

## Separation and Divorce

# Child Custody, Access, and Parenting Plans



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## Introduction

When parents separate, they need to arrange how they will share the parenting of their children.

If they cannot agree, they may have to go to court. The court must decide based on what is best for the child. In family law, this is called the “best interests” of the child.

## What decisions do parents who are separating need to make?

Parents who do not live together have important decisions to make, such as:

- Where will our child live?
- How much time will each of us spend with our child?
- How will we make major decisions about how to care for and raise our child?
- What role will each of us have in caring for our child?

In family law the answers to these questions are called “custody and access” or “parenting plans”.

## How are parenting plans decided?

Many separating parents are able to agree on a parenting plan. If they agree, they may not have to go to court.

It is best if the parenting plan is in writing and signed by both parents and a witness. The parenting plan is often put in a document called a “parenting agreement”, a “separation agreement”, or a “paternity agreement”.

If possible it is best to get a lawyer to write the agreement. The lawyer will think of important things

that the parents might not have considered. For more information about getting legal help, see [pages 16 to 19](#).

But one lawyer cannot represent or protect the rights of both parents. Before the parents sign the agreement, they should each have their own lawyer review it.

If one parent does not follow the written agreement, the other parent can go to court to get it enforced.

## What is custody?

Custody is the right to make important decisions about how to care for and raise a child, for example:

- the child's school and educational programs,
- the child's religion,
- where the child will live,
- other activities for the child, such as sports, tutoring, and music lessons,
- the child's legal name, and
- health care decisions for the child.

Custody is **not** about which parent the child lives with or how much time a child spends with each parent. For example, even if only one parent has custody, the child might live equal time with each parent. Or the child might live mainly with one parent, but both parents have custody and share the decision-making.

## Who will the child live with?

Some children of separated parents live mainly with one parent, and some divide their time living with both parents.

Often a child lives mainly with one parent if that parent was the main caregiver for the child before separation, or if the child is very young. A common arrangement when a child lives mainly with one parent, is for the child to spend one mid-week day and every second weekend with the other parent.

The living arrangement can be anything that is in the child's best interests.

## What are the different types of custody?

### **Joint custody**

Joint custody means that both parents must agree on major decisions that affect their child. One parent cannot decide these things without the agreement of the other. If they disagree, they must find a way to resolve it.

Courts do not like to order joint custody if parents are unable to make these decisions together. Joint custody works best when parents share similar ideas about how to raise their child. It takes a lot of co-operation.

Sometimes parents with joint custody divide up the decision-making. For example, one parent may make medical decisions, while the other makes educational decisions.

## **Sole custody**

If one parent has sole custody, this means he or she can make all of the important decisions about the child, even if the other parent disagrees. Sometimes the parent with sole custody must talk to the other parent before making the decision.

Some people assume that if a parent with sole custody dies, the other parent gets custody. This is not always true. A parent with sole custody can choose who will have custody of their child for the first 90 days after their own death. The person they choose, or anyone else, can apply to court to have custody after that. For more information see [page 8](#).

When one parent has sole custody, the other parent usually has “access”.

## **What is access?**

When a child lives mainly with one parent who has sole custody, the child and the other parent usually have the right to spend time together. This is called access.

A parent with access also has the right to ask for and be given information about their child’s health, education, and well-being from the other parent or places, such as schools and hospitals. But for some health information requests, such as hospital records, the parent with sole custody may need to give their written consent first.



## What are some of the different types of access?

### Reasonable access

If the parents are able to co-operate, the access arrangements can be left open and flexible instead of having a detailed schedule. This is sometimes called “reasonable access” or “liberal and generous access”. This allows the parents to informally make arrangements that can easily be changed if the situation changes.

## **Fixed access**

Sometimes the terms of the access include a specific and detailed schedule. This is often called “fixed access” or “specified access”. The terms may cover things like holidays, long weekends, children’s birthdays, and religious occasions. They may include where access will take place, or other conditions.

## **Supervised access**

In some situations, access may need to be supervised by another person. For example, supervised access might be ordered if the parent with access:

- has a drinking or drug problem,
- has abused the child in the past, or
- has threatened or tried to take the child away from the other parent.

The person who supervises might be a relative, a friend, a social worker, a worker at a supervised access centre, or a children’s aid worker.

## **No access**

In the most extreme cases, a parent might not have any access to their child. For example, this could happen when serious child neglect or abuse has been proven, or where a child’s safety cannot be protected.

## Does child support affect a parent's right to access?

No. Access and child support are separate issues. A parent cannot be denied access because they have not paid child support. And a parent might still have to pay child support even if they do not have access. For more information, see CLEO's publication **Separation and Divorce: Child Support**. See the [back cover](#) to find out how to order a copy or view it online.

## Can someone other than the parents get custody and access?

Usually it is the child's parents who make an agreement or apply to court for custody or access. But in some cases, other people might get custody or access, such as a step-parent, grandparent, or other relative. Or it could be someone outside the family who has a close relationship with the child.

Courts must make these decisions based on what is in the best interests of the child.

When we use the word "parent" in this booklet, it usually means anyone who has custody or access.



## Traveling with a child

A parent with sole custody can travel with their child outside of Canada without the other parent's permission. It is important to bring the agreement or court order with them in case they have to prove they have sole custody. But crossing borders can be unpredictable, so it is safer to also bring a letter of permission signed by the other parent and witnessed by a Notary Public.

If a parent does not have sole custody, they should bring a letter of permission signed by the other parent and witnessed by a Notary Public.

To get a passport for a child under 16, a parent with custody must apply for it. They will need the other parent's signature if the other parent has joint custody or fixed access.



## Can a parent move with their child?

A parent can move with their child if the move will not affect the other parent's access. If the move would affect access, the parent needs the agreement of the other parent or a court order changing the access. If they go to court, the parent who wants to move will have to convince the judge that the move is in the best interests of the child.

## Where can parents get help to work out a parenting plan?

Some parents find it difficult to come to an agreement about custody, access, and parenting plans. If they cannot agree, they may have to go to court. But before they do that there are other steps they can take to help them reach an agreement.

## **Negotiation with the help of lawyers**

Often family law lawyers can help parents reach an agreement without going to court. Each parent needs to have their own lawyer. One lawyer cannot act for both parents.

Experienced family law lawyers can help parents find ways to work towards an agreement. The parents and their lawyers can meet together to talk about the issues they disagree on. For more information about getting legal help, see [pages 16 to 19](#).

## **Mediation**

Parents can meet with a mediator to help them reach an agreement without going to court.

Mediators are trained to help parents talk about the problems that need to be solved and suggest solutions they can both accept. Mediators often have experience with separated families and the issues they face. They can help parents come to an agreement that is best for the child.

Mediators do **not** give legal advice and they do **not** make the decisions.

If possible, each parent should meet with their own lawyer before the mediation starts. They can also have their lawyers help them through the whole process.

Mediation can be helpful, but not always. For example, if a parent has been abused or feels intimidated by the other parent, they could be at a disadvantage in mediation.

If parents do go to mediation, they should not agree to any arrangement or sign anything before they each discuss it with their lawyer.

Mediation services are available at many courthouses. For more information call the Ontario Association for Family Mediation at **1-800-989-3025** or visit their website at [www.oafm.on.ca](http://www.oafm.on.ca).

## **Court**

When parents cannot agree, they can go to court and have a judge decide what custody and access arrangement is in the best interests of the child. They can go to court on their own, but it is best to get the help of a lawyer. For more information about getting legal help, see [pages 16 to 19](#).

When judges make decisions about custody and access, they usually assume it is better for a child to have a continuing relationship with both parents. Judges also consider:

- the emotional ties between the child, the parents, other family members, and caregivers,
- the child's wishes (the more mature the child, the more the child's wishes will be considered),

- the stability of the home that each parent can provide for the child,
- how the parents plan to care for and raise the child,
- the ability of each parent to provide for the child's needs, and
- whether or not a parent has ever been involved in a child protection case or a criminal case.

The judge does not consider the past behaviour of a parent unless it makes them less able to act as a good parent. For example, a judge will not take into account which parent was to blame for the family break-up. But the judge must take into account if a parent was ever violent or abusive towards:

- their spouse,
- anyone in their household,
- a parent of the child, or
- their own or any other child.

### **What happens in court?**

In most cases, the judge makes the decision after listening to what the parents and their lawyers have to say. But sometimes the judge wants independent information.

For example, the judge might ask the Office of the Children’s Lawyer (OCL) to speak on behalf of the child. This service is free. If the OCL agrees to take part, one of their social workers may prepare a report about the child, and the child’s home and family. The report includes recommendations to the judge. And one of their lawyers may go to court on behalf of the child, after considering the child’s wishes and all of the circumstances.

The judge might also order a “custody and access assessment”. The parents must pay for this. The assessor could be someone like a social worker, psychologist, or psychiatrist. They report to the court after talking to the parents, the child, and others such as family members, new partners, teachers, and doctors. The judge considers the report when making a decision.

The court process can take a long time to finish. In the meantime, a judge may make a “temporary order” about custody and access. A judge may also change an existing arrangement if there has been a change in the situation.

## **Arbitration**

Instead of going to court, the parents can choose an arbitrator to hear their case and make the decisions. Usually, parents must pay for an arbitrator. The arbitrator is often a retired judge, a mental health professional, or a lawyer experienced in family law.

The parents can each have their own lawyer represent them throughout the process.

Arbitration is not the same as mediation. In Ontario, arbitrators can make legally binding decisions if they follow certain rules. Here are two of the most important rules:

1. Each parent must get their own legal advice before agreeing to have arbitration.
2. The arbitrator must make a decision based only on Canadian family law and the best interests of the child. This means the arbitrator cannot base their decision on any religious, cultural, or other rules. The arbitrator must apply the same principles that a judge would apply in a Canadian court.

Parents sometimes choose to discuss their family law dispute with a religious or community leader or other person they trust. They might choose to follow this person's advice, or they might feel they must follow it. But this person does not have any legal power to make the decision unless they followed all the rules to make it a legal family law arbitration **and** the parents agreed to give them this power.

Once parents agree to go to arbitration, they cannot go to court, except to appeal the arbitrator's decision.

## Finding a lawyer

The Law Society of Upper Canada has a directory of all lawyers who are licensed to practice law in Ontario. Make sure the lawyer you hire has experience with family law. The Law Society also has a Directory of Certified Specialists who focus on family law.

The Law Society Referral Service can give you the name of a lawyer in your area who can give you a free consultation for up to 30 minutes. There is no charge for this referral service.

Visit the Law Society website at [www.lsuc.on.ca](http://www.lsuc.on.ca) and click on “**Find a Lawyer or Paralegal**”, or call them at:

Toll-free..... **1-800-268-8326**

Toronto area ..... **416-947-3330**

## What if I cannot afford a lawyer?

You may be able to get help from Legal Aid Ontario. Legal Aid Ontario helps low-income people get legal assistance through a broad range of services. You must be financially eligible to receive most of these services. Call Legal Aid Ontario to find out if you are eligible. Legal Aid Ontario also offers many services over the phone. You do not have to meet any financial requirements for general information and referrals.

Visit their website at [www.legalaid.on.ca](http://www.legalaid.on.ca) or call them at:

Toll-free.....	1-800-668-8258
Toll-free TTY.....	1-866-641-8867
Toronto area (accepts collect calls).....	416-979-1446
Toronto area TTY .....	416-598-8867

Legal Aid Ontario offers the following family law services:

- **Family Law Information Centres**

The Ministry of the Attorney General has established a Family Law Information Centre in every courthouse that deals with family law. All of the Centres have free pamphlets on topics such as separation and divorce, court procedures, and family mediation. Many of the Centres have staff who can give information and make referrals to community agencies and legal services.

Advice lawyers from Legal Aid Ontario are available at some locations at certain hours. An advice lawyer can give general information on family law matters free of charge. If you are financially eligible, the advice lawyer may be able to give you legal advice for your specific case. To find a Family Law Information Centre in your area, call Legal Aid Ontario.

- **Family Law Service Centres**

At Family Law Service Centres, if you are financially eligible, you can receive help with documents, legal representation, and referrals to other types of services. These centres are located in Toronto, North York, Newmarket, Brampton, Chatham, and Sarnia. It is important to use the centre in the region where your court case is located.

- **Family Law Offices**

There are two family law offices in Ontario: one in Ottawa, and one in Thunder Bay. If you are financially eligible, the lawyers and paralegals at these offices can help with issues including custody, access, support, child protection, and restraining orders.

- **Family duty counsel**

If you do not have a lawyer, duty counsel may be able to give you immediate advice about family law issues and basic court procedure. Services are available in most court locations in Ontario. You must be financially eligible for duty counsel assistance. Duty counsel can give advice, speak to the court on your behalf, or help you negotiate a settlement.

- **Family Law Information Program**

The Family Law Information Program is an online resource available on the Legal Aid Ontario website. This program is designed to help you to make informed decisions about legal issues and practical family issues.

- **Summary legal advice**

You may be able to get free advice about your family law issue from a lawyer for up to 20 minutes. This service is only provided over the phone. You do not meet the lawyer in person. You must be financially eligible to receive summary legal advice. Call Legal Aid Ontario to find out if you are eligible.

- **The certificate program**

If you are financially eligible, you can apply for full representation for your case by a lawyer through Legal Aid Ontario's certificate program. Legal Aid Ontario provides certificates to cover the cost of lawyers. Certificates are reserved for the most serious legal matters, such as domestic violence, child protection, or complex family law cases. Your case must qualify to receive representation.

**This booklet gives only general information.  
You should get legal advice about your own  
situation.**

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