



Community Legal Information Association of Prince Edward Island, Inc.

Custody and Access

Separating parents must make arrangements for child custody, access and visitation. This pamphlet explains some of the law in these areas.

What is custody?

Custody means the right and responsibility to care for a child. It includes the right to have the child live with you and the right to make decisions for the child. The PEI *Custody Jurisdiction and Enforcement Act* says that, unless otherwise ordered by a court, the parents of a child are joint guardians of a child and are equally entitled to custody of the child.

The law says custody should always be arranged in a way that is best for the child. A parent who has custody of a child has the right to:

- choose what school the child goes to;
- decide if the child will receive religious instruction;
- make medical decisions for the child, including consent to surgery;
- make all day-to-day decisions concerning the child, like baby-sitting arrangements;
- decide what activities the child is involved in.

Are different custody arrangements possible?

When parents separate, the question of custody can become a huge issue. This is especially true when the parents can't agree on an arrangement for their child. Usually one parent has the child living with her or him. If the other parent is actively involved in the child's life and both parents make decisions about the child together, then they have joint custody, even if the child lives with one parent and visits the other parent.

If parents:

- are not living together when the child is born,
- have not lived together since the child's birth, and
- the non-custodial parent is not involved with the child,

then the parent the child lives with has “de facto sole custody”. De facto sole custody means an assumption of sole custody, but without legal documents to back it up.

If this is your situation, it is a good idea to have papers stating that you have sole custody. If a situation arises with the child's other parent, police are reluctant to get involved without an order stating that you have sole custody. This could cause delays in getting your situation dealt with properly. You will need a lawyer. To find out more about this, you can use the Lawyer Referral Service to meet with a lawyer for a consultation for a small fee. Call 1-800-240-9798 or 902-892-0853 to reach the Lawyer Referral Service.

If you have sole custody, you are the person legally responsible for making decisions about your child. You can share some of the upbringing of the child with grandparents or with someone else and still remain the custodial parent in the eyes of the law. Sharing childcare responsibilities or allowing another person to baby-sit the child will not change your custody arrangements. However, if both parents share parenting responsibilities, they would have "de facto joint custody", which means an assumption of joint custody, without legal documents to back it up.

Both parents have joint custody of the child if they have lived together after the birth of the child, whether they were married or not. If the parents separate, they may agree to change this custody arrangement. They may choose for one parent to have sole custody or they may agree that they will have joint custody of the child. Joint custody does not mean that the child has to live an equal amount of time with each parent.

An issue that can be affected by your custody arrangements is your mobility, or ability to move to another location with the children. If you have joint custody with the other parent, along with day-to-day care of the children, you cannot move the children to another province unless you get permission in writing from the other parent or the court. If you have sole custody, you may be able to move, if access and visitation can be worked out with the other parent, or if the court gives you permission.

Who can get custody?

According to the PEI *Custody Jurisdiction and Enforcement Act*, a parent of a child - or any other person - may apply to court for an order concerning custody of the child. This may include a relative or friend with whom the child lives on a permanent basis. The law describes this person as someone who has a "settled intention" to parent the child - for example, a person who is not the biological parent of a child, but has acted as a parent to the child, can apply for custody or access because of the role he or she has played in the child's life. The person's chance of gaining custody will depend on the situation. The court tries to provide a stable home for children.

As long as the custodial parent is a capable caregiver the judge is unlikely to change custody. The right to custody does not depend on the age of the parents. Naming (or not naming) a parent on the birth certificate will not affect custody rights for either parent. A judge will often prefer to leave the child with the person who already has custody, unless that situation is harmful to the child. However, sometimes a judge might decide that it is in a child's best interest to remain in their community, even if the custodial parent is planning to move. In every case, the judge looks at what is best for the child.

Many things affect the judge's decision. For example, it is important for the judge to know who has cared for the child in the past and what kind of attachment the child has formed with that caregiver. The judge wants to know what kind of plans the person seeking custody has for the child. A judge may ask for a home study in order to have more information to make a decision.

Home studies provide a way for judges to get more information about the people who want custody and about the child. The judge may order a social worker or another person hired by the court to do an assessment.

People involved in a custody dispute can decide to come to an agreement at any point in the process, either with or without the help of mediators. If they do reach an agreement, the home study is not completed and the terms of their agreement are sent to the judge. If they cannot agree, the judge will hear the case in court, including the results of the home study, and make a decision based on the best interests of the child.

Children may have a say in the question of custody. The *Act* says that the views and preferences of the child are to be taken into consideration wherever possible. The judge decides how appropriate it is to take into account the child's wishes. The older and more mature the child, the greater weight his or her wishes will have on the court's decision.

If circumstances change, a parent or another person may return to court to ask the judge to change a custody order. A judge may consider the question of custody whenever a person brings an application to court. The court can change an order whenever there has been a change in circumstances that affects, or is likely to affect, the best interests of the child. Again, the judge looks at what is best for the child. The court will not change the arrangement without careful consideration. It is in the child's best interests to have stability and certainty in his or her home life.

Access

What is access and visitation?

Access and visitation refers to the rights of a child and the parent who does not have the child living with him or her to spend time together. It also includes the right to information about the health, education and well-being of the child, but does not include the right to make major decisions about the child.

Judges grant access and visitation because it is believed that it is important for a child to have a meaningful relationship with both parents. A child has a right to know both parents and both parents have the right to know what is happening with their child.

Judges generally think it is in the best interests of the child to have maximum contact with both parents, so they will usually order access and visitation.

Shortly after a separation, visitation may be a painful issue to adjust to and sort out. Some parents may find visits even more difficult to deal with when the other parent begins a new relationship. As long as the new person in the other parent's life poses no risk to the child, the child has the right to know and spend time with the new couple.

Who can get access and visitation?

Access and visitation protects the child's right to spend time with a person, usually a parent, who does not have the child living with him or her. If only one parent has custody of the child, usually the other parent will have access and visitation.

Even if the parents have joint custody, the child may live primarily with one parent and have visitation rights with the other parent.

Visitation arrangements can be worked out through mediation or through court. A clearly written agreement or order about access and visitation reduces conflict between the parents concerning times and schedules, and ensures that the child sees the other parent regularly.

The person with access and visitation:

- can spend time with the child;
- has the right to information about the child's education, health, and religious upbringing.

The custodial parent can agree to give access and visitation to:

- the other parent;
- any of the grandparents;
- anyone else who wishes to regularly visit the child.

If you and the person who wants access and visitation cannot agree, he or she can ask the court for an order allowing visits with the child. However, there is nothing written in law that specifically gives or protects grandparents' rights to access and visitation with their grandchildren.

When deciding if someone should have access and visitation, the court looks at:

- whether it will be good for the child to have a relationship with the person;
- whether the child knows the person already;
- the child's overall best interests.

The person who wants access and visitation must show the judge that the child will benefit from time spent with him or her. A judge will not take away access and visitation unless it is best for the child.

How do you get a custody, access and visitation order or agreement?

People can agree on custody, access, and visitation arrangements among themselves. This is the best way to make decisions. Whatever arrangements are made should be put into a written form that the parties sign and have witnessed. The courts will give some consideration to agreements that are drawn up and signed by the parties themselves. However, this is best done through a lawyer to be sure it is correct and reflects the law.

Custody and access are very difficult issues to deal with and sometimes people need help. If you need help getting an agreement, you can contact Family Court and ask to speak to the family court mediators (902-368-6655). They will provide free mediation in child custody disputes. In situations of family violence, mediation may not be appropriate. For family violence situations, an assessment will be done to decide whether mediation can proceed or not.

In mediation, one of the counsellors will sit down with those involved and try to work out an agreement. The purpose is to come up with arrangements that you can commit to and follow. There are also private mediators who can help - some mediators charge fees on a sliding scale according to your income, while others have a set rate. For a list of family mediators in PEI, call CLIA at 902-892-0853 or 1-800-240-9798.

Court should be the last resort in custody disputes - it is far better to try to come to an agreement with the help of mediators or lawyers. What the judge orders in court may not be what you would prefer, and any conflict between you and the other parent may get worse. However, if you cannot reach an agreement, either parent may apply to court for an order called a Custody Order. One of the things that the court will consider in

deciding custody is whether a parent encourages a good relationship between the child and the other parent.

If you find out that the other parent is going to court to ask for custody, see a lawyer as soon as possible.

What could cause access and visitation to be denied?

Usually the courts feel that it is in the child's best interests to have frequent and regular visits with both parents. It is rare for a parent to have no access and visitation. The court denies access when:

- the child does not want to see the non-custodial parent for good reason (for example, this might happen in a family violence situation or if the child has not seen that parent for a long time);
- there is a history of not returning the child to the custodial parent.

In some cases one parent may be concerned about the child's safety during visits with the other parent. A judge may order "supervised or restricted access" in this situation.

Supervised access can mean that the visit with the child is supervised by another person or that another person is present when the child goes from one parent to the other. This could be:

- a professional who works with families;
- a friend or family member who is willing to supervise visits.

A judge might also put certain restrictions on access. Examples of restrictions might be:

- the parent shall not be under the influence of alcohol immediately prior to or during access;
- both parents shall refrain from making negative comments about each other in the child's presence;
- access will happen at the home of the grandparents.

Access and visitation is a right of the child - children have the right to know and spend time with both parents. A parent is entitled to access and visitation if it is in the child's best interests. It is not affected by other things, such as whether or not the parent pays support. If there is a court order or an agreement saying that the parent must pay child support, he or she must pay. The parent with custody cannot refuse access and visitation to the other parent just because he or she is not paying child support.

How are orders or agreements enforced?

If you have custody through a court order or agreement but are being denied custody, you may apply to the court for help in enforcing the court order or agreement. The court can order the Sheriff or the police to find and deliver the child to you. If the person who has access to the child is not returning the child according to the order or agreement, the court may put restrictions on the visits. For example, the court may order:

- that future visits be supervised;
- that the person with custody and the person with access mediate their disagreement;
- that the person with access provide his or her address and telephone number to the person with custody.

It is a criminal offence for a parent to take a child away from the parent who has a court order for custody unless that parent agrees, or the child is moved to protect him or her from danger or harm. This applies no matter where in Canada the court order was made. If the non-custodial parent takes a child, the custodial parent can call the police. The police can get the child back and arrest and charge the non-custodial parent.

If you have an order or agreement for access and visitation that is not being followed because the custodial parent will not allow the children to go with you, you can take the custodial parent back to court to get the order changed. There are steps a court can take to enforce a written order or agreement. Some police departments are willing to help enforce a court order but others are not – you can call to find out what the police will do in your community.

Custody can be a difficult issue. There are services available, like Family Court Mediation Services (902-368-6056 or 368-6057) or private mediators or lawyers, to help you deal with custody, access and visitation issues. It is important to take advantage of these whenever you can. Reaching a custody agreement that everyone can commit to and follow is the best solution for everyone. It is healthy for your child to see and benefit from co-operation and compromise between parents.

This information has been prepared by Community Legal Information Association of Prince Edward Island, Inc. It contains general information about family law and family court. It does not contain legal advice. To obtain legal advice, contact a lawyer. If you don't know a lawyer, call the Lawyer Referral Service at 902-892-0853 in the Charlottetown area or 1-800-240-9798 toll-free. The Lawyer Referral Service provides you with a consultation with a lawyer for a small fee.

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For more information, you can telephone CLIA at 902-892-0853 or 1-800-240-9798, visit our website at www.cliapei.ca or email us at clia@cliapei.ca. You can also find us at: www.facebook.com/CLIAPEI, www.twitter.com/CLIAPEI and www.youtube.com/CLIAPEI.

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