The Family Law Series

Custody and Access

When two people have a child, they each have an equal right and equal responsibility to raise their child. They have an equal right to make decisions about their child's care and upbringing. This is true whether the parents are married or not.

When parents live together, they can make decisions about their child's care and upbringing together on a day-to-day basis. As a couple, they work out how they spend time with and share responsibility for their child.

When parents do not live together, they must arrange how they will share their parenting rights and responsibilities.

What types of decisions do parents who do not live together need to make?

Parents who do not live together must make decisions about:

- where their child will live,
- how much time each of them will spend with their child,
- how they will make decisions about their child's welfare and upbringing, and
- what role each of them will play in caring for their child.

These are decisions about what the law calls "custody" and "access".

What is custody?

Custody is the right to make the important decisions about the care and upbringing of a child. For example, the child's:

- religion,
- school and educational programs, and
- medical treatment.

If parents disagree about what is best for the child, it is the parent with custody who gets to make the final decision.

In addition to decision-making, custody normally includes the physical care, control, and upbringing of the child. The child usually lives with the parent who has custody.

What is access?

If one parent has custody of a child, the other parent usually has access. Access is the right to spend time with a child and the child's right to spend time with that parent.

Access also includes the right to ask for and be given information about a child's health, education, and welfare. The parent with custody has an obligation to keep the parent with access informed about these matters. In addition, other authorities, such as the child's school, doctor, and daycare providers, must provide any information or reports requested by the parent with access, in the same way that they provide these for the parent with custody.

However, the parent with access does not have the right to make decisions about how their child will be raised.

What are the different types of custody?

Sole custody

In this situation, one parent has sole custody and the other parent has access. The child lives most of the time with the parent who has custody, and that parent has the legal right to make all the major decisions about how to raise the child. The child may spend time with the parent who has access, and may even regularly stay at his or her home. But the main responsibility for raising the child and the right to make important decisions regarding the child belongs to the parent with custody.

Joint custody

Another type of custody arrangement is joint custody. Parents who have joint custody share the rights and responsibilities of custody even though they live apart. Both parents have the right to make decisions about their child.

Joint custody is more about who can make decisions concerning the child than it is about the time the child spends with each parent. The child might live half the time with each parent or most of the time with one parent. Either way, both

parents have the right to make decisions about important matters concerning their child.

Joint custody needs lots of co-operation and works best when the parents share the same ideas about how to bring up their child. Courts are reluctant to order joint custody if both parents do not agree to work together.

Temporary or "interim" custody

When parents go to court to get a decision about custody and access, or when custody and access are decided in connection with a divorce or other issues, the process can take a long time. If the parents cannot agree about where the child will live in the meantime, either parent or both of them can ask the court for a temporary order. A temporary order sets out what the custody and access arrangements will be until the court hears the case and decides all the issues.

Because the courts consider stability important for a child's welfare, the parent with temporary custody often has an advantage when the judge is deciding which parent the child should live with permanently. The longer a temporary custody arrangement has been in place, the more important this becomes for the final decision. This is also true if there is no court order, and the

child is living with one parent, with or without the other parent's consent.

It is important for a parent to act quickly if he or she wants to change existing custody arrangements.

Parenting plan

Instead of sole custody or joint custody arrangements, some parents choose to negotiate "parenting plans". These plans can take many forms and some are more detailed than others. But most include the rules the parents will follow in order to make their co-parenting work best for their child. Often parenting plans include things such as:

- the role and responsibilities of each parent,
- how the parents will communicate with each other about the child, and
- how decisions about the child will be made.

Plans usually include the process to be followed to make changes or resolve conflicts.

Some plans simply set out these and other rules for co-parenting. Others go into much more detail.

They can cover things such as:

- the child's schedule with each parent,
- whether or not the child's surname can be changed,
- what school and doctor the child will go to if either parent moves, and
- whether the child will be permitted to play contact sports or watch certain types of television programs.

Parenting plans are agreed to by parents after they have negotiated the terms themselves, through their lawyers, or in mediation. They are normally not ordered by the court. When there is a lot of conflict between the parents, parenting plans may not be a good idea. In that situation, it may be better to have standard custody arrangements that are clear about which parent has authority. They are easier to enforce and easier for schools and other authorities to follow.

Shared custody

Sometimes the term "shared custody" is used in a court's decision about child support. This term has nothing to do with what is usually meant by "custody". Usually custody is about who has the right and responsibility to make decisions affecting the child, or who the child lives with.

But shared custody has to do with the amount of time the child spends with each parent for the purpose of figuring out how much support should be paid.

Even if one parent has sole custody, when a child spends at least 40% of their time with the parent who has access, the parent with access is said to have "shared custody" for the purpose of figuring out how much support he or she must pay. The 40% can be made up of weekends, overnights, and parts of vacations. If the child spends at least 40% of the time with the parent with access, the parent with custody might receive less child support.

What are the different types of access?

Reasonable access

Often, if the parents can agree, access arrangements are left open and flexible. This can be done whether custody and access are decided by an agreement between the parents or by court order. The agreement or order does not specify when or how often the parent with access can spend time with his or her child. Instead, it simply states that one parent is to have custody and the other parent is to have "reasonable access".

This allows the parents to informally work out an arrangement that is the most convenient for them and that can be easily changed if their circumstances change.

Fixed or limited access

Other times, the terms of access are fixed, either by written agreement or by court order. The order or agreement sets out how often the access visits will take place, how long they will last, and may give the exact times for the visits. Some orders also specify where access will take place, or other conditions of access.

Supervised access

Under some circumstances, a judge might order that someone else must be there when the access parent and the child are together. The other person might be a relative, a friend, a worker at a supervised access centre, or a Children's Aid worker. Supervised access is ordered when the judge has concerns about how the parent with access will behave while he or she is with the child. For example, if the parent with access has a drinking problem or drug problem, has abused the child in the past, or has threatened or tried to take the child away from the parent with custody, the judge might order supervised access.

Special access arrangements might also be made if there is a history of the parent with access abusing the parent with custody. The law says that a parent's past behaviour should not be considered when deciding custody or access unless that behaviour affects his or her ability to act as a parent. It also says that a child should see each parent as much as is consistent with the child's best interests. Instead of refusing access to a parent who has abused the other parent, some judges might order that the parent with access cannot pick the child up at the child's home. The child must be taken to see the parent with access by someone other than the parent with custody.

Refusal of access

Only in the most extreme cases will a judge deny a parent access. For example, access might be denied when serious child abuse has been proven and the abusing parent refuses treatment.

A parent cannot refuse to pay child support because he or she cannot get access or chooses not to visit his or her child. But, access will not be denied because a parent fails to pay child support. There are other ways to get support from a non-paying parent.

Who can get custody and access?

Usually it is a child's biological or adoptive parent who gets custody. But in some cases other family members, such as a grandparent, step-parent, or an aunt or uncle can get custody. The law allows any person to apply to the court for custody, but it is harder for a non-parent to get custody.

Access can also be given to other family members and, occasionally, to non-family members who have a close relationship with the child.

How do you decide who gets custody and who gets access?

When parents agree on custody and access

Parents may be able to agree about custody and access. If they are making a separation agreement, they can include the custody and access terms in that agreement. Or they can make an agreement dealing only with custody and access. The agreement should be in writing, and signed by both parents in front of a witness who should also sign it. It is best to have the agreement written by a lawyer. But if the parents write it themselves, they should each have their own lawyer look it over before they sign.

It is possible for parents to have an informal or verbal understanding about custody and access, without making a written agreement. Although this is easier to do, it is safer to have a proper written agreement. Then, if the parents later disagree about what the arrangements are, they can refer to the written agreement. If one of the parents does not do what was agreed to, the other parent can enforce the agreement.

When parents do not agree on custody or access

Mediation

When parents are having a difficult time agreeing on custody and access terms, they can meet with a mediator. A mediator can help them reach an agreement without going to court and having a judge decide. Mediators are trained to help parents talk about the problems that need to be solved and come up with solutions they can both accept. When an arrangement has been worked out it can be put into a written agreement. Because the parents sometimes have to pay for mediation, it is a good idea to include how that expense will be shared in the written agreement.

After parents reach an agreement in mediation, they should show the written agreement to their lawyers before signing it. Mediators do not act as

lawyers or give legal advice. Successful mediation is simply a solution that the two parents agree to. It is not necessarily based on their legal rights. If possible, each parent should see a lawyer before going into mediation. Then they will both know their legal position while they are working out an agreement.

You do not have to agree to go to mediation. Sometimes it can be helpful, but not always. For example, if a parent has been abused or feels intimidated by the other parent, they could be at a disadvantage in mediation. It would be better for that parent to hire a lawyer.

Even if you have started mediation, you can end it at any time if you do not feel comfortable with it.

Be careful choosing a mediator. Mediation is not a regulated profession. Try to get a mediator who is recommended by someone you trust. Qualified mediation services are available at many court houses. You can get more information from the Ontario Association for Family Mediation by calling **1-800-989-3025** or visiting their web site at <**www.oafm.on.ca**>.

Court

When parents cannot agree on custody and access, they can go to court and have a judge decide. They can do this on their own, but it is best to get the help of a lawyer. The court process is complicated, and so are many of the things that judges must take into consideration when deciding who should have custody and what the access arrangements should be.

If the question of custody and access goes to court, the court must decide what custody arrangement would be in the best interests of the child. Usually this is done by listening to what the parents and their lawyers have to say. However, sometimes the judge wants independent information about the child's needs and wishes. The judge can ask a lawyer from the Office of the Children's Lawyer (OCL) to speak on behalf of the child. This lawyer will present the child's views and preferences to the court if the child is old enough and knows what he or she wants. Otherwise the lawyer will try to figure out what is in the child's best interests some other way.

The OCL also has social workers. The judge can ask a social worker to give the court a report about the child and the child's home and family.

Sometimes the judge may also order a custody assessment. This is done by an assessor who does not work for either parent and whose only concern is the best interests of the child. The assessor talks to:

- the child alone,
- each parent alone, and
- the child with each parent.

Then the assessor gives a report to the court. The judge will consider the report when they make the final decision.

Arbitration

Arbitration is another way of having someone else make the decision when parents cannot agree on custody and access arrangements. It is similar to court, but less formal. There are other differences as well, such as:

- parents cannot get legal aid to help pay for their lawyers in an arbitration,
- you cannot use arbitration unless both parents agree to do it,
- the parents can choose the arbitrator, and
- the parents have to pay the arbitrator's fees and expenses.

Arbitration is sometimes confused with mediation, but they are very different. A mediator cannot make legally binding decisions, but an arbitrator can be given the power to do this.

In Ontario, certain rules must be followed for family law arbitration to be legally binding. Two of the most important rules are that:

- each parent must get their own advice from a lawyer *before* agreeing to have arbitration, and
- the arbitrator must make a decision based only on Canadian family law.

This last rule means the arbitrator cannot base their decision on any religious, traditional, or other principles or rules. They must apply the same principles that a judge would apply in a Canadian court. The arbitrator's decision about custody and access must take into account the same factors that a judge would, and must be based only on the best interests of the child.

You and the other parent may choose to discuss your family law dispute together with a religious or community leader or other person you trust. This person might suggest how your dispute could be settled. You might choose to follow this person's advice, or you might feel you have to follow it.

Either way, this person does not have any legal power to make decisions for you *unless* you and the other parent agreed to give them this power, and they followed all the rules necessary to make the process a legally binding family law arbitration.

You always have the right to appeal a family law arbitrator's decision to a court.

What about parents who cannot afford a lawyer?

Parents who cannot afford a lawyer might qualify for a legal aid certificate. Contact Legal Aid Ontario (LAO). To find out how to apply:

Toll-free	**1-800-668-8258**
Toronto area	**416-979-1446**
Toll-free TTY	**1-866-641-8867**
Toronto area TTY	**416-598-8867**

You can also visit LAO's web site at <**www.legalaid.on.ca**>. If you are refused a certificate you can appeal. Sometimes a community legal clinic can help with this. To contact a community legal clinic, look under "Legal Aid" or "Lawyers" in your phone book or call one of the LAO phone numbers listed above. You can also visit <**www.legalaid.on.ca/en/locate**>.

If you get a legal aid certificate you can choose your own lawyer, as long as the lawyer accepts legal aid cases. Legal Aid Ontario offices have lists of local family law lawyers who take legal aid cases. Legal Aid Ontario also has three Family Law Offices, with staff lawyers to represent or assist parents on legal aid with custody and other family law cases:

Toronto:

416-348-0001
1-800-331-9618

Thunder Bay:

(807) 346-2950
1-800-393-8140

Ottawa:

(613) 569-7448
1-800-348-0006

How does the judge make a decision?

Both the Canadian Divorce Act and the Ontario Children's Law Reform Act say that the judge must decide custody and access based only on what is in the child's best interests. It is the child's best interests, and not the interests of either parent, that must be the only consideration.

Some of the things taken into consideration in deciding what custody and access arrangement would be in the child's best interests are:

- the emotional ties between the child and each person seeking custody or access, other family members who live with the child, and anybody else involved in caring for the child,
- the child's wishes (when the child is mature enough to know and express them),
- the stability of the child's present home environment and how long the child has been in that home,
- the ability and willingness of each parent to take care of the physical, emotional, and other needs of the child,
- the plans each parent has for the care and upbringing of the child,
- the permanence and stability of the family each parent would provide,
- the biological or adoptive relationship between the child and each person seeking custody or access (this is usually considered when someone other than a parent, for example, a grandparent or step-parent, is seeking custody or access),
- the person who has done most of the parenting until now.

The courts also consider that, in most circumstances, it benefits a child to have a continuing relationship with both parents and to have as much contact with each parent as is consistent with the child's best interests. Therefore, judges also look at the willingness of each parent to encourage the child's contact with the other parent.

The past behaviour of a parent is not considered unless it makes them less able to act effectively as a parent. For example, a judge will not take into account which parent was to blame for the break-up of their relationship. But, if a person who wants custody or access has ever been violent or abusive towards:

- their spouse,
- anyone in their household,
- a parent of the child, or
- any child,

the judge must take this behaviour into account.

Can the custody arrangement be changed?

When custody and access are arranged by an agreement between the parents, the arrangements can be changed without going to court if both

parents agree to the changes in writing. They should each have their own lawyer write the changes to the agreement, or at least look them over before they sign.

If custody and access are set out in a court order, or if both parents do not agree to a proposed change in an agreement, only the court can make the change.

Stability is usually considered to be in the child's best interests. Therefore, unless both parents agree, a judge will change an existing order only if there has been some significant change in the child's needs or circumstances, or in a parent's ability to meet the child's needs.

Courts are often asked to change existing custody arrangements when the parent with custody wants to move farther away from the parent with access. If the move would make it more difficult for the parent with access to see their child as often, the court will reopen the question of custody. The judge must be satisfied that the move would be in the best interests of the child, with enough advantages to make up for the reduced contact with the other parent.

This publication contains general information only. It is not a substitute for getting legal advice about your particular situation.

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