

Custody & Access

Custody and Access Defined

Custody

One of the most important issues upon separation or divorce is child custody and access. Custody and access decisions by parents and the courts will set out what a child's daily life will look like. Custody is not just physical custody of a child. It also includes care of a child and decision-making. Important decisions about a child must be made regarding health, education, and religion.

Access

Access refers to time that an individual is allowed to have contact with a child. It usually involves time that the person can visit and care for the child, but it may also refer to the right to telephone, text, or e-mail.

If access is considered beneficial for a child but there are safety concerns surrounding a parent, supervised access may be ordered. Supervised access is time with a child that is supervised by a third party such as a family member, social worker, or an access agency. This gives parents the opportunity to have access with a child under more controlled circumstances if they have addiction issues, a history of emotionally or physically abusive behaviour, or if they are otherwise unable to properly supervise a child.

Specified access is a term used to indicate that a parent has specific times with a child. For instance, the access parent may have care of the child every Friday at 6:00 p.m. until Sunday at 4:00 p.m.

Reasonable or liberal access with a child is a term used when a parent is granted access, but the times are flexible or not specific. Both parents must agree to the times for access and make the necessary arrangements.

Both parents also have the right to access information about their child. Unless a Court orders otherwise, the non-custodial parent has the same right as the custodial parent to receive school, medical, psychological, dental and other reports about the child. The noncustodial parent does not have the right to make decisions about those matters, unless it is

Lesson Plan Overview

Family law is an area of law that deals with family relationships, and the rights and responsibilities associated with the creation, transformation, or discontinuation of those relationships.

This lesson plan introduces students to the concepts of custody and access in family law. The objectives of the lesson are to understand the meaning of custody and access and to be able to identify the different types of custody and access arrangements. Students should also be able to examine and analyze the main issues in custody matters, including how custody and access are decided, what happens if a parent or guardian wants to move with a child, how the child's wishes are considered, and access by non-parents.

Activities & Discussion Questions:

1) Provide the students with Handout 1, which is a quiz on the general concepts of custody and access.

2) Provide the students with Handout #2: Case Study of *Haberman v. Haberman*, 2011 SKQB 415 (CanLII), <http://canlii.ca/t/fnr3l>

Review the discussion points.

3) Provide the students with Handout #3: Case Study of *Gordon v. Goertz*, 1996, 2 SCR 27, 1996 CanLII 191 (SCC).

specified in a court order or agreement.

Four Different Types of Custody Arrangements

1) Sole Custody

Sole custody means that the child is primarily or solely in the care of one parent. A parent with sole custody of a child makes major decisions about the child, like which school to attend or which religion to teach. This is the parent the child lives with and is the parent legally responsible for the care of that child. If the child spends time with the other parent, that time is called access. If parents have never lived together after a child is born, the parent who has the child in their care is presumed to have sole custody under provincial legislation called *The Family Maintenance Act*.

2) Joint Custody

When parents have joint custody, they share in major decision-making about the child. For example, they will decide together about things like which school the child will attend or which religion to teach the child. One parent may be granted final decision-making power if there is a disagreement, or the parties may have to go to mediation if they cannot agree. Joint custody does not mean that there is an equal sharing of time with the child between the parents. Sometimes, when there is joint custody, the child will still live mostly with one parent (primary physical care and control) and spend time in the care of the other parent (physical care and control as agreed or specified). Day to day decisions will be made by the parent who has care and control. Parents are presumed to have joint custody of their child if they lived together after their child was born according to *The Family Maintenance Act*.

3) Split Custody

Split custody is only possible where there are two or more children. Each parent has legal custody of one or more of the children. Custody of the children may still be joint with one parent having primary care and control of the child over 60% of the time, or there may be sole custody of one or more of the children.

4) Shared Custody

Shared custody means that parents share decision-making and care and control of the child or children. Each parent must have the child in their care for at least 40% of the time. Shared custody is a type of joint custody arrangement. It is not generally appropriate in abusive or high-

Review the discussion points.

4) Handout #4 is an activity on access by extended family members.

Glossary

Access – the time an individual is allowed to have contact with a child.

Joint Custody – the child spends time with both parents who share in major decision-making.

Reasonable or Liberal Access – where access times are flexible, not specific.

Shared Custody – the child is in the care of each parent at least 40% of the time and the parents share the decision-making

Sole Custody – the child is primarily or solely in care of one parent

Split Custody – each parent has legal custody of one or more of the children.

Supervised Access – when time with a child is supervised by a third party.

Relevant Law:

Federal Legislation:

Divorce Act - sections 16 (1), (7)

Criminal Code of Canada - sections 282 and 283

Provincial Legislation:

The Family Maintenance Act - sections 39(1), (2), (4), (2.1)

The Queen's Bench Rules – 60.10(1) – (5)

The Child and Family Services Act – sections 78(1), (1.1), (4), (4.1), (42)

conflict custody cases where the parents will not be able to cooperate.

How are Custody and Access Decided?

Parents can often agree on custody and access to their children. If they cannot agree there are a number of services, such as mediation, that can help parents discuss their concerns and try to work out an agreement for custody and access.

Mediation is available through a government program called Family Conciliation and through private mediators. In mediation, a neutral, third-party, skilled, professional counselor helps parents make decisions about the ongoing care of their children after separation. Mediation can help parents make decisions about custody issues, like how the children will spend time with each parent on weekdays, weekends, holidays and how they will continue to make major decisions about education, religion, health care and activities. Mediation is a voluntary process.

If parents can't agree on custody or access and are unable to resolve their issues through mediation, they may have to go to court. Either parent can apply to court for custody of their child or access to their child. The test for deciding custody and access is what is in the best interests of the child. *The Family Maintenance Act* sets out what should be considered when looking at the best interests of a child which includes:

- The nature, quality and stability of the relationship between the child and each parent,
- The nature, quality and stability of the relationship between the child and other significant individuals in the child's life,
- The child's physical, psychological, educational, social, moral, and emotional needs, including the need for stability, taking into account the child's age and stage of development,
- The impact on the child of any domestic violence,
- Whether the parents can cooperate on issues affecting the child,
- The willingness of each parent to promote the relationship between the child and the other parent,
- Any special needs the child has for care, treatment or education,
- The proposed plan to care for the child and the capacity of each parent to provide a safe home, adequate food, clothing and

Family Conciliation

Family Conciliation has a number of programs for families going through a separation or divorce. There is no cost for their services. One of their programs, *For the Sake of the Children*, is mandatory for parents or guardians going through family court proceedings. Parents who have attended *For the Sake of the Children* can enroll in mediation through Family Conciliation. An impartial, trained family mediator will help parents make decisions about the care of their children.

Brief Consultation Report

This is a program through Family Conciliation where children between the ages of 11 and 17 can meet with a family relations counselor to help them address their concerns and provide their wishes about custody and access. A report is prepared for the court to consider.

medical care,

- The history of who has cared for the child.
- The effect of disruption on the child's sense of continuity,
- The views and preferences if the child (if the court considers it appropriate to find out what they are), and
- The child's cultural, language, religious, and spiritual upbringing and heritage.

Child's Voice in Custody and Access Cases

Can older children decide themselves on custody or access? The court may consider the child's wishes but there is no magic age at which a child may decide. When considering the preferences of a child, the court would look at the maturity of the individual child, consult with professionals such as child psychologists or request that Family Conciliation assist by preparing a Brief Consultation Report

Manitoba courts balance the need for older children to have a say about their living arrangements and the desirability of keeping children out of parental conflict and the family court system. Judges and lawyers normally do not involve children in custody matters or speak directly to them about their wishes and concerns. The case of *Haberman v. Haberman* (2011 SKQB 415) is a Saskatchewan case where the judge took a different approach.

Mobility Cases

A parent can move away with the children if the other parent gives consent. If the other parent will not consent, the parent will need to go to court and get a court order that will allow the parent to move away with the children. Where a parent has specific access rights and the other parent moves away with the child, without consent, or without a court order, the moving parent may be found in contempt of a court order under *The Court of Queen's Bench Rules*. It is possible that the parent may be charged with abduction under the *Criminal Code*, where the child is under 14. In addition, the *Hague Convention on the Civil Aspects of Child Abduction* allows parents with custody rights to request the return of their children, under 16 years of age, from another country.

Mobility cases are difficult to predict because they are based on the best interests of the individual child without a presumption in favour of the custodial parent. The most recent Supreme Court of Canada

United Nations Convention on the Rights of the Child

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

decision on mobility considerations in family law was decided 20 years ago and it is still the governing law in these cases: *Gordon v. Goertz* [1996], 2 SCR 27. That case set out the considerations when a court is deciding whether a parent can move with a child:

- The existing custody arrangement and the relationship between the child and the parent with custody;
- The existing access arrangement and the relationship between the child and the parent with access;
- That it is desirable for the child to have maximum contact with both parents;
- The child's views;
- The reasons for the move, if it is relevant to the parent's ability to meet the needs of the child;
- The disruption of a change in custody; and
- The disruption as a result of moving away from family, schools and community.

Access by Extended Family Members

Grandparents and relatives can usually reach agreements with parents about access to children. However, in some cases there is a dispute as to whether grandparents or extended family members should have access to a child or what type of access they should have. Parties can try to work out the access issues through mediation or direct negotiation. If they can't reach an agreement, *The Child and Family Services Act* gives grandparents and other members of the extended family the right to apply for access through the court. Non-family members can also request access, but their application is based on "exceptional circumstances". The primary consideration in such cases is the best interests of the child. Family Conciliation has a Grandparent Advisor that provides information and mediation regarding grandparent and extended family member access to children.

Grandparent Advisor

The Grandparent Advisor provides information about access to grandparents and other extended family members. The Grandparent Advisor will consult with interested parties and try to mediate a satisfactory solution for the child and parties involved. The consideration is always what is in the best interest of the child.

If disputes can't be resolved in mediation, the grandparent advisor can also advise about next steps and refer to the Grandparents' Access Guide.