘joint physical custody’. *Patterson*.

The statute does not create a presumption in favor of joint legal custody. *Hall*.

The court of appeals has stated that “[w]ithout further definition ... joint custody implies a relationship where each party has a degree of control over, and a measure of responsibility for, the child’s best interest and welfare,” *Patterson*, and that [G.S. § 50-13.2\(a\)](#) allows the court substantial latitude in fashioning a ‘joint custody’ arrangement. *Diehl*.

If awarded joint legal custody, the parties share the right to make major decisions affecting the child’s life or certain decisions are allocated between the custodians by the court. *Diehl*; *Patterson*

(because the General Assembly chose not to define “joint custody”, the court, or parties to a custody agreement, are free to define the term to fit the needs of a particular situation).

### **Must a Court Award Joint Legal Custody of A Parent Requests It?**

No. In the recent case [Oltmanns v. Oltmanns, NC App June 2, 2015](#), the court of appeals rejected father’s argument on appeal that the trial court was required to award joint legal custody after finding that both parents had been significantly involved in the lives of the children before separation. The trial court awarded primary legal custody to mom after concluding it was in the best interest of the children to do so. The court of appeals upheld the trial court, pointing to the findings that because the parents:

“have some differing belief systems, values and priorities, there are numerous areas where they might disagree on what is best for the children. Ongoing tension between them over decisions about the children’s upbringing would have a more damaging effect on the children than the unilateral decisions of either parent. ....due to the lack of trust between the parents, the differing values and the parenting styles between them, and the fact that both parents are extremely intelligent, the court finds that the parties are unable to make decisions of significance for the children together and that the power struggles between them is more detrimental to the children that unilateral decision making authority to one parent would be.”

The trial court supported the decision to give defendant mother primary legal custody with findings that she had demonstrated more willingness than had father to support and foster the relationship between the children and the other parent and to consider father’s opinions when making decisions about the children.

See also *Dixon v. Gordon*, 223 NC App 365 (2012) and *Thomas v. Thomas*, 757 SE2d 375 (2014)(both upholding primary legal to one parent based on parents’ inability to communicate and resolve conflict).

### **Can the Court Split Joint Legal Custody?**

When the parents can’t agree on much of anything but dad feels strongly about whether Johnny plays football, can the court award joint legal custody except with regard to decisions about extracurricular activities and then give final say to dad on those issues? The court of appeals has said no. If the court decides to award joint legal custody, it must be “true” joint legal – evidently meaning both parties decide everything together. The court can ‘split’ joint legal only with specific findings as to why such a ‘deviation’ is necessary and in the best interest of the child.

So in *Diehl*, the court of appeals reversed the trial court order of split joint legal that allowed mom to make most decisions but allowed dad to decide whenever a decision would have a significant financial impact on him. The court of appeals held that the trial court’s findings that the parties

were unable to “effectively communicate” regarding the needs of the children did not support that order and questioned whether an award of joint legal was appropriate at all given the general inability of the parties to communicate.

There was a similar decision in *Hall v. Hall*, 188 NC App 527 (2008), but in dicta, the court indicated that a history of disagreements between the parties as to a specific issue, such as school or religion, would be sufficient to support a split of joint legal. And in *MacLagan v. Klein*, 123 NC App 557 (1996), the court upheld a decision to award joint legal except with regard to the child's religious upbringing. Findings by the trial court that the child had been raised Jewish by agreement of the parties but the mother had decided the child needed to convert to Christianity when the parents separated supported the conclusion that it would be in the child's best interest for one parent to make that decision.

