

Custody and Access

IN NEW BRUNSWICK



Public Legal Education
and Information Service
of New Brunswick

Public Legal Education and Information Service of New Brunswick (PLEIS-NB) is a non-profit organization. Its goal is to provide the public with information on the law. PLEIS-NB receives funding and in-kind support from the Department of Justice Canada, the New Brunswick Law Foundation and the New Brunswick Department of Justice and Office of the Attorney General.

This booklet is intended for general information only. It does not contain a complete statement of the law in the area and laws change from time to time. Anyone requiring advice about his or her specific situation should contact a lawyer. We gratefully acknowledge the assistance provided by members of the Law Society of New Brunswick and the Department of Justice and Office of the Attorney General.

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I. Custody and Access

What is custody?

Custody is having the care and control of a child. This means having the authority to make the major decisions about the child. The law in New Brunswick recognizes that children are in the joint custody of both parents until that is changed by a court order or written agreement. The issue of custody often arises when a marriage or relationship breaks down. It is at such times that parents must decide on arrangements for the care of the children. Parents may be able to choose sole or joint legal custody. Another less common arrangement is split custody.



What is sole custody?

Sole custody is where only one parent has the legal right and responsibility to provide for the day to day care of the child. A parent with sole custody makes the decisions about the child's education, religion, health care, and general upbringing. The children would live with the parent with sole custody more than 60% of the time over the course of a year.

What is joint legal custody?

Joint legal custody is where both parents continue to share the responsibility to care for the child. Joint custody can include any arrangements that the parents agree on or the court orders. It may or may not mean that the child lives an equal amount of time with each parent. It does mean that parents make the decisions about bringing up the child together. For example, the child may live with only one parent while the other parent still has a say in major decisions. Joint custody requires both parents to co-operate with each other.

What is shared custody?

In some cases the parents also may share the physical custody of their children, meaning a child lives at least 40% of the time with each parent over the course of a year. This type of arrangement is referred to as "joint physical custody" or "shared custody".

What is split custody?

Split custody describes an arrangement where each parent has custody of one or more of the children. That means each parent has one or more children living with him/her more than 60% of the time in the year.

What is access?

Access refers to the right of a child and a parent without custody to spend time together. This is sometimes called “visiting rights”. A parent without physical custody can apply to the court for access. An access parent has the right to information (unless ordered otherwise by the court) about the health, education, and well-being of the child. An access parent **who does not have joint legal custody** does not normally have a say in the major decisions about the child.

The purpose of access is for a child to have a meaningful relationship with both parents. Generally the court considers it in the best interests of the child to have maximum contact with both parents. An agreement or court order will set out the periods of time that the children are in the care of each parent. This schedule depends on the time each parent spent caring for the children before separation, the ages of the children and the work schedules of each parent. There is no ‘default schedule’. It is based on the facts and tries to reflect the time that the child was used to spending with each parent. This means that the first weeks and months after separation are critical. Once a pattern of access has developed over the first two months that the parents live apart, it is very hard to change.

II. Arranging Custody and Access

Is it important to decide on custody and access?



For parents who separate it is very important to have terms of custody and access set out by a legal agreement or court order. If the children live with you without a court order or legal agreement (*de facto custody*), it may be hard to enforce your rights if the other parent decides to take the children. If you are a parent with access and the parent with *de facto custody* denies you access, you may not be able to enforce your rights.

Can either parent apply for custody?

Yes. In New Brunswick both parents have equal right to have custody of the children in the absence of a court order or an agreement, even if they are not married. This includes the parents of an adopted child. If you are not the natural parent but you have raised a child as your own, you may be able to get custody or access.

How do we decide about custody and access?

1. **Parents can agree:** You and the other parent can agree on who will get custody and how access will work. You can put the agreement in writing in a **parenting agreement** or include it in a **separation agreement**. Because this is such an important issue, you should each consult a lawyer.
2. **Parents can use mediation:** If you need help to reach an agreement, you may want to try the services of a mediator. This option may not be available if the relationship has been an abusive one. Before you finalize any agreement, you should each consult a lawyer.
3. **Parents can ask the court to decide:** If you cannot agree, you can apply to the court and a judge will decide for you. The judge will issue a **court order**, which sets out the legal responsibilities, rights and obligations of both parents. You will likely need the help of a lawyer to apply to court.

Why should I get legal advice?

The issues of custody and access can be complicated. No matter how you decide to settle your family law matters, you should each get **legal advice** from a **lawyer**. A family law lawyer may be able to help you resolve matters out of court. It is important to choose the right lawyer for your legal problem. The best references generally are other people who have used that lawyer. You can also check out the Law Society website (www.lawsociety-barreau.nb.ca) which offers a list of lawyers licensed to practice in N.B. Look under “Member Directory” on the navigation bar. You can see a lawyer’s status or search for a lawyer by city. Or, look in the Yellow Pages of the telephone directory, under “**Lawyers**”.

What if I cannot afford a lawyer?

If you cannot afford a lawyer and you meet the eligibility criteria, you may be able to get assistance from **Legal Aid**. Otherwise, you will have to make your own application. For more information about your options, go to www.familylawnb.ca or call the toll free family law information line at 1-888-236-2444.

Can someone other than the parent apply for custody or access?

Yes. Third parties such as grandparents, aunts, uncles, foster parents or others can also apply for custody or access. The court will consider the best interests of the child. However, in a divorce proceeding, any third party must apply to the court for permission to make a custody application. It may be difficult, because the rights of the parent will come first.

III. Custody and Access Issues

How does a court decide?

In deciding custody and access the court will only look at what is in the “best interests of the child”. The judge may look at the following:

- the needs of the child (mental, emotional and physical health);
- the effect a disruption would have on the child;
- the love, affection, and ties between the child and the parent;
- the plans you have to care for the child;
- the stability of your home;
- the child’s culture or religion;
- the views and preferences of the child.

The court may consider your willingness to provide access when deciding custody of the child. If you refuse to cooperate, you might not get custody.

When considering the best interests of the child, the court may make an order requiring either or both parents and/or their child to participate in a custody/access evaluation to be conducted by a mental health professional. Generally, the parents are responsible to find and agree on who will do the evaluation, and to pay for it. Parents should choose someone who is qualified to do such evaluations and has previous experience.

Will my child have a say?

Depending on the age or maturity of your child, the court may consider his or her preference to live with one parent. Teenagers are more likely to have a say. However, the court may be reluctant to place a child in the very difficult position of choosing one parent over the other.

Will my children be separated?

Courts usually prefer to keep brothers and sisters together. However, they will consider separating siblings if it is in the best interests of the children to do so.

My spouse ended the relationship. Can he or she still apply for custody or access?

Yes. The court will not consider the past conduct of a parent, unless the conduct relates to his or her ability to act as a parent. It does not matter whose fault it was that the relationship ended.



Who gets the children while we are waiting to go to court?

If you cannot agree, a judge can make a temporary decision about custody and access called an **interim order**. Again, the court will look at what is in the best interests of the child. This order will be in effect until the court issues a final order. An interim custody order will help you if the other parent takes the child without your permission.

IV. Living with the Decision

What if I do not agree with the judge's decision?

If you and your lawyer feel that the judge's decision did not properly reflect the circumstances that existed when the order was made, you can ask a higher court to review the decision by appealing the decision. The judge must have made an error of law, and it is not enough that you did not like the judge's decision. You should always consult with your lawyer.

What if the custodial parent denies my access rights? Can I call the police?

Before the police can enforce a custody or access order, which are family law orders, they must be directed to do so by the Court of Queen's Bench – Family Division. If your access rights are being denied, you can apply to the court for help. The court can order the custodial parent to obey the order and let the access parent see the child. The court may even award extra access to make up for the lost time. The judge may find the parent with custody in contempt of court for disobeying a court order. The penalty for contempt is a fine, or even a jail term. The court can also order the parent with custody to reimburse money spent while trying to see the child. The court may even give custody to the access parent.

What if the parent with access is not paying support?

Access and support are two separate legal issues. You cannot prevent the parent with access from seeing the child just because he or she has stopped paying child support. Similarly, the parent paying support cannot stop making payments because he or she chooses not to visit the child or is denied access.

What if the parent with access disobeys the order?

If the parent with access disobeys the order, for example, never returns the child on time or takes the child without telling the other parent, the parent with custody can take him or her to court. The judge may find the access parent in contempt of court. The parent with custody can also go to court and ask the judge to change or limit the access order.



What if the parent with access decides not to exercise his or her access rights?

Not visiting the child may jeopardize the arrangements. The parent with custody can apply to the court after a certain amount of time seeking an order to end access.

What if I think my child is being abused during the visit?

If you think your child is being abused or neglected, you can ask the court to deny access to the other parent, or to impose restricted access that allows supervised visits only. You will need enough evidence to prove the abuse is occurring. You should also contact the Department of Social Development and report your concerns to Child Protection. Their investigation may confirm the abuse and provide you with evidence for the court application.

My ex-spouse has access and is constantly harassing me. What can I do?

You may ask the court to order that your ex-spouse pick up and drop off the children at a neutral, safe location – such as a grandparent's house or a social service agency. You also may be able to use legal remedies such as an **Emergency Intervention Order**, a **restraining order**, a **peace bond**, or **criminal harassment** charges to protect yourself from phone calls and other unwanted contact. You can get more information about these remedies from PLEIS-NB.

V. Changing the Agreement

Can we change the custody/access agreement or court order?

Yes.

If there is an agreement: Both parents can agree to change a written custody and access agreement. If you need help reaching an agreement, a mediator may be able to help. You should put any changes in writing. Both parents should see separate lawyers to get advice about the changes.

If there is a court order: If there has been a significant change in circumstances since the original order, you can apply to the court to change or cancel the order. An application to change a custody order is not an appeal. The judge will not re-try the case. Rather, he or she will only look at evidence of the changed circumstances. It is not easy to change existing custody arrangements. The judge must be convinced the change will be in the best interests of the child.

Can we change the order informally, without going to court?

Informal changes of a court order have no legal effect and may jeopardize further rights. For example, a couple may agree to follow a new agreement without changing the court order. If one parent suddenly decides to break the informal agreement, the other parent cannot go to court to enforce it. It is best to apply to have the order varied.

Can a parent with custody move to another province?

The issue of “parental mobility” can get very complicated. The *Charter of Rights and Freedoms* makes sure that we can move to any province in Canada. On the other hand, if a parent with custody moves, it may threaten the access parent’s relationship with the child.

Under the *Divorce Act* the court can order the parent with custody to give the access parent notice before changing residence. The access parent can ask the court to either change the custody arrangement or order the custodial parent to stay in the province. However, courts will only interfere if the move is not in the best interests of the child.



If I move to another province, can I protect my custody or access rights?

If the parent with custody moves to another province, he or she should ask a court in that province to give effect to the order.

I was divorced in another province but now I live with my children in New Brunswick. Can I apply to change the custody order?

It is possible to apply to change the custody order in New Brunswick. The court may change the order here, even where the original order was made in another province. If it is a divorce order, there will be a confirmation hearing where your ex-spouse lives. Before a judge will hear the matter, he or she will make sure that the child has a strong connection to the province and evidence is available here of what is in the child’s best interest.

VI. Special Problems

Parental Abduction

What if my child is taken without my permission?

As noted previously, when a custody order exists parents may use the family law system to deal with violations of the order. However, a parent, or anyone else, who removes and hides a child under the age of 14 without the consent of the custodial parent, commits a criminal offence. Abduction is a crime. The police may charge the abducting parent and issue a Canada wide warrant for his or her arrest. This enables the police to find and return the child more quickly than by using family court procedures. If the court treats the charge as a summary conviction offence (less serious) the parent could be jailed for six months and/or pay a fine. If the court treats the charge as an indictable offence (more serious) the parent could face up to ten years in prison. If you think the non-custodial parent has abducted your child you should contact the police and a lawyer immediately.

What if my child agreed to go with the non-custodial parent?

Even if your child has gone willingly, the police can still lay charges. Consent of the child is not a defence to a charge of abduction. It is a defence, however, if the child was taken with the consent of the parent with custody. Another defence is that it was necessary to take the child to protect him or her from danger of imminent harm, such as abuse.



What if I do not have a custody order?

Although it is always better to have a custody order, it may not be necessary to have one before the police can lay criminal charges against a parent. However, the parent who had *de facto* custody must first obtain the consent of the Attorney General. If you think that the other parent may take the child, you should apply to the court for a custody order.

Can the custody order be enforced if my child is taken to another province?

Family law is also intended to prevent parental abduction. As long as you have a custody order, family courts throughout Canada can act to enforce it. It may be necessary to obtain an order in the other province confirming the original order. If your children have been taken from one province to another, the court in that province can issue an enforcement order. Although the abducting parent will not be arrested, police officers or a child care agency will have the authority to find, take charge, and return the child to the parent with legal custody. Contact your lawyer immediately.

What if I think my child will be taken out of the country?



Apply for a custody order immediately. The court can take measures to prevent the other parent from taking the children such as issuing an order requiring the non-custodial parent to surrender his or her passport or other travel

documents. Always keep a certified copy of the custody order with you and leave a copy with officials at the school or daycare and other places where you take your children so they are aware of the situation.

If you think the other parent might try to take the children out of the country before a custody hearing, call your Passport Canada Office. Ask them to put the children's names on a passport control list so that they will not be issued a passport.

If your child has already been taken out of Canada you still may be able to take action. Canada is one of several countries which has signed The Hague Convention on Civil Aspects of International Child Abduction. If the child was taken to a country which has signed the Convention, you can request that the custody order be enforced and the child returned. You will have to fill out a Convention application and a sworn affidavit and send it to the central authority in the other country.