

CUSTODY AND ACCESS

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Once a couple has decided to proceed with a separation or a divorce, arrangements must be made for the care of any child who may be involved. Parents may make arrangements collaboratively; these can be written into a formal parenting plan. A parenting plan can include things such as how much time each parent can spend with the child, and who makes major decisions involving him or her. This plan can be made informally, or it can be part of a separation agreement or a court order. However, it should be noted that informal arrangements can be difficult to enforce.

In the event that a couple is unable to come to an agreement on who should have custody of the child, a judge can make the decision on behalf of the parties. This may involve a request by the judge to have an assessment conducted, typically by a clinical investigator, social worker, psychologist or psychiatrist. The individual will speak with the involved parties and with the child in question. After a professional assessment, a report will be written for the court recommending custody and access of the child.

In Canada, the cornerstone of the law relating to children is the principle that whenever the court considers a question relating to the upbringing of children the paramount consideration should be the welfare of the child. However, the judge may also consider additional factors such as: the age of the child, a desire not to separate siblings, the *status quo* (i.e. to maintain stability in parenting), the wishes of the child, and his or her religious/cultural upbringing. The court will also consider factors relating to the parents, such as: abuse; conduct/lifestyle; interference with the parent/child relationship; health; parental rights (in cases where there are custodians other than parents); and separation agreements. Finally, the judge will look at all other information that is presented in court. This being so, it is essential for the parties to retain competent legal representation, in order to present the most favourable case on their behalf.

Custody is the right to make major decisions about a child's education, welfare, health, and religion, unless otherwise stated in a separation agreement or a court order. Also, custody ordinarily includes a right to have physical care of the child. Custody will usually be given to the person asking for it, if there is no dispute. However if both parents want custody of the child, the court will issue a custody order according to what is perceived to be the child's best interests. There are several different forms of custody orders: sole custody; joint custody; shared custody; parallel parenting; and "bird's nest" orders. (Further details in connection with the various types of orders are available from Balasunderam Law Office.) Finally, 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

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order. If a custody order has been issued it may be reviewed by a Court and varied if a material change in circumstances is demonstrated.

In the event that a parent is not awarded custody of his or her child, that parent still retains the right to spend time with the child remains, unless the court decides that this is not in the best interest of the child. Access to the child can be arranged in detailed writing through a parenting plan, separation agreement or a court order. It is best that this plan be drafted with the assistance of a lawyer at our office. In lay terms, access means visiting rights. Because it is a child's right to have a relationship with both parents, a judge will usually order that the spouse who doesn't have custody to be able to visit the children. This is called an access order. The order may detail when, where and for how long visitation will take place. Access is a right of the child and not a right of the parent. A court has the ability to refuse a parent access to a child if there is a fear that the child or the parent with custody may be harmed, if in such a case access is granted it may be supervised. This means that someone else will be present when the child is visited by the parent with access. In most cities across Ontario, there are government funded Supervised Access Centres which are staffed by trained professionals and volunteers. On arrangement families can attend these centres for supervised visits or for supervised drop off and/or pickup of the child for access visits. It is rare to see access to children denied completely, however in exceptional circumstances the court will not hesitate to do so. The accessing parent still has many important legal rights, unless the court says otherwise, the parent has the right to: make inquiries and be given information regarding the health, education and welfare of the child.

In the case that a custody/access order is not being followed, the court can be asked to enforce the order. The court will then try to get the parents to respect the orders arrangements. Both parents will be asked to attend court to explain why the order is not being followed; at this point it will be beneficial to obtain council from our office. If the court is satisfied that access is not occurring without a good reason, the court can fine the custodial parent or even sentence them to jail time. If the court feels that the arrangements are not satisfactory to the situation the court can make the required amendments.

Custody and Access can be a confusing area of Family Law. There are many different forms of orders which may be issued by the court. Custody/Access orders have a vital impact on the lives of parents and children and can be difficult to understand. Please contact our office to assure that you are well informed and are receiving adequate assistance with your case. ¹

¹ James G. McLeod & Alfred A. Mamo, *Annual Review of Family Law*, 2009 (Toronto: Carswell, 2009).