

# Custody & Access - Legislation

## *The Family Maintenance Act*

39(1) Subject to subsection (2), rights of parents in the custody and control of their children are joint but where the parents have never cohabited after the birth of the child, the parent with whom the child resides has sole custody and control of the child.

39(2) Either parent of a child may make an application

- (a) for custody of the child; or
- (b) for access to the person of the child;

and upon the hearing of the application the court may order that

- (c) custody of the child be committed to the applicant or respondent or both;
- (d) the non-custodial parent have access, at such times and subject to such conditions as the court deems convenient and just, for the purpose of visiting the child and fostering a healthy relationship between parent and child;
- (e) a party pay costs in such amount as the court may determine.

39(4) Unless a court otherwise orders, the non-custodial parent retains the same right as the parent granted custody to receive school, medical, psychological, dental and other reports affecting the child.

## **Best interests of child**

39(2.1) In determining a child's best interests in an application under subsection (2) or section 46, the court shall consider all matters relevant to the best interests of the child including, but not limited to, the following:

- (a) the nature, quality and stability of the relationship between
  - (i) the child and each parent seeking custody or access, and
  - (ii) the child and other significant individuals in the child's life;
- (b) the child's physical, psychological, educational, social, moral and emotional needs, including the need for stability, taking into consideration the child's age and stage of development;
- (c) the impact on the child of any domestic violence, including consideration of

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- (i) the safety of the child and other family and household members who care for the child.
  - (ii) the child's general well-being,
  - (iii) whether the parent who perpetrated the domestic violence is able to care for and meet the needs of the child, and
  - (iv) the appropriateness of making an order that would require the parents to co-operate on issues affecting the child;
- (d) the ability and willingness of each parent to communicate and co-operate on issues affecting the child;
- (e) the willingness of each parent seeking custody to facilitate the relationship between the child and the other parent;
- (f) any special needs of the child, including special needs for care, treatment or education;
- (g) the proposed plan of care for the child, including the capacity of the parent seeking custody or access to provide a safe home, adequate food, clothing and medical care for the child;
- (h) the history of the care arrangements for the child;
- (i) the effect on the child of any disruption of the child's sense of continuity;
- (j) the views and preferences of the child, where the court considers it appropriate to ascertain them;
- (k) the child's cultural, linguistic, religious and spiritual upbringing and heritage.

### ***Divorce Act***

16 (1) A court of competent jurisdiction may, on application by either or both spouses *or by any other person*, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

16(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

### **Order respecting change of residence**

16(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as

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the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

### *The Court of Queen's Bench Rules*

#### **Motion for contempt order**

**60.10(1)** A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

#### **Service**

**60.10(2)** The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise.

#### **Affidavit in support**

**60.10(3)** An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit.

#### **Warrant for arrest**

**60.10(4)** A judge may issue a warrant for arrest (Form **60I**) of the person against whom a contempt order is sought where the judge is of the opinion that the person's attendance at the hearing is necessary in the interest of justice and it appears that the person is not likely to attend voluntarily.

#### **Content of order**

**60.10(5)** In disposing of a motion under subrule (1) the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

- (a) be imprisoned for such period and on such terms as are just;
- (b) be imprisoned upon failure to comply with a term of the order;
- (c) pay a fine;
- (d) do or refrain from doing an act;
- (e) pay such costs as are just; and
- (f) comply with any other order that the judge considers necessary;

and may direct the sheriff to take possession of and hold the property of the person in contempt and to collect and hold any income from the property until the person complies with the order.

## *Criminal Code*

### **Abduction in contravention of custody order**

**282 (1)** Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

### **Abduction**

**283 (1)** Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, whether or not there is a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

## *The Child and Family Services Act*

### **Access — purpose of section**

**78(1)** The purpose of this section is

(a) to facilitate relationships between children and their grandparents and other family members, when those relationships are in the child's best interests;

(b) to recognize, on applications by grandparents for access, that children can benefit from a positive, nurturing relationship with their grandparents; and

(c) to recognize that in exceptional circumstances children can benefit if non-family members are given access.

### **Access application by grandparent or other family member**

**78(1.1)** Subject to subsection (6), a grandparent, step-parent or other member of a child's family who does not have a right to apply for access to the child under any other provision of this Act or under a provision of another Act may apply to court for access to the child.

### **Access order**

78(4) On an application under this section, a judge may make an order granting an applicant access to a child in such manner, at such times and subject to such conditions as the judge considers to be in the best interests of the child, as determined in accordance with subsection (4.2).

### **Access provisions**

78(4.1) An order for access may include, but is not limited to, provisions requiring that

- (a) the child spend specified periods of time, with or without supervision, with the applicant;
- (b) the child have the opportunity to have the applicant attend specified activities of the child;
- (c) the child be able to receive gifts from, or send gifts to, the applicant, directly or indirectly;
- (d) the child be able to receive communications from, or send communications to, the applicant, directly or indirectly, whether orally, in writing, or by another means of communication; or
- (e) a specified person provide the applicant with pictures of the child and information about the child's health, education and welfare.

### **Child's best interests**

78(4.2) In making an order for access under this section, in addition to considering the best interests criteria set out in subsection 2(1), the court shall consider all relevant matters, including

- (a) the mental, emotional and physical needs of the child;
- (b) the nature of any pre-existing relationship between the applicant and the child; and
- (c) where the application is made by a grandparent, that a child can benefit from a positive, nurturing relationship with a grandparent.