



All Women. One Family Law.
Know your Rights.

flew Family Law
Education for Women
Women's Right to Know

fodf Femmes ontariennes et
droit de la famille
Le droit de savoir

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, it is recommended that you get legal advice as soon as possible to understand your options and 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", and our webinar "Looking for a Family Law Lawyer" on our website at www.onefamilylaw.ca.

In Canada, the law says that in most cases both parents have the right 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 child will live. You can make these arrangements with or without the help of lawyers and the Court.

If you cannot agree, either parent 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 in an important way.

What is custody?

Custody means having the legal right and responsibility to make all of the important decisions about the child's life. This includes things like:

- choosing the child's school
- choosing the child's religion
- making medical decisions for the child.

The parent with custody is called the **custodial parent**, and the child usually lives with the custodial parent most of the time.

What is access?

If one parent gets custody of the child, the other parent will usually get access. The Court usually thinks it is in the best interests of the child to have contact with both parents. If the Court orders **access**, that usually means the right to visit and spend time with the child, and to know about the child's health, well-being and education. Even a parent who has not spent much time with his or her child can usually get access.

The parent who has access is called the **non-custodial** or **access parent**.

If you can talk easily and honestly with your child's other parent, you can make your own informal arrangement about custody and access. It is a good idea to put your agreement in writing, with the date, and get both parents to sign it. It is best if each parent gets a lawyer to look at it, and to file it with the Court.

If you cannot agree with the other parent, or if the relationship is or was abusive, it is safer for you and your child to get a lawyer and consider going to Court to make custody and access arrangements.

However, the child may live with only one parent and the second parent consents to or accepts the living arrangement. As long as the arrangement is accepted, the second parent gives up the right to custody, and only has the right to access with the child, unless an agreement or Court Order changes the arrangement.

Types of custody

There are two main types of custody arrangements:

1. Sole custody

If you have **sole custody**, you can make major decisions by yourself about things like your child's health, education and religious teaching.

The other parent usually has the right to know about the decisions you make, but cannot tell you what decisions to make for the child.

2. Joint custody

If you have **joint custody**, you and the child's other parent both have the right to make major decisions about the child's life, which requires you to work together. If the Court knows the parents do not get along, or if there is or was abuse, the Court is less likely to order joint custody.

Joint custody does not necessarily mean that the child spends the same amount of time living with each parent.

You should know: While the Court is deciding on a final custody arrangement, it may award **interim or temporary custody** to one of the parents. This arrangement will apply until the Court makes a final custody Order. Interim custody is important because the Court usually wants to continue the arrangement that is already working for the child.

Types of access

The Court can make many different types of access Orders. Some are very open while others are more specific.

1. Reasonable access

A Court can order that one parent gets custody and the other parent gets **reasonable access**. This allows you and your child's other parent to make your own access arrangements that you both agree to.

2. Fixed or limited access

If you do not get along with your child's other parent, you can ask the Court for an Order that sets out the terms of the access visits, such as when, how long and how often the access visits will be. This is called **fixed or limited access**. If your relationship is or was abusive, you can ask the Court to set dates and times for visits so that you do not have to talk to the other parent about these details.

3. Graduated access

Sometimes the Court may set up a **graduated access schedule**. This means that the access parent has very limited time with the child at first, but gradually has more access over time. A graduated schedule gives your child a chance to get to know and trust the access parent. The Court 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.

4. Supervised access

The Court can order **supervised access** if it is worried about the child's safety with the access parent, or if the access parent and the child have not spent much time together. Supervised access 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 there are staff who monitor 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 child. Supervised access exchanges can take place at a supervised access centre, where staff will help to transfer the child between you and your partner so that you can avoid contact with one another. The access exchange can also be at a safe location such as a police station.

5. No access

In very rare cases, a parent will be **denied access** to his or her child. This will only happen if the Court believes the child will be physically or emotionally harmed by that parent, and supervised access will not provide enough protection.

Where the child lives

If you have sole custody, the child will usually live with you most or all of the time.

But custody does not always determine where the child lives. If you have joint custody with the other parent or if the other parent has access, the child may divide the time living with both of you. The child might sometimes stay with the other parent for nights, weekends, weeks or holidays, depending on what you agree on, or what the Court orders.

Usually, a child spends 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 cares for the child most of the time is called the **primary caregiver**. Courts often decide that children should live with the parent who has been the primary caregiver for most of the child's life, or who is the primary caregiver at the time that the Court is deciding custody.

Following custody and access Orders

If you have an agreement or Court Order for custody and access, you must follow it. Either you or the child's other parent can ask the police to help you enforce the custody Order. If you do not allow the other parent to see his or her child as set out in the Order, the Court could transfer custody of the child to the other parent, if he or she applies for it.

The law does allow you to refuse access if you are afraid for the child's safety. If you think your child is at risk and you refuse access, get legal help right away. In an emergency, call the police at 911.

Sometimes, one parent will fight for access and then not show up to see the child during the ordered access time. This can be upsetting for the child but, unfortunately, there is nothing the law can do to force the access parent to visit. 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 the Court makes a decision about custody and access, it must only consider the **best interests of the child**. This is a strict legal test. Some of the things that the Court will look at are:

- has there been any abuse in the household?
- how loving is the relationship between each parent and the child?
- how strong are the emotional ties between the child and each parent?
- 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?
- how able is each person to provide for the child?
- for older children, 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 may not want to 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 grand-parents, step-parents, aunts or uncles apply to the Court. No matter who applies, the Court will consider the best interests of the child before granting custody or access.

Moving with your child

A difficult issue that can arise when parents do not live together is whether the parent the child lives with can move the child out of the city, the province or even in some cases, out of 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 child's other parent to see the child on a regular basis. Depending on the distance of the move, the cost of access visits may also be an issue.

Like all decisions dealing with a child, the Court will decide whether to allow the move based on the **best interests of the child**. If you are allowed to move with your child, the Court may change the access Order 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 will have expensive travel costs to visit the child.

In some cases, the Court may say you are not allowed to move with your child, if the other parent does not agree.

Travelling with your child

In most cases if the other parent has custody or access, you cannot take the child outside Canada without the other parent's permission. That means if you want to travel with your child, you will need the custody Order and a letter from the other parent that gives permission for the child to leave Canada. The letter should be notarized by a lawyer.

When you leave Canada and/or try to enter another country, you should expect border officials to ask you to prove that the child's other parent has agreed to the child's travel.

Child abduction

Sometimes, one parent takes the child outside Canada without the other parent's permission. This is very serious. This is called **child abduction**. Child abduction is a serious crime in Canada.

There is no way to make absolutely sure your child is never taken outside of Canada without your permission, but there are some things you can do to help protect your child. Make sure that the custody Order or agreement:

- is as clear and detailed as possible;
- specifically says that the child cannot travel outside of Canada without your permission.

The Order can also say that you or the Court must keep the child's passport or the other parent's passport.

What to do if your child has been taken out of Canada without permission

If you think that your child has been taken out of the country without your permission, you should:

- **Call the police** right away. The police will send an alert to border officials in Canada and the country where the other parent might take your child.
- **Call the Consular Affairs Bureau** right away, toll free at 1-800-387-3124 or 1-800-267-6788. Their office is open 24 hours a day, 7 days a week.

If your child is taken outside of Canada without your permission, you should also talk to both an immigration lawyer and a family law lawyer right away.

The main law that may be able to help you get your child back is the *Hague Convention on the Civil Aspects of International Child Abduction*. It is an international treaty signed by many 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.

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 “Child Custody/welfare”.



• *The views expressed in these materials are the views of FLEW and do not necessarily reflect those of the Province.*



• *While financially supported by the Law Foundation of Ontario, the content of this publication does not necessarily reflect the views of the Foundation.*

There is a greater risk of violence when an intimate relationship is ending. If you are in immediate danger, call 911. If you or someone you know is at risk, visit the FLEW website for information on getting support.

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 in English*

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

** This booklet is available in multiple formats and languages. 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.*

