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A GUIDE TO THE LAW IN ALBERTA REGARDING

CUSTODY & ACCESS Children of Married Parents Seeing a Divorce

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GENERAL

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CUSTODY AND ACCESS

Custody: The right to make major decisions about the child's health, education, welfare, and religion. It ordinarily includes a right to physical care of the child.

Access: A spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information in regards to the health, education, and welfare of the child. They also have the right to some share of physical time with the child.

A Court can change or suspend a custody or access order on an application by either or both former spouses or by any other person.

Custody and access can be awarded to parents, individuals standing in the place of biological parents (step-parents), or others in limited circumstances. When determining whether a person is standing in the place of the biological parent, Courts will consider:

- a. Does the person have authority to make decisions affecting the child?
- b. How involved the person was in the child's care, discipline, education and recreational activities?
- c. Length of relationship with the child etc.

CUSTODY AND ACCESS OF CHILDREN OF MARRIED PARENTS

The Court's primary consideration is the "best interests" of the child when making custody decisions. It is always best if couples are able to reach an amicable agreement regarding their child's care and custody. However, where an agreement is not reached, the Court will make an order regarding custody and access,

based on the "best interests" of the child. The Court will consider the couple's ability to cooperate and communicate about parenting issues, despite any personal differences the parents may have as a result of their divorce.

While married, each parent has equal rights to custody of the child. This means that each has equal obligations and responsibilities for the care and upbringing of the child. Once divorced or separated, these obligations and responsibilities may be changed by written agreement between the parties or a Court order to ensure the "best interests" of the child are still met.

THE "BEST INTERESTS" OF THE CHILD

In awarding custody or access orders, the most important consideration to the court is the "best interests" of the child. The term "best interests" includes, but is not limited to:

- a. Ensuring the greatest possible protection of the child's physical, psychological, and emotional safety
- b. The child(ren)'s need for stability, taking into consideration the child's age and stage of development.
- c. The history of care for the child(ren).
- d. The child(ren)'s cultural, linguistic, religious and spiritual upbringing and heritage.
- e. The child(ren)'s views and preferences.
- f. Any plans proposed for the child(ren)'s care and upbringing.
- g. Any family violence.
- h. The nature of the relationship between the child(ren) and the person applying for the order.
- i. Any civil or criminal proceedings that are relevant to the safety or well-being of the child(ren).

When making custody and access decisions, the court will also consider:

- a. The views of the child(ren)'s current guardians.

- b. The parents' ability to cooperate on issues affecting the child(ren)
- c. The ability and willingness of the person applying for the order to care for and meet the needs of the child(ren) and to communicate and co-operate with the other parent or guardian on issues affecting the child.

CUSTODY

1. What is Custody?

It is the child's right to have a relationship with both parents. The Court has the power to order which spouse will have custody of the child or whether it will be shared. The Court tends to look at the situation of each parent equally while making custody decisions. Custody will usually be given to the person asking for it, if there is no dispute. If both parents want custody of the child, the Court will make a custody order according to what it feels is in the best interests of the child.

2. Parental Responsibilities

When a parent has custody over a child, that parent has both rights and responsibilities. Parental responsibilities include, but are not limited to, a duty to:

- a. Provide day-to-day care and control of the child (food, shelter and clothing).
- b. Supervise the child's daily activities.
- c. Meet the required ordinary health, education and welfare needs of the child.

3. Types of Custody

As long as there is no court order to the contrary, parental rights and responsibilities are to be exercised jointly by the parents who are both guardians. It is assumed that the two parents will reach an agreement on major decisions affecting their child. Until there is a Court order, neither parent may deny the other parent the right to see the child.

A custody order issued under the *Divorce Act* can be for a limited time or it can be a final order. The Court may also impose conditions or restrictions on any custody order. It is also important to note that a custody order may be reviewed by a Court and varied if a material change in circumstances is shown.

4. Joint Custody

This is the most common type of custody. The Court will award joint custody when both parents are capable parents and usually they have remained on good terms and can discuss matters concerning the children in a reasonable way. The child may live primarily with one parent and the other parent will have generous access to the child. Parents may also choose **shared parenting** where each parent has physical custody for roughly equal amounts of time. Shared parenting may affect child support (see our pamphlet "Support for Married Persons and their Children under the Divorce Act" for more information).

The parent who has physical control of the child at any one time generally makes decisions regarding day-to-day care. Major decisions in the areas of major medical treatment, education, and religious decisions are to be made by both parents together.

5. Sole Custody

This is a less common form of custody, where one parent has a full right to custody to the exclusion of the other parent. The child would reside with the sole custodial parent and the sole custodial parent would make all of the decisions for the child. The parent without sole custody usually has access with the child and a right to information about the child. This type of custody may be subject to conditions. For example, the custody order might state that the child must remain in the province.

ACCESS

1. What is Access?

The term access means visiting rights. Because it is a child's right to have a relationship with both of their parents, a Judge will usually order that the spouse who does not have custody of the children will be able to visit the children. This is called an access order. It may detail where and when visits will take place, their length, and any other conditions or matters that may be decided by written agreement or by Court order.

Access is a right of the child and not a right of the parent. A parent with custody cannot refuse access to the other parent, unless there is a Court order stating that. If a parent with custody refuses access, he or she can be found in contempt of Court, fined or possibly imprisoned. A repeated refusal of access could be a major factor in the Court ordering that the other parent be given custody of the child.

It is rare to see access to the children denied completely. However, in exceptional circumstances, the Court will deny access. These rights of access are very important as they permit both the child and the parent without custody a chance to maintain a relationship despite the break-up of the marriage.

2. Rights of an Access Parent

The parent who is not awarded custody still has many important legal rights. Unless the Court says otherwise, an access parent has the right:

- a. To make inquiries and to be given information as to health, education and welfare of the child, unless the court order says otherwise;
- b. To oppose the adoption of the child by a third party and to be given notice of an adoption hearing;
- c. To receive notice of and to be heard in any criminal proceedings against the child;

- d. To receive notice of a hearing if the child is considered to be neglected under the Child, Youth and Family Enhancement Act;
- e. To share equally in the child's estate should he or she die without a will;
- f. To consent to or to oppose a change in the child's given name or surname under the *Change of Name Act*;
- g. To apply for access.

This is not a complete list. Speak to a lawyer for more information.

3. Types of Access

Reasonable Access - Parents may decide between themselves when access should be granted. If they are unable to agree, they may approach the Courts to receive a specified access order.

Conditional Access - Where certain conditions must exist before access is allowed.

Supervised Access - The parent wanting access may only visit in the presence of another adult approved by the parent with custody or the Court.

Specified Access - The court will outline the exact days and times when the parent may visit.

No Access – If the court feels that the parent without custody may harm the child, he or she will be denied access completely.

4. Parenting After Separation (PAS) Course

The Parenting After Separation (PAS) course is a **mandatory** 6-hour course for people who live in Alberta and are applying for a custody or access order. In Edmonton, call 780-413-9805 to register for this free course.

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The purpose of the course is to help parents understand the process and effects of separation and how family breakdown affects children. The goal of the course is to encourage parents to make positive choices in parenting their children after separation. Some of the things parents learn in the course are:

- a. How to help children through separation;
- b. How to maintain a positive relationship with children through separation;
- c. How to cooperatively make a parenting plan;
- d. How to use mediation for parenting disputes.

After completing the course, parents will receive a certificate of completion that will be filed with the Courts.

5. Where do I find more information about the PAS course?

Family Justice Services (780) 427- 8329
<http://www2.albertacourts.ab.ca/ProvincialCourt/FamilyJusticeServices>

Click on Courses/Seminars for Parents and Families.

6. Focus on Communication in Separation (FOCIS) Course

The focus on Communication in Separation Course is a **free** 6-hour course offered monthly by Alberta Justice Family Mediation Services, designed for separated or divorced parents of young children who are experiencing higher levels of conflict. The purpose of the FOCIS course is to teach parents how to communicate in order to parent their children effectively after separation or divorce.

In the FOCIS course parents learn:

- a. How to communicate effectively while parenting apart;
- b. How to reduce tension in conflicts for the benefit of both parents and the child(ren);
- c. That ongoing conflict between parents can have a long lasting, negative effect on the child(ren);
- d. Listening and speaking skills.

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In Edmonton, call (780) 644-5092 to register.

7. Where do I find more information on the FOCIS course?

Alberta Justice Family Mediation Services (780) 427-8329
<http://www2.albertacourts.ab.ca/ProvincialCourt/FamilyJusticeServices>

Click on Courses/Seminars for Parents and Families.

8. What are my options if I do not want to go to Court?

There are different services available to help you resolve a family conflict and come to an agreement without going to Court. The most common way is through mediation programs run by Alberta Justice Family Mediation Services, although you can hire a private mediator.

9. Alberta Justice Family Mediation Services

Family mediation is a voluntary process that allows parents to resolve their disputes over decisions affecting their children. Concerns regarding parenting time, responsibilities, child support, or other issues can be resolved through family mediation. Mediation services are provided for free to parents who have children under 18 years old when one of the adult parties has an income less than \$40 000 a year.

For more information call (780) 427-8329.

COURT ORDERS

1. Custody and Access Orders Obtained Under the *Divorce Act*

Custody and/or access orders are issued under the *Divorce Act*, in the Court of Queen’s Bench. A Court order granting custody or access may be obtained prior to, at the same time, or after a divorce. Parents making an application in the Court of Queen’s Bench should be represented by a lawyer. Before bringing on

such an application, you must first attend the **Parenting After Separation (PAS)** seminar (see above).

If an agreement cannot be reached in mediation, the parents may also get an **open assessment**. The parents choose a professional such as a psychologist, psychiatrist or social worker from a list provided to prepare the assessment. Such assessments are either ordered by the Court or agreed upon by the parties.

An **open assessment** will usually involve meeting with both parents, the child, and any other person that may have relevant information on the issue. The professional will provide a report to each of the parent's lawyers containing his or her recommendation as to what is in the "best interests" of the child. If the parents are still unable to reach an agreement, the matter will be decided by a Justice after hearing evidence at a trial.

The open assessment is not free and each parent must pay half of the total cost of the assessment. The total cost of the assessment can be as high as \$10,000 for each party. In certain circumstances the assessment may cost more than this. In cases of financial need, a subsidy for the cost of the open assessment is available by making an application to the Family Court Services. Call (780) 427-8343 for more information. It should be noted that custody disputes can be extremely expensive.

2. Appeals

Parents who are unhappy with the decisions made regarding the custody and access of the child, may appeal. An order made by a Justice in the Court of Queen's Bench, under the *Divorce Act* may be appealed to the Court of Appeal as long as the appeal is filed and served within 20 days for an interim custody order and within 30 days for a Divorce Judgment.

3. Varying the Custody or Access Order

A custody or access order is never permanent. A Court always has the authority to change the order later if the circumstances change.

The factors considered by the Court in a custody or access order variation are any material changes in the condition, means, needs and other circumstances since the making of the original order. For example, an order may be varied if the following circumstances exist:

- a. One parent wants to relocate with the child(ren)
- b. Alcohol or drug abuse;
- c. Refusal to obey the terms of the original custody order.

This list is not complete. A variation order should be heard in the province the child(ren) are regularly resident.

4. Problems with Orders

If there is a change of circumstance in either parent's life or the child's that amounts to a material change in circumstances since the last order, a parent can apply for a variation to the current custody or access order. If the order is not being followed, it may need to be changed.

If a parent is having problems seeing their child despite having a court order giving them custody or access, they should contact a lawyer who would be better able to assist them in enforcing their rights.

5. Enforcing a Custody or Access Order

Once the Court hands down a custody or access order, the order is legally binding and enforceable throughout Canada and may be enforced by any Superior Court Judge in any province. If a parent obtained a divorce in another province, he or she must register a copy of the divorce judgment containing the custody order with

the Court of Queen’s Bench in Alberta before enforcement actions can begin.

If the custody or access order contains a police enforcement clause, the police or RCMP will help enforce the order. A parent should take the order to the police before asking for their help. The police will take reasonable steps to find the child and uphold the rights of parents to spend time with their child. If the child is outside Alberta, the local police will contact the appropriate law enforcement agency in the area where the child is located. If you want to ensure that you will be able to obtain assistance from the police, you should ask the Court to consider granting a police enforcement clause as part of the order granted.

6. Abduction or “Child Snatching” Where No Custody Order Exists

A parent of a child who is under 14 years old may be charged with “child snatching” under s. 283(1) of the *Criminal Code of Canada* if that person removes the child from the other parent without permission. If a person charged with abduction or “child snatching” is found guilty, they may face imprisonment for up to 10 years. Therefore, if a custody order is not in place, a parent should not take their child from the home without letting the other parent know where the child will be.

A parent who is in the process of getting a divorce who takes the child when leaving the home should begin an action for a custody order as soon as possible. You should contact a lawyer in the event your child is abducted by your spouse.

FREQUENTLY ASKED QUESTIONS

Where do I find a lawyer?

Lawyer Referral Service 1 (800) 661-1095

Legal Aid Society of Alberta (780) 427-7575
www.legalaid.ab.ca

What are my options if I do not want to go to court?

There are different services available to help you resolve a family conflict and come to an agreement without going to court. The most common way is through mediation programs run by the Courts, Family Court Counsellors, lawyers or Legal Aid.

Family Justice Services

Family Court Services (780) 427-8343

Mediation Services (780) 427-8329

What is the Parenting After Separation (PAS) course?

The Parenting After Separation (PAS) course is a free 6 hour course that is mandatory for people who live in Alberta and are applying for a parenting, custody or access order in the Court of Queen’s Bench. In Edmonton, call (780) 413-9805 to register.

Where do I find more information?

Family Law Information Centre (780) 415-0404
www.albertacourts.ab.ca/familylaw/