



Resolution Services



General Information Booklet

GUARDIANSHIP, PARENTING, CUSTODY, ACCESS AND CONTACT

GENERAL INFORMATION: GUARDIANSHIP, PARENTING, CUSTODY, ACCESS AND CONTACT

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***Resolution Services and Court Staff cannot give you legal advice, or
predict the outcome of your case.***

***This booklet provides general information only. You should speak to
a lawyer for legal advice about your own situation***

These instructions have been prepared for you by Resolution Services. Contact us at:

Calgary

7th floor, Calgary Courts Centre
601 - 5 Street SW
Phone 403-297-6981

Edmonton

8th floor, Brownlee Building
10365 – 97 Street
Phone 780-415-0404

Grande Prairie

Main Floor, Court House
10260 - 99 St.
Phone: 780-833-4234

Lethbridge

1st Floor, Court House
320 - 4 St. S
Lethbridge AB T1J 1Z8
Phone: 403-388-3102

Red Deer

Main Floor, Court House
4909 - 48 Ave
Phone: 403-340-7181

Medicine Hat

Court House
460 First Street SE
Medicine Hat, AB T1A 0A8
Phone 403-529-8716

**Outside these centres, call the
Resolution Services Contact Centre at 1-855-738-4747**

Introduction

If your application deals with guardianship, parenting, custody, access or contact, you should read this booklet before starting to fill out your court forms.

This booklet will give you general information about the law relating to these issues, and the principles applied by the court when deciding matters relating to the care of children. This information is general in nature, and is not intended to be an in-depth discussion of all legal issues relating to children.

We recommend that you speak to a lawyer to find out how the law would be applied to your situation.

If you need further information, please contact the Resolution Services staff. They can answer questions you have about:

- steps for getting or changing a court order or opposing these applications; and
- general information and court procedures for other family law matters.

What do the terms guardianship, parenting, custody, access and contact mean? Simply put, they are legal terms for the various relationships that parents (and sometimes others) have with children.

In Alberta, a child is any person who is under the age of 18. Other provinces have different rules for when a child becomes an adult, but if the child is living in Alberta, it is Alberta's rule that applies.

The laws that discuss these issues in Alberta are *The Divorce Act* and *The Family Law Act*.

The Divorce Act applies to parents who are or were married and have started an action under the *Divorce Act*. It continues to apply after the Divorce Judgment has been granted.

The Family Law Act applies to everyone else who must make decisions about a child.

What is Guardianship?

A guardian of a child has certain entitlements (rights), responsibilities and powers with respect to that child.

A guardian is **entitled**:

- To be involved in making significant decisions about the child; and
- To have enough time with the child to exercise the powers and responsibilities.

A guardian is **responsible**:

- To take care of the child's physical, psychological and emotional development; and
- To make sure the child has medical care, food, clothing and shelter.

A guardian has the **power**:

- To make day to day decisions about the child;
- To decide where the child will live;
- To make decisions about education and extracurricular activities;
- To make decisions about the child's cultural, linguistic, religious and spiritual upbringing;
- To decide who the child will live with and/or associate with;
- To decide if the child will work and if so, what kind of work;
- To provide consents where required by law;
- To receive and to respond to any notice required by law to be given to a guardian;
- To deal with legal matters on behalf of the child;
- To appoint someone to act on the guardian's behalf in an emergency situation, when the guardian is ill or absent;
- To receive health or educational information about the child;
- To exercise any other power that may be necessary to carry out the guardian's responsibilities.

The powers that a guardian has are not absolute. They may be limited in three ways:

- There are laws that limit the guardians' powers. For example, even though a guardian has the power to decide about the child's education, there are laws that say that your child must go to school.
- If a guardian abandons or neglects their child, then Children and Youth Services may become involved and take steps to remove the children or supervise the guardians.
- If the guardians cannot agree on how the powers and responsibilities will work between them, then the court can make that decision for them in a Court Order, called a Parenting Order or a Custody and Access Order.

Who is a Guardian?

The *Family Law Act* sets out who is a guardian of a child. Both parents of the child are guardians if:

- They were married to each other at the time the child was born;
- They were married to each other, but divorced less than 300 days before the child was born;
- They lived together for at least 12 months and the child was born while they were living together;
- They lived together for less than 12 months, but were in an adult interdependent relationship, and the child was born during that relationship; or
- They married or became adult interdependent partners after the child was born, but within one year of finding out about the pregnancy or the birth of the child.
- They signed an agreement that they would both be guardians.

Example:

Sandra and Steve are dating. Sandra becomes pregnant and they decide to live together. Steve moves into Sandra's one bedroom apartment and they share the rent, utilities and groceries. Sandra does Steve's laundry and Steve fixes Sandra's car. They shop for baby items together, and meet each other's parents.

Two weeks after the baby is born, they break up and Steve moves out.

In this case, even though Sandra and Steve did not live together for 12 months, they did have many of the key signs of an Adult Interdependent Relationship:

- They shared expenses.
- They divide household chores.
- They held themselves out as a couple.
- They had an intimate relationship.

For those reasons, the court would likely find that they were in an Adult Interdependent Relationship and that both of them are guardians of the child.

If the parents are not living together or married, then a parent is a guardian if that parent has shown an intention to assume the responsibilities of a guardian within one year of finding out about the pregnancy or the birth of the child. Some ways that a parent may show that intention are:

- The parent gives birth to the child.
- The parent voluntarily pays or offers to pay support (other than as ordered by the court) to the birth mother or for the child.
- The parent gives some other kind of support or offers to give such support to the birth mother or for the child.
- The parent shows their intention to assume the responsibility of a guardian in some other way.

Examples:

Sue and Larry are dating. Sue gets pregnant and they break up before the child is born. Larry buys diapers and formula for the baby and drops them off with Sue whenever he visits the baby.

In this case, Larry would probably be found to be a guardian. Within the first year, he has shown that he wants to assume the responsibility of a guardian by giving non-financial support; and visiting the baby

* * *

Agnes and Herman are dating. Agnes gets pregnant and they break up. Herman is not involved with the baby, but does pay the child support that the court orders him to pay. When the child is a teenager, he runs into Herman and they discover a mutual interest in mechanics. Herman spends a lot of time with the child from then on, and when he turns 16, Herman buys him a car.

In this case, Herman is not a guardian. He has paid child support, but only as ordered by the court, not voluntarily. He has become involved with the child, but it was not within one year of finding out about the child.

The *Family Law Act* also allows the court to make an order appointing someone to be a guardian of a child. That person does not have to be a parent of the child. It is possible for a child to have more than 2 guardians.

What is Parenting?

“Parenting” is a term in the *Family Law Act* that applies when guardians do not live together. Normally, when guardians live together, they share all of the powers, entitlements and responsibilities for the children. But when they live apart, they must come to terms with how the time with the children will be shared and how decisions will be made.

In some cases, the guardians are able to work things out between themselves with just a verbal agreement. In other cases, they may be able to work things out, but want to formalize the arrangements. They will then enter into a “Parenting Agreement”, which is a contract between the guardians that sets out how much time the children will spend with each of them, and how decisions will be made.



Tip:

Many couples will make use of a mediator to help them reach an agreement. A mediator does not take sides or tell you what to do. Their role is to guide the discussion between you, to help you reach agreement, and to make sure all the bases are covered.

If the guardians are not able to agree, then they can go to court. In that case, the judge will hear from both of them, then will make a decision about the time that the child will spend with each guardian and how decisions will be made. The judge’s decision is set out in a Parenting Order.

Parenting Arrangement:

↔ ↔ ↔ ↔ GUARDIANSHIP ↔ ↔ ↔ ↔ ↔		
Parent 1	Both parents	Parent 2
<ul style="list-style-type: none"> ○ Decide where to live. ○ Decide which school to go to. ○ Decide about whether or not child can work. ○ Make day to day decisions when child is in this parent’s care. 	<ul style="list-style-type: none"> ○ Consent to medical treatment. ○ Attend parent-teacher interviews. ○ Decide about religion. 	<ul style="list-style-type: none"> ○ Decide about extracurricular (hockey). ○ Make day to day decisions when child in this parent’s care.
Time with the child: Monday – Friday, except for hockey practices and games.		Time with the child: Every weekend and takes to hockey practices and games.



Tip:

Remember that a parenting order is between guardians, so if a non-parent (e.g. Grandma) is a guardian, they will be a party to the parenting order.

What is Custody?

When parents are married, they are both guardians of their children and share all of the powers, entitlements and responsibilities that are discussed above.

If they separate and file for divorce, the agreement or order that is made will often use the terms "custody" and "access".

If there is no order or agreement in place, then married parents have "joint custody". That means that they make the decisions about the children together and that they are both entitled to spend time with the children.

Often, parents will continue the joint custody in their agreement or order, but will specify with whom the children will live and how the other parent's time with the children will work. The parent with whom the children spend most of their time is said to have "primary care and control" – which means that they make the day to day decisions most of the time. The other parent has "access", which means that they spend time with the children.

Joint Custody Arrangement

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<i>Parent 1 has primary care and control</i>	<i>Both parents</i>	<i>Parent 2 has access</i>
<ul style="list-style-type: none"> ○ Make day to day decisions when child is in this parent's care. 	<ul style="list-style-type: none"> ○ Decide where to live. ○ Decide which school to go to. ○ Decide about whether or not child can work. ○ Consent to medical treatment. ○ Attend parent-teacher interviews. ○ Decide about religion. ○ Decide about extracurricular (hockey). 	<ul style="list-style-type: none"> ○ Make day to day decisions when child in this parent's care.
Time with the child: Monday – Friday, except for hockey practices and games.		Time with the child: Every weekend and takes to hockey practices and games.

The parents may agree or the court may order that one of the parents has “sole custody”. This means that one of the parents makes all of the decisions about the children. In most cases, the other parent will still have access.

Sole Custody Arrangement

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<i>Parent 1 has sole custody</i>	<i>Both parents</i>	<i>Parent 2 has access</i>
<ul style="list-style-type: none"> ○ Decide where to live. ○ Decide which school to go to. ○ Decide about whether or not child can work. ○ Consent to medical treatment. ○ Attend parent-teacher interviews. ○ Decide about religion. ○ Decide about extracurricular (hockey). ○ Make day to day decisions when child is in this parent’s care. 		<ul style="list-style-type: none"> ○ Make day to day decisions when child in this parent’s care.
Time with the child: Monday – Friday, except for hockey practices and games.		Time with the child: Every weekend and takes to hockey practices and games.

Even though one parent has sole custody, they may not be able to make all the decisions about the children on their own. The court order may have terms that restrict their powers. For example, the order may say:

- The custodial parent may not move without the other parent’s consent.
- The custodial parent may have to consult the other parent before making decisions.
- The access parent may be allowed to make certain specific decisions.

What is Access?

Access is a term used in the *Divorce Act*, so, in Alberta, it will only apply to divorcing or divorced parents.

Access refers to the time that the parent without custody (or primary care) has with the children.

If the other parent has sole custody, then the access parent has only the right to make day to day decisions for the children when they are in their care. For example, the access parent can decide what meals to serve or what activities the children will do, but may not make decisions on medical care or schooling.

If the two parents have joint custody, then the access parent has the right to make day to day decisions for the children when they are in their care, and also to participate in the major decisions about the children.

Many court orders or agreements will simply say that the access parent has "reasonable" or "generous" or "liberal" access. What does that mean?

Simply put, it means that the access arrangements are flexible, and that the parents are to work together to create a schedule that they both can accept. If this kind of arrangement does not work, they parents can create or the court can order specified access.

Specified access means that the days and times of the access visits are spelled out in the agreement or order. Sometimes only some of the days and times are spelled out, and the rest left as reasonable access. Other times, the order or agreement will be specific as to every access visit over the course of the year.

Example of a Specified Access Order:

The Respondent shall have access to the children as follows:

- In every 14 day period, from Tuesday after school until Wednesday morning, then from Friday after school until Sunday noon, then from Thursday after school until Friday morning, with the first such 14 day period to commence Monday, September 6, 2010.
- In the event that the Respondent's weekend falls on a long weekend, then the access shall be extended to Monday at noon.
- The regular access schedule shall be suspended during the Christmas vacation, Spring Break vacation and summer school vacation times.

- Christmas school vacation shall be divided between the parties so that the Respondent has the children for the first half of the vacation (including Christmas Day) in even numbered years, and the second half of the vacation (not including Christmas Day) in odd numbered years.
- The Respondent shall not have access to the children during Spring Break, as the children routinely spend that time period with the maternal grandparents.
- Summer school vacation shall be divided between the parties so that they each have the children for two – 2 week periods. The Respondent shall provide the Applicant with his summer vacation schedule by May 1 of each year. If the parties cannot agree with respect to the division of the summer vacation period, then they may return to Court for a further Order.

An access order or agreement can also have conditions or restrictions. Some examples:

- If the access parent has an alcohol problem or uses illegal drugs, the order may say that they cannot have use alcohol or illegal drugs within a certain time before the access visit or during the access visit.
- If the child has health problems that make it difficult to be around cigarette smoke, the order may say that the access parent must make sure that no one smokes around the child.
- If the access parent is not set up to properly care for the child, the order may say that they cannot have overnight access until they have a bed for the child.
- In extreme cases, the order may say that the access must be supervised.



Tip:

Remember that custody and access orders are only made under the *Divorce Act*. In all other cases, the Order will be called a Parenting Order.

What is Contact?

If you are not a guardian of a child, but want to be able to spend time with the child, you can apply for Contact.

Contact means simply that you can spend time with the child. That time may be in person, or by telephone or by mail or e mail. You would have no decision making powers with respect to the child.

In most cases, a person applying for Contact must go through two court applications.

First, they must ask for “leave to apply”. When deciding whether or not to grant leave to apply, the judge will look at the relationship that the person has had with the child and whether or not the person actually needs a court order to allow them to spend time with the child.

If the judge grants leave to apply, then the person must make a second application to the court for the contact order.

Before granting a contact order, the judge must be satisfied that:

- contact between the child and the person is in the child’s best interests;
- the child’s physical, psychological or emotional health may be put in danger if the contact is denied; and
- the guardians’ denial of contact is unreasonable.

In some cases, the person wanting contact is allowed to skip the application for leave, and go directly to the contact application. These cases are:

- a parent of the child. (This would be the case where the parent is not a guardian.)
- someone who was married to or in an Adult Interdependent Relationship with the guardian and stood in the place of a parent to the child. (i.e. a step-parent)
- a grandparent who has had a relationship with the child, but has now been cut off from the child because the parents have separated or because one of the parents has died.

How Does the Judge Make These Decisions?

It is always best if the parents (or guardians) can make decisions about the care of their children themselves. They are the ones that know and love their children, and in most cases, are able to do what is best for their children.

In some cases, parents cannot agree, and must ask the court to decide for them. In that case, the judge must decide, based on the best interests of the children.

The *Family Law Act* sets out some tools for the judge to use when deciding what is in the child's best interests. Most importantly, the judge must make sure to protect, as much as possible, the child's physical, psychological and emotional safety.

When making a decision, the judge must look at these factors:

- the child's physical, psychological and emotional needs;
- the child's need for stability;
- the child's age and stage of development;
- who has been caring for the child up to now;
- the child's heritage (i.e. their language, culture and religion);
- what the child wants (so long as it is not going to hurt the child to ask them that);
- the plans each person has for caring for and raising the child in the future;
- any family violence;
- how strong the relationship is between the child and each party;
- the child's relationships with other people in the household and in the child's life;
- the ability of each party to properly care for the child;
- how cooperative each party will be when it comes to communicating with the other;
- what each of the parties wants to happen;
- the benefit to the child in developing and/or maintaining a relationship with each of the parties;

- how well each of the parties will exercise the powers, entitlements and responsibilities of a guardian; and
- any criminal charges or convictions.



Tips:

- Once a court order is made, you must obey it. In many cases, parents will, over time, come to different agreements with respect to their time with the children or how decisions will be made. So long as both of you agree, this is fine, but the court order is still there, and either one of you are allowed to insist that you both go back to those terms.
- Parenting or custody orders are not meant to last until the child grows up. The arrangements that are made when a child is a toddler will not work once they start school, and when they become a teenager, time with their friends is often more important to them than time with their parents. At the same time, parents may change jobs, move or otherwise need to change the parenting schedules. If circumstances change, you can change your parenting or custody order. If you agree, you can write up a consent order, and ask a judge to sign. If you can't agree, you will make a court application and the judge will decide for you.
- Sometimes the children will not want to follow the court order. In those cases, it is up to you to make sure that they do, the same way you make sure they go to school or to the dentist, even if they do not want to. However, if you believe that it is not in their best interests to spend time with the other parent, then you may want to go back to court and ask to change the order.
- Parenting, custody or contact orders end once the child turns 18.
- Many people believe that once a child reaches a certain age, they can decide themselves where they want to live. This is not true. Until the child turns 18, the decision is made by the parents or the court. Having said that, the *Family Law Act* says that the court must take the child's wishes into account, and the older the child is, the more weight the court will give to the child's wishes. But the decision / court application is always made by the parents – never the child.

The Actual Laws

In this booklet, we have explained the laws in general terms. For more specific information, the actual laws can be found at:

The Divorce Act (<http://laws-lois.justice.gc.ca/eng/D-3.4/index.html>)

The Family Law Act

(http://www.qp.alberta.ca/1266.cfm?page=F04P5.cfm&leg_type=Acts&isbncln=9780779765805)

This publication has been prepared by Resolution Services, and provides general information about the law as of the date it was written. It is not intended to provide you with legal advice. If you want advice on your case, speak to a lawyer.