A GUIDE TO THE LAW IN ALBERTA REGARDING

CUSTODY, ACCESS & PARENTING TIME

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CUSTODY, ACCESS & PARENTING TIME

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# A Guide to the Law in Alberta Regarding Custody, Access & Parenting Time

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WHICH ACTS GOVERN CUSTODY, ACCESS & PARENTING TIME?

The Divorce Act is a piece of federal legislation that applies to married parents seeking a divorce. It applies throughout Canada and its jurisdiction is the Court of Queen’s Bench. Custody and access orders are granted and enforced under the *Divorce Act*.

The Family Law Act is a piece of provincial legislation that applies to married, non-married and adult interdependent (common law) parents not seeking a divorce. It applies only in Alberta and its jurisdiction is both in the Court of Queen’s Bench and Provincial Court. Parenting and contact orders are granted and enforced under the *Family Law Act*.

WHO IS A PARENT?

A female person who gives birth to a child is presumed to be the biological mother of the child.

Although it is usually not a problem to identify the mother of the child, it may be more difficult to identify the father of the child.

A male person is presumed to be the biological father of a child if one of the following conditions is met:

a. he was married to the mother of the child when the child was born;
b. he was married to the mother of the child and the marriage ended less than 300 days before the birth of the child;
c. he married the mother of the child after the birth of the child and has acknowledged that he is the father of the child;
d. he cohabited with the mother of the child for 12 consecutive months during which time the child was born and he acknowledged that he is the father of the child;
e. he cohabited with the mother of the child for at least 12 consecutive months and the cohabitation ended less than 300 days before the birth of the child.
f. he is registered as the father of the child on the child’s birth certificate;
g. a Court has found him to be the father of the child for any purpose.

PARENTAL RESPONSIBILITIES

Parental responsibilities include, but are not limited to:

a. Providing day-to-day care and control of the child (food, shelter and clothing).
b. Supervising the child’s daily activities.
c. Meeting the required ordinary health, education and welfare needs of the child.

As long as there is no Court order to the contrary, parental rights and responsibilities are to be exercised jointly by the mother and father 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 Parenting Order, neither parent has the right to deny the other parent the right to see the child.

WHO IS A GUARDIAN?

Under the *Family Law Act*, the mother and the father are both presumed to be the guardians of the child if:

a. they were married to each other when the child was born;
b. they were married to each other and the marriage ended less than 300 days before the birth of the child;
c. they married each other after the birth of the child;
d. they lived together for 12 consecutive months during which time the child was born; or
e. they lived in a relationship of adult interdependence when the child was born or after the birth of the child.
f. If none of these apply, they are both guardians of the child from birth until the child begins to usually reside with one of the parents, who then becomes the sole guardian, or with both of the parents together or equally, who then both become guardians.

Guardians are responsible for making all significant decisions affecting the child and have a right to sufficient time with the child. Guardians have a duty to cooperate with each other in matters that affect the child. If guardians cannot agree, they can apply to Court for a Parenting Order that will spell out how they are to exercise their rights and responsibilities.
A mother or a father who is not a guardian can apply to the Court to be appointed as a guardian if certain conditions are met. You should speak to a lawyer about your specific situation before launching a guardianship application.

THE “BEST INTERESTS” OF THE CHILD

In awarding custody, access, contact and parenting time, the most important consideration to the Court is the “best interests” of the child.

The Court will want to ensure the greatest possible protection of the child’s physical, psychological and emotional safety. The Court may consider all of the child’s needs when making a Parenting Order, including, but not limited to:

a. The child’s need for stability, taking into consideration the child’s age and stage of development.
b. The history of care for the child.
c. The child’s cultural, linguistic, religious and spiritual upbringing and heritage.
d. The child’s views and preferences.
e. Any plans proposed for the child’s care and upbringing.
f. Any family violence.
g. The nature of the relationship between the child and the person applying for the Parenting Order.
h. The ability and willingness of the person applying for the Parenting Order to care for and meet the needs of the child and to communicate and co-operate on issues affecting the child.

i. The views of the child’s current guardians.

j. Any civil or criminal proceedings that are relevant to the safety or well being of the child.

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

• The views of the child(ren)’s current guardians.
• The parents’ ability to cooperate on issues affecting the child(ren)
• 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.

WHAT IS CUSTODY?

Custody is 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.

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. 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.

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.

TYPES OF CUSTODY

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.

**Sole Custody**

Sole custody is less often awarded. Where there is sole custody, only one parent has custody and they have control of any and all major decisions affecting the child. Usually even if one parent has sole custody, the other parent will be awarded access rights.

**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. 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.
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.

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.

**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.

**Specified Access**

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

**Conditional Access**

Where certain conditions must exist before access is allowed. For example, if an access parent has alcohol abuse problems a condition may be that the parent must be sober to be able to visit the child.
Supervised Access

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

If the court feels that the parent without custody may harm the child, he or she will be denied access completely.

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:

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

CUSTODY AND ACCESS ORDERS 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.
OPEN ASSESSMENTS

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.
Parenting After Separation (PAS) Course

Before applying for divorce or custody and/or access orders parents must attend the Parenting After Separation (PAS) course is a free 6-hour course for people who live in Alberta. In Edmonton, call 780-413-9805 to register for this free course.

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:

- How to help children through separation;
- How to maintain a positive relationship with children through separation;
- How to cooperatively make a parenting plan;
- 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. This course is also a prerequisite for the Parenting After Separation for High Conflict Families (PASHC) Course. This is a free, three hour course that focuses on health emotional disengagement and boundaries between parents.

Where do I find more information about the PAS / PASHC courses?

Family Justice Services
(780) 427- 8329

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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. It is not mandatory. It is 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:
• How to communicate effectively while parenting apart;
• How to reduce tension in conflicts for the benefit of both parents and the child(ren);
• That ongoing conflict between parents can have a long lasting, negative effect on the child(ren);
• Listening and speaking skills.

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

Where do I find more information on the FOCIS course?

Alberta Justice Family Mediation Services
(780) 427-8329
PARENTING TIME

The Parenting Order sets out how decisions about the child are to be made and how and when the child’s time is to be shared between the parents. This is called parenting time. Each parent is presumed to have equal rights to parenting time. This means that each parent has equal obligations and responsibilities for the care and upbringing of the child. This may be changed by written agreement between the parties or by a Parenting Order.

Types of Parenting Time

The primary consideration in awarding parenting time is the “best interests” of the child. The Court may also impose conditions or restrictions on any Parenting Order that grants parenting time. An example of this would be where a Court imposes a condition that requires the parent to attend counselling or that visits must be supervised. It is also important to note that a Parenting Order may be reviewed by a Court and varied if a change in circumstances is shown.

Parenting time set out by a Parenting Order may be very general or very specific. A very general Parenting Order may simply state that each parent has equal parenting time, meaning the child spends an equal amount of time with each parent and all decisions regarding the child are equally shared. This works best when both parents remain on good terms and can discuss matters concerning the child in a reasonable way.
TYPES OF PARENTING TIME

There are three general types of parenting time, primary, shared and split.

**Primary**
Primary residence or primary parenting time is where the child(ren) spend(s) most of their time - over 60% of the year - living with one parent.

**Shared**
Shared residence or shared parenting time is where the child(ren) spend(s) about the same amount of time with each parent - between 40-60% each over a year.

**Split**
Split residence or split parenting time is where one or more children have a primary residence with one parent and one or more children have a primary residence with the other parent.

The type of parenting time your family has may affect what Child Support payments may be owed. See out pamphlet on Child & Spousal Support for more information.
PARENTING AND CONTACT ORDERS UNDER THE FAMILY LAW ACT

A Parenting Order will help separated parents share their responsibilities and define their parenting plan in the “best interests” of the child.

Parenting Orders replace custody and access orders for non-married partners, adult interdependent partners, and married parents who are not seeking divorce. A parent who is separating from his or her partner, and who takes the child when leaving the home, should begin an action for a Parenting Order as soon as possible. In most cases, Parenting Orders encourage both parents to be involved with the child.

When a non-parent or non-guardian, such as a grandparent, wants to have time with the child they may apply to the Court for a Contact Order. However, it is always better to arrange contact with the child by reaching an agreement with the child’s parents or guardians.

APPLYING FOR A CONTACT ORDER

A person who wants a Contact Order must first ask the Court for leave (permission) to apply for such an order. One exception is for grandparents in situations where the parents are separated or one parent is dead.
In this case, a grandparent who has been denied contact with the child can apply for a Contact Order without asking for leave. A Contact Order may include visits, telephone calls, emails and letters.

APPLYING FOR A PARENTING ORDER

There are two ways of obtaining a Parenting Order:
  a. Through the Provincial Court (Family Division)
  b. Through the Court of Queen’s Bench

Although both Courts use the same application forms and similar application procedures, parties cannot apply to both on the same matter.

There is no filing fee for most claims under the Family Law Act, regardless of the level of court you go to.

Parents making an application for a Parenting Order in Provincial Court do not need to be represented by a lawyer. This means that costs can be quite low. However, if parenting time issues are to be decided at a trial, it may be wise to obtain the services of a lawyer. If you cannot afford a lawyer, Legal Aid may be able to assist you.

At the first hearing in Provincial Court, the Judge can make any orders that are agreed to by the parties or schedule the case for a trial if there is no agreement. The Court can either make a final or an interim Parenting Order.
A final Parenting Order means that the Judge’s decision on parenting time will be indefinite, while an interim Parenting Order means that the Judge’s decision on parenting time will last only until the next court hearing or final decision.

In exceptional circumstances, the Court may grant an ex parte interim Parenting Order. This is an order that does not require the other parent to be notified about the court date when it is granted. An ex parte interim order will remain in effect until the next court hearing. In order to obtain this sort of order, speak to a Family Court Counsellor. It is important to remember that, in all cases, the Judge will be basing his or her decision upon what is in the “best interests” of the children.

To apply for a Parenting Order in Provincial Court without a lawyer, the applicant should telephone Family Justice Services at [780] 427-8343 to make an appointment with a Family Court Counsellor.

These counsellors are attached to the Court and will be able to give free assistance with the Parenting Order application.

Parents making an application for a Parenting Order in the Court of Queen’s Bench are often represented by a lawyer. If you live in Alberta, you must attend the Parenting After Separation (PAS) seminar before bringing on such an application. In Edmonton, call [780] 413-9805 to register. This is a free seminar.
In Edmonton, parents are often referred to Family Mediation Services. A mediator is assigned to the case and it is his or her job is to sit down with the two parents and attempt to assist them to reach an agreement on parenting time. Call [780] 427-8329 for more information. This is a free service, as long as one of the parties earns $40 000 per year or less.

It should be noted that parenting time disputes can be extremely expensive to litigate, and parents are encouraged to use alternative dispute resolution services, such as mediation, whenever possible.

RESPONDING TO A PARENTING ORDER APPLICATION

If your child’s other parent applies for a Parenting Order in either Provincial Court or the Court of Queen’s Bench, you will have the opportunity to file a Response. You will be the respondent.

When completing a Response, the respondent must first decide whether or not they agree with the orders asked for by the applicant. If the respondent does agree, he or she can check the “I agree” box on the Response form, file the Response with the Court and then serve the Response on the applicant.

If the respondent does not agree with the orders asked for by the applicant, he or she should check the “I Disagree” box on the Response form, and then complete the Response and Reply forms.
If the respondent is requesting any orders on the Response form (i.e. a child support order or a Parenting Order), they must complete a Statement for each order requested. The respondent must also give reasons why the position he or she presents on the Reply Form is in the “best interests” of the child.

Before filing the forms at the courthouse, the respondent must affirm that the Reply and the Statements (if applicable) are true. Lawyers, notary publics and certain courthouse staff are all authorized to affirm documents. There is no fee for these services at the courthouse. There are penalties for swearing a false statement.

The respondent should provide as much detail as possible on these forms because this is their chance to tell their side of the story. The Response and Reply forms will be the evidence that the judge will use to decide the matter in court unless there is a trial.

Once all the forms are complete (Response, Reply and Statements, if applicable), the respondent should file them at the same courthouse that the applicant filed his or her claim. After the forms have been filed, the respondent must serve them on the applicant.

All of the forms mentioned above can be found on the Family Law Information Center’s (FLIC) website (www.albertacourts.ab.ca/familylaw). Select “Booklets” and then “Forms and Instructions”. Each form also has a corresponding document that provides detailed instructions on how to properly complete the forms.
Though the forms are available online, it is strongly recommended that you consult with a lawyer about your specific situation. FLIC can also answer some of your questions, and will be able to help you select the correct forms. Call FLIC at [780] 415-0404.

CASE FLOW CONFERENCES

Before unrepresented parties may appear in Provincial Court, they will be required to attend a case flow conference. At this conference, the litigants, an intake counsellor and a case coordinator will explore the parties’ legal options, facilitate resolutions to their dispute and, where required, make referrals. Litigants are also given information on mediation and judicial dispute resolution in an effort to resolve the matter outside of court.

At the conference, the litigants should make a sincere attempt to gain consensus on as many issues as possible. The parties are sometimes able to reach an agreement at this stage, which will ultimately save them time and money.

If the matter proceeds to Court, the case flow coordinator or family court workers will ensure that the parties are ready to attend court and that they understand the court procedures. The family court workers also help prepare Court applications and attend Court and judicial dispute resolution hearings with the parties. This will save time for the Court and the parties by reducing the number of unnecessary adjournments that unrepresented litigants sometimes require.
ALTERNATIVES TO COURT

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.

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 by Alberta Family Justice Mediation Services 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.
VARYING AN ORDER

A custody, access, parenting or contact order is never permanent. A Court always has the authority to change the order later if the circumstances change. The Court of Queen’s Bench may change an order originally made by a Provincial Court Judge or a Court of Queen’s Bench Justice.

However, a Provincial Court Judge may only change an order originally made by a Provincial Court Judge.

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. The child’s interests and needs change;
c. Alcohol or drug abuse;
d. A party’s refusal to obey the terms of an original order.

This list is not complete. A variation order should be heard in the province the child(ren) are regularly resident. Ultimately the Court will decide in the “best interests” of the child.
PROBLEMS WITH ORDERS

A parent who has reason to believe there is a serious risk to the child’s safety and well-being can apply to the Court to have an existing order reviewed. If a parent is having problems seeing their child despite having a court order giving them parenting time, they can apply to the court to enforce their order. They should also contact a lawyer who would be better able to assist them in enforcing their rights.

APPEALING AN ORDER

Parents who are unhappy with the decisions made regarding the parenting time of the child may appeal. If the original order was made in Provincial Court, it may be appealed to the Court of Queen’s Bench within 30 days of the order. If a Justice in the Court of Queen’s Bench made the order, it may be appealed to the Court of Appeal within 30 days.

ENFORCING AN ORDER

Once the Court hands down a parenting or contact order, the order is legally binding and enforceable throughout Alberta. 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.
In Alberta, custody orders made in other provinces may be enforced in Alberta if a certified copy of the order is registered here. To enforce an extra-provincial custody order, parents will likely require a lawyer. 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 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.

When enforcing time with a child provided for by a contact order or access order, the court may order:

a. the applicant be given appropriate time with the child, to make up for the time that has been lost or denied;

b. the applicant be reimbursed for the necessary expenses incurred as a result of being denied time with the child;

b. the respondent give security to be held until obligations are fulfilled
d. payment of a penalty of up to $100 per day to a maximum of $5,000 for denying time
e. the respondent serve time in prison for up to 90 days for denying time.

ABDUCTION OR “CHILD SNATCHING”

A parent of a child who is under 14 years old may be charged with an offence if that person removes the child from the other parent without permission. If a person charged with abduction is found guilty, they may face imprisonment for up to 10 years. Therefore, a parent should not take their child from the home without consent of the other parent or a court order authorizing them to do so.

In the extreme circumstance of a parent fleeing with the child, the Parenting Order can include a police enforcement clause. This gives the police the authority to enforce the Parenting Order should you need to call and ask for their help. Once notified, 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 but in Canada, 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 Parenting Order. If your child is taken outside of Canada, you may qualify to bring a request under international laws that prevent child abduction. You should contact a lawyer immediately in the event your spouse abducts your child.

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REFERRALS

Legal Aid Society of Alberta
(780) 427 - 7575

Student Legal Services of Edmonton - Civil / Family Project
(780) 492 - 8244

Family Mediation Services
(780) 427 - 8329

Family Law Information Centre
(780) 415 - 0404

Edmonton Community Legal Services
(780) 702 - 1725

Family Centre
(780) 423 - 2831

Lawyer Referral Service
1 - 800 - 661 - 1095

Parenting After Separation
(780) 413 - 9805