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Child Custody and Access

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Child Custody and Access

This booklet is meant to give you a basic understanding of legal issues. It is not a substitute for individual legal advice and assistance. If you are dealing with family law issues, get legal advice as soon as possible to protect your rights. For more information about how to find and pay for a family law lawyer, see our booklet on "Finding Help with your Family Law Problem" on our website at www.onefamilylaw.ca.

In Canada, the law says that both parents have the same rights to raise their children and to make decisions about how the children are cared for.

If you and your child's other parent separate or do not live together, you must make plans about your child's daily life and where your

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child will live. You can make these arrangements with or without the help of lawyers.

If you cannot agree, either of you can apply to the court for an order for **custody** or **access**. You must apply for custody or access in the city or town where your child usually lives. Orders about custody or access can be changed if either parent's situation changes a lot.

What is custody?

Custody does not mean where the child lives. That is called residency. **Custody** means the parent who is responsible for making decisions about the child's life.

There are two kinds of custody:

1. If you have **sole custody** or **custody**, you can make major decisions by yourself

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about things like your child's health, education and religious teaching. If you have sole custody or custody, you are called the custodial parent. The other parent is called the non-custodial parent.

If you have sole custody, the other parent usually has the right to know about the decisions you make, but you usually do not have to talk to them before you make decisions.

2. If you have **joint custody**, you and the child's other parent must make major decisions about the child's life together.

Sometimes parents say they have **shared custody**. This does not necessarily mean you share decisions about the child. It means that the child spends the same amount of

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time living with each of you. It is also called **shared parenting**.

Where the children live

Most of the time, children spend more time with one parent than the other. When this happens, the home where the child spends more time is called the child's **primary residence**. The parent who does most of the child care is called the **primary caregiver**. Courts often decide that children should live with the parent who was the primary caregiver before and after separation.

What is access?

Most of the time, courts believe that it is in a child's best interests to have as much contact as possible with both parents. If a child does not live with one parent, that parent will

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usually still have the right to spend time with the child. They usually also have the right to know about the child's health, well-being and education. This is called **access**. Even parents who have not spent much time with their children usually get access.

If you can talk easily and honestly with your child's other parent, you can make an informal arrangement about access. If you cannot get along with the other parent, or if the relationship was abusive, it is better to go to court to make access arrangements.

What to expect if you go to court

There are many different kinds of access orders. Some are very open while others are more specific. A court order about access could allow you and your child's other parent to make your own access arrangements to

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suit all of you. This is called “**reasonable and generous access** on request”. If you do not get along with your child’s other parent, it is better to get an order that sets the dates and times of access visits. This way you will not have to always talk to the other parent about the details of the access visits.

Sometimes the court may set up a **graduated schedule**. This means that the parent has very little access at first, but has more access over time. A graduated schedule gives your child a chance to get to know and trust the access parent. The courts may use a graduated schedule if your child has not spent much time with the access parent or if you separated when your child was very young.

The court can order supervised access if it is worried about the child’s safety with

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the access parent or if the access parent and the child have not spent much time together. This means that the parent cannot be alone with the child. The person who supervises the visits can be a member of the family, or someone else. Supervised visits can also happen at places called **supervised access centres**, where staff monitors the visits.

The court can also order supervised access exchanges if it is worried about conflict or safety when you and the other parent meet to transfer the children. Supervised access exchanges take place at a supervised access centre, where staff will help to transfer the children between you and your partner so that you do not have any contact with one another.

In very rare cases, a parent will be **denied access** to their child. This will only happen if

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the court believes the child will be hurt by that parent.

Following custody and access orders

If you have an agreement or order for custody and access, you must follow it. Either you or the children's other parent can ask the police to help you enforce the custody order. If you do not allow your children's other parent to see them as set out in the order, he can ask the court to transfer custody of the children to him. The law does allow you to refuse to allow access if you are afraid for the children's safety. If you refuse access, get legal help right away.

Sometimes, one parent will fight for access and then not show up to see the children during the ordered access time. This can be

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upsetting for the children but, unfortunately, there is nothing the law can do to force the access parent to use their time. If this happens on a regular basis, keep track of all missed or shortened visits. You may be able to use this information to go back to court and ask for the access order to be changed.

How do courts decide about custody and access?

When courts make decisions about custody and access, they must consider the **best interests of the child**. This is a strict legal term. Here is some of what the court looks at:

- has there been any abuse in the household?
- how loving is the relationship between each parent and child?
- how strong are the emotional ties between the child and each parent who wants custody?

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- how long has the child lived in a stable environment?
- what plans does each parent have for the child's care and upbringing?
- how well can each person parent?
- what does the child want?

Family law courts also look at what arrangements already exist. This is called the **status quo**. If the child's living arrangement is working well, the court will not usually make big changes.

Parents are not the only people who can apply for custody and access. The law says that any person can apply. Sometimes, extended family members such as grandparents, step-parents or aunts apply to the court. No matter who applies, the court will consider the best interests of the child.

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Moving with the children

One difficult issue that often arises when parents don't live together is whether the parent the children live with can move the children out of the city, or in some cases, even out of the province or the country. You may want to move to be closer to other family members for support or for a job opportunity. Such a move may make it difficult for your children's other parent to see the children on a regular basis. Depending on the distance of the move, cost may also become an issue.

Like all decisions dealing with children, the test the court will use to decide whether or not to allow the move is the **best interests of the children**. If you are allowed to move with your children, the court may change the

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access arrangements to allow for longer visits with the access parent, or it may reduce the amount of money you receive in child support because the other parent has expensive travel costs associated with access.

Travelling with the children

In most cases, one parent cannot take the child outside Canada without the other parent's permission. If you travel with your children, you should have the custody order and a letter from the other parent that gives permission for the children to leave Canada. The letter should be notarized by a lawyer. When you cross the border, you should expect the border guards to ask you to prove that the children's other parent knows about the trip and has agreed to let them leave the country.

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Child abduction

Sometimes, one parent takes the children outside Canada without the other parent's permission. This is very serious, because it can be difficult to get the children back once they leave Canada. This is called **child abduction**. Child abduction is a serious crime in Canada.

There is no way to make absolutely sure your children never leave Canada illegally, but there are some things you can do to help protect your children. Make sure that the custody order or agreement:

- is as clear and detailed as possible;
- specifically says that the children cannot travel outside of Canada.

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The order can also say that you or the court must keep the children's passports or the access parent's passport.

The main law that may be able to help you get your children back is the *Hague Convention on the Civil Aspects of International Child Abduction*. It is an international treaty signed by 75 countries. The countries who signed the treaty agree that they will work together with one another to find and return children who have been illegally moved from one country to another.

If your child is taken to a country that did not sign the Convention, it will be much harder to get your child back to Canada. If this happens, you can fight for custody using the laws of the country where your child was taken. You can also try to negotiate with the abductor and his family.

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For more information about how to prevent an international abduction, read *International Child Abductions: A Manual for Parents*. This booklet was produced by Foreign Affairs Canada. It also says what to do if your child is taken out of Canada without your permission. You can order a copy from Foreign Affairs Canada or read the Manual online at <http://www.voyage.gc.ca/>. Click on “Children and Travel” and then on “Custody and Abduction”.

What to do if your child has been taken out of Canada

If you think that your child has been taken out of the country you should:

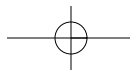
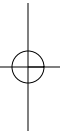
- **Call the police** right away. The police will send an alert to the border guards in the country where the other parent might take your child.

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- **Call the Consular Affairs Bureau** right away at 1-800-387-3124 or 1-800-267-6788. Their office is open 24 hours a day, 7 days a week.



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If you are a francophone woman living in Ontario, you have the right to access French language services in family law court proceedings. For more information regarding your rights, contact a lawyer, a community legal clinic, or the support line Femaide at 1-877-336-2433, TTY 1-866-860-7082.

You can find more information on how to access services in French on our website at www.onefamilylaw.ca or www.undroitdefamille.ca.

Family Law Topics Available*

1. Alternative Dispute Resolution and Family Law (ENG 001)
2. Child Protection and Family Law (ST 002)
3. Child Support (ST 003)
4. Criminal and Family Law (ST 004)
- 5. Child Custody and Access (ST 005)**
6. Domestic Contracts (ENG 006)
7. Family Law Arbitration (ENG 007)
8. Family Law Issues for Immigrant, Refugee and Non-status Women (ST 008)
9. Finding Help with your Family Law Problem (ST 009)
10. How Property is Divided in Family Law (ENG 010)
11. Marriage and Divorce (ST 011)
12. Spousal Support (ST 012)

** This booklet is available in multiple formats. Please see www.onefamilylaw.ca for more information. You can also find additional materials on the website to help you understand your family law rights.*

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