

FAMILY LAW CUSTODY AND ACCESS

What is Custody?

Custody is care and control of your child. When two people have a child, they have an equal right to raise their child and to decide on his or her care and upbringing. This is true if you are legally married or not. The law says that each parent has the right to custody unless a court order or separation agreement gives that right to one parent only. If the order or agreement gives both parties the right to custody, that is called joint custody. This gives custody rights to each parent even though they live apart. Often a child only lives with one parent after a separation and that parent almost always has custody.

What is Access?

Access is the right to spend time with your child. If only one parent has custody of the child, the other parent has the right to see the child and receive information about him or her. This includes information received directly from other sources such as schools, daycare centres and the child's doctor.

A court can order reasonable access. This means it is up to the parents to work out the arrangements together. If the parents are unable to agree, the court has the power to place conditions on when, where and even how the other parent is able to see the child. When the court feels it is in the best interests of the child, it can order supervised access. This means that a person (for example, a relative, friend, or Children's Aid worker) must be present when the parent and child are together. However, this is unusual. The court refuses access only in extreme cases (for example, when child abuse has been proven).

How Important is Custody?

Major decisions have to be made concerning your child's future, health, education and well-being. If parents cannot agree, the parent with custody has the final word. Even when parents agree on custody, there can be problems regarding access. If you have a court order or a legal agreement, you can enforce your rights.

How Do We Decide Who Has Custody of the Children?

You and the other parent may be able to come to an agreement on custody and access arrangements together. If you cannot, the court will make the decision for you. If you and the other parent are separated and come to an agreement on custody and access, this can be included in your separation agreement or in an agreement dealing with only custody and writing, signed by both of you and witnessed by a third person. You should get legal help before signing.

What If We Can't Agree?

If you are separated and cannot agree on custody and access, you must go to court. The court will make an order regarding your custody and access rights. Several different courts in Ontario deal with custody and access. A lawyer will advise you about which court is best for your situation. If you are applying for a divorce, you can settle questions about custody and access at the same time. A divorce application is filed in the Ontario Superior Court. In a dispute over custody, the court will probably order a custody assessment.

In larger centres this service is available through the courts. Elsewhere, a referral is made to a private agency. The assessor does not work for either parent in a dispute. The assessor determines the custody issue in the best interests of the child.

Interviews are held with:

- the child alone;
- each parent individually; and

- the child with each parent.

If possible, the assessor also tries to hold discussions with the two other parents together and with the entire family. Other people who are significantly involved in the child's life (for example, a second spouse, grandparents, or a daycare worker), may also be interviewed by the assessor. The assessor sees the parties as often as needed to determine the best solution. The assessor's report is given to the court. The judge usually relies on the report to arrive at the final decision.

The process can take up to three or four months, but it is usually quicker and doesn't cost as much as a court trial. Couples are often able to come to an agreement during the assessment process. During the period before the court makes a final order, it often makes a temporary decision about custody and access. This is called an interim order.

How does The Court Decide?

The court decides the questions of custody and access in the best interests of the child. The court considers many factors, including:

- the needs of the child;
 - the ties and affection between the child and each parent; and
- the ability of each parent to care for and raise the child.

The court does not consider the conduct of the parents, or whose fault it was that the relationship ended. Conduct is only considered if it affects parenting abilities.

Can We Change The Custody Agreement Or Court Order?

Yes. When there is a significant change in circumstances affecting the child, you can go to court and have the custody agreement or court order changed. A custody agreement can also be changed out of court if both parents agree to this in writing. You should get legal help before doing so.

Do I Still Have Rights If I'm Not the Natural Parent?

Situations like this can be very complex. You must get legal advice. In some cases, it is possible to have access to or custody of a child who is not your natural son or daughter if you have been raising this child as your own. If you have adopted the child, you have the same rights as a natural parent.

What If The Other Parent Won't Let Me See The Child?

You must go to the court to apply for an order giving you access rights. The federal and provincial governments have new laws to help you enforce custody and access orders.

If you have reasonable grounds to believe that the other parent may try to take the child, the court can take steps to prevent this. If you think anyone has taken your child, call the police and a lawyer immediately.

How Do I Get Custody?

Custody and access are very serious issues and can be complicated. Even if you and the other parent can agree on custody, it may be advisable to have a court order. You should get legal advice to make sure you know your rights and have considered all the important facts.