

# OVERVIEW OF FAMILY LAW

# The Legislation

## **Federal Law:**

*Divorce Act* - federal law, it applies only to people who are married and who are applying for divorce (as well as other relief which includes custody and access, child support and spousal support)

## **Provincial Laws in Alberta:**

*Family Law Act* – parenting and access orders, child support, spousal or partner support, guardianship, exclusive possession of house and goods

*Matrimonial Property Act*- property division, possession of house, vehicle and personal goods

*Child, Youth and Family Enhancement Act*- Children's Services matters and adoption

# Levels of Court

- **Court of Queens Bench of Alberta**
- This court level must hear Divorce applications and may be used for Family Law Act applications including those dealing with property
  
- **Provincial Court of Alberta**
- This court level hears Family Law Act applications,(not including property division), and Children's Services matters

# Parenting Terminology

In Divorce cases the terms for parenting arrangements are:

- *Custody* ,which is decision making for the children
- *Residential care* which is where the children live the majority of the time
- *Access* which is the time the children spend with the parent they do not live with

In Family Law Act cases:

- Decision making for the children is called *decision making*
- The time a parent spends with a child is called *parenting time* or *contact*

# Decision Making for Children

- The Divorce Act refers to decision making for the children by the term “custody” and does not itemize the decisions to be made
- Under the Family Law Act the areas of decision making are set out in section 21(6)

When a parenting claim is filed under the Family Law Act the Claimant is asked to propose whether one or both parents will make the following decisions for the children:

- The child's place of residence
- The child's education
- The child's extracurricular school activities
- the child's cultural upbringing
- the child's spiritual upbringing
- Whom the child will associate with
- Whether the child should work
- Who would consent to health related treatment for the child
- Who would give the other required consents for the child
- Who would receive and respond to a notice regarding the child
- Who would deal with legal proceedings relating the child
- Who would appoint a person to act on behalf of the guardian in an emergency or when the guardian is temporarily absent
- Who receives any information that significantly affects the child

# Family Law and Domestic Violence

- Except for a few provisions, family law does not reflect the reality of woman abuse.
- Laws are gender-neutral.
- Assumes a relative equality of power between the two parties, which obviously isn't the case in cases of abuse.
- Family law related to children almost always assumes they are better served by having a close relationship with both parents.
- Feminization of poverty on relationship breakdown still the reality for most women

# Custody and Access

Abusive men often use custody and access as a way to try to maintain control over or intimidate their partner. It's very important for a woman with children who's leaving an abuser to move quickly to establish legal custody of her children to prevent him from claiming she's abducted them or from simply taking the children and refusing to let her see them.

Pam Cross, Springtide Resources

Until custody and access are resolved, both parents have equal legal rights to have custody of their children.

**Sole custody** – parent has right to make decisions about the child’s upbringing without involving the other parent.

**Joint custody** - Parents with joint custody make major decisions together.

**Shared custody** –The phrase shared parenting is generally used to describe situations in which the children spend at least 40% of their time with each parent. This term is found in the child support guidelines and its use is often linked to a claim for reduced child support payments.

Children often spend most of their time with one parent, whether that parent has sole or joint custody. The other parent in these cases will almost always have **Access** to the children.

Courts generally believe that it is best for children to have as much contact as possible with both parents. Where there are concerns about the child’s safety or the access parent’s parenting skills, access may be supervised.

It is only likely to be denied completely if the court believes there is an extremely serious risk of harm to the child or if there is a high risk that the access parent will take the child out of the area, particularly out of the country.

All decisions about custody and access are made using what is called the “best interests of the child” test, which requires the court to consider a number of factors. These include any history of abuse in the household, the love and emotional ties between the child and the person claiming custody, the length of time the child has lived in a stable environment, plans for the child’s care and upbringing, and the ability of each person applying for custody to act as a parent.

- *Main components of custody and access arrangements*
- Who has custody? Is it sole or joint?
- Where do the children live?
- What is the parenting or access schedule? When will the children be with each parent? Are they with one parent most of the time, or do they see both parents about half of the time, or is there some other variation?
- What are the arrangements for holiday or special occasion visits?
- Does each parent have an opportunity to care for the children if the other parent is unavailable (goes out of town for work, vacation etc.)?
- Are there risk factors such that access should be supervised?

# Best Interests of the Child

The most important aspect of any legislation dealing with custody and access is the best interests of the child test, because this is the basis on which all custody and access decisions are made. This test appears in in general terms in the **Divorce Act**. Section 18 of the **Family Law Act** sets out in more detail the factors the court is required to consider when determining decision making for children, parenting time and contact time.

The list set out in section 18 provides a summary of the main factors that a court will take into account:

18 (2) in determining what is in the best interests of a child, the court shall,

(a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and

(b) consider all the child's needs and circumstances, including

(i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,

(ii) the history of care for the child,

(iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,

(iv) the child's views and preferences, to the extent that it is appropriate to ascertain them;

(v) any plans proposed for the child's care and upbringing,

(vi) any family violence, including its impact on

(A) the safety of the child and other family and household members;

(B) the child's general well-being,

(C) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and

# Best interest of the child continued...

18(2) continued..

(D) The appropriateness of making an order that would require the guardians to cooperate on issues affecting the child,

(vii) The nature, strength and stability of the relationship

(A) between the child and each person residing in the child's household and any other significant person in the child's life, and

(B) between the child and each person in respect of whom an order under this part would apply,

(viii) The ability and willingness of each person in respect of whom an order under this part would apply

(A) to care for and meet the needs of the child,

(B) to communicate and cooperate on issues affecting the child,

(ix) Taking into consideration the views of the child's current guardians, the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian,

(x) The ability and willingness of each guardian or proposed guardian to exercise the powers, responsibilities and entitlements of guardianship, and

(xi) Any civil or criminal proceedings that are relevant to the safety or well being of the child.

# Best Interests of Child and Violence

Section 18 (3) of the **Family Law Act** addresses the issue of family violence specifically:

18(3) In this section, “ family violence” includes behaviour by a family or household member causing or attempting to cause physical harm to the child or another family or household member, including forced confinement or sexual abuse, or causing the child or another family or household member to reasonably fear for his or her safety or that of another person, but does not include

- (a) the use of force against a child as a means of correction by a guardian or person who has the care and control of the child if the force does not exceed what is reasonable under the circumstances, or
- (b) acts of self protection or protection of another person.

18(4) for the purpose of section 2(b) (vi) the presence of family violence is to be established on a balance of probabilities.

These provisions acknowledge the reality of violence within families. In the past, judges were not specifically required to consider spousal violence and abuse in their custody and access decisions. Before the law changed, some judges would disregard evidence of violence or abuse because they believed that woman abuse had nothing to do with parenting skills and that it ended on separation. The present provisions make it clear that violence or abuse perpetrated by a parent is relevant to his or her abilities to act as a parent and require the judge to consider it.

## ***Abuse***

Custody will rarely be granted to a parent who has abused the child directly, although access is not uncommon. Despite the legislation described above, partner abuse remains under-recognized by judges as a significant factor to be considered when determining appropriate custody or access arrangements. For instance, the presence of woman abuse does not necessarily rule out an order for joint custody or extensive access because it is perceived to be in the best interests of the children, even though such an arrangement can be extremely problematic for the woman. It is important to frame the abuse, within the context of the legislation, as having an impact on the abuser's ability to act as a parent.

Joint custody is rarely appropriate in cases involving violence against women.

Experience in working with woman abuse survivors suggests that joint custody is inappropriate where:

- it places women and children at risk of ongoing harm
- it places children in the centre of a high level of conflict that cannot be resolved
- the violence continues during and post separation
- there is a clear history of poor communication, coercive interactions, inability to problem-solve and a lack of a child-centred focus by one or both parents
- there is a serious mental health or substance abuse problem

Some advocates believe that the best interests of the child are always served by both parents collaborating on decision-making. However, joint decision-making on all issues provides opportunities for conflict in any relationship. In abusive relationships, it provides an opportunity for ongoing violence.

Because the *Divorce Act* contains a section that encourages maximum contact with both parents that has sometimes been interpreted as a bias in favour of joint custody, it is important to frame the decision-making component of custody in terms of minimizing conflict or opportunities for abuse within the family.

# Access where spouse abusive

There are strategies women can use if they are having access troubles with an abusive ex-spouse:

- Get as much precise detail in the access terms of the order as possible.
- Have multiple copies of the order so one is always available to show the authorities if a problem arises.
- Orders should include a condition that the terms of the order are enforceable by the police. In some areas the police will only enforce orders if it is specified that they do so.
- Document any and all problems – complaints the children return with, suspicious injuries, comments made by the kids about what went on in the visit, times he missed or was late for access, any threats he has made to keep the children.
- Report any times their access is denied to her lawyer.
- Depending on the circumstances, consider counselling for the children so they can have an outside third party with whom they can talk through their concerns.
- Have a witness present for access exchanges.
- In situations where there are serious concerns for the children's safety, contact child protection authorities.

## A Sample Affidavit/Statement:

[What do you want? What are you asking the Court to Order?]

1. My name is Virginia Radcliffe. This affidavit supports my application for custody and child support. I am married to Joe Black. We have two children, Samantha Black, born July 10, 2005, who is 1½ years old, and Sarah Black, born November 13, 2001, who is 5 years old.
2. I separated from Joe on March 1, 2007, after he hit me in the face. I went to the women's shelter and have been living there ever since with both my children. Joe has seen the girls twice since I left. I made arrangements to drop them at his mother's house, where he visited with them for several hours. I am prepared to keep doing as explained below.

3. I am seeking sole custody of Samantha and Sarah, with my husband to have access every other weekend. Exchanges need to be supervised. My mother-in-law, Jessica Black, is prepared to do this for us. Access should begin Saturday mornings at 10:00 a.m. and end Sunday afternoons at 5 p.m. My husband can communicate with the children by telephone during the week.
  
4. I am also seeking child support as set out by the Federal Child Support Guidelines and spousal support for me.

# Why should you get it?

4. Custody: I have always been the primary caregiver to our children. My husband and I agreed that I would stay home with the children until they were in school full time. His work as a salesman requires that he travel often. He is a good father, but is away from home approximately 10 overnights a month. I am responsible for all the day to day caregiving, attending to medical and other appointments, getting Sarah to soccer and swimming lessons, remembering birthday parties, helping with homework and the like. I realize that now we are separated, I will have to look for work, but I will look for a job that allows me to be home by 5 o'clock each day. When Joe is on the road, he would not be able to care for the children in the evenings and overnight if they were to live primarily with him.
5. I have also had primary responsibility for decision making related to the children. I found a pediatrician and dentist for them and have made most of the decisions about what recreational activities Sarah would become involved in. Joe is interested in spending time with the children but has never wanted the responsibility associated with making decisions about their lives.
6. I think the children should stay with me as I am the parent they are the most used to and this will create less of a disruption for them.

7. Because I have always made the major decisions and because I do not think Joe and I can communicate effectively, I don't think joint custody would work well for the children.
8. As well, Joe has become increasingly abusive to me over the past year and I do not think this makes him a suitable custodial parent.
9. Because I have been the main caregiver, he has never had responsibility for them for more than a couple of hours at a time. Joint custody is not appropriate because of his treatment of me.
10. Joe has always needed to have a lot of control over me and what I do. I think that was one of the reasons he was happy to have me stay at home with the kids. He likes to know everything I do in the day, where I have gone, who I have seen. Before the kids were born when I was working, he would drop me off and pick me up from work every *day* that he was not traveling, even though we have two cars. He really discouraged me from keeping up my friendships, going out with my workmates and even from spending time with my family.

11. When I was pregnant with Samantha, he developed an explosive temper and would yell at me and throw things around, even breaking some things, over very small disagreements. Sometimes this happened in front of Sarah, who would become very upset.
  
12. Last year, he became very angry because I had taken the girls to my mum's for the day and was not back when he got home from work. After yelling at me while I was trying to get the children out of their car seats, he grabbed me by the shoulders and shook me really hard. I was holding the baby, who was 9 months old at the time. She was not hurt physically, but she was very upset and screamed for a long time before I could settle her down. I had bruises on my shoulders the next day. He was very apologetic and said it would never happen again. However, he has grabbed, shaken or pushed me more than a dozen times since. On July 10th, he became very angry after Samantha's birthday party ended because he said I spent too much time talking and laughing with my friends and not enough time with him. He hit me very hard across the face. The girls were both in the room at the time, and I picked up the baby and took Sarah by the hand and ran out of the house. I went to our neighbour, who gave us a ride to the shelter.

13. Since then, Joe has told me how bad he feels about what he did, but he is not prepared to go to counseling – he just says that if I listened to him better he would not get so angry. He tries to call me more than 10 times a day at the shelter and won't leave me alone.

14. For all these reasons, I know that joint custody would not work for me or for the children.

15. **Access:** I think it is important for the girls to have a relationship with their father. I think if he has a relatively short period of time with them, he can manage fine. He will likely spend a lot of time with his parents, who are good with the girls. Because of his violence to me, I do not want to see him to exchange the children, so I would like to drop them off at his parents' place before he gets there and then pick them up after he has left. I think for now, given the ages of the girls, access every other weekend with one overnight is appropriate. I will be happy to discuss increasing the access once we see how this goes.

16. **Exclusive Possession of the Matrimonial Home:** I wish to remain in the family home to maintain some stability for the children. This will mean Sarah can keep her friends in the neighbourhood and attend the school she is already registered at. Our house is only a short walk from my parents-in-law, who are very involved with the children. Because there have been a few episodes of violence by my husband, I need the protection of an exclusive possession order.

17. **Restraining order:** Because Joe has been so persistent in trying to contact me since I left, and because I am afraid he will be physically violent again, I need a restraining order to make sure I am safe.
  
18. **Child Support:** Joe makes good money as a salesman. His income is up and down a bit because of commissions, but in the last 4 years, he has never earned less than \$70,000 a year. He is well able to support the children.
  
19. **Spousal Support:** As soon as things stabilize a bit for the children and we get back into our home, I will look for work. I worked in the auto plant before having the girls, and will try to get hired back there. It was a union job and paid well. Until I find a job, however, I need spousal support. Since the decision for me to stay at home with our children was a joint one, I feel I deserve support until I can become re-employed.

## ***Requesting a custody and access assessment:***

*There is no government office in Alberta that is made available in family cases to provide a report or assessment to assist the judge to decide what will be in the best interests of the child.*

The ways to get outside opinions included in the court cases are as follows;

1. A qualified person is hired privately to prepare home studies of the parents.
2. A qualified person is hired privately to prepare a written custody assessment.
3. A counselor's or child psychologist is retained to meet with the children and prepare a report as to the children's wishes and/or what might be a suitable parenting plan, given the development stage and needs of the child.
4. In Queen's Bench cases a Practice Note 7 order may be granted directing a qualified person to do an intervention with the family, or to provide an assessment to assist the judge to decide what is best for the children-although the parents pay for this the report belongs to the court.

***Requesting a custody and access assessment continued ...***

5. In rare cases a judge may speak directly to the child.
6. A court order may be granted directing that the child be given his or her own lawyer.

Assessments and reports also provide an opportunity for abuse issues to be factored into recommendations. A woman should ensure that any assessor undertaking this work is knowledgeable about woman abuse issues and her situation.

If you are concerned that the man will abduct the child, you can ask for the following in the custody order:

- International travel is prohibited.
- Either or both parents can be required to surrender their travel documents.
- The child's passport be deposited with the court.

The parent who has concerns should obtain a number of certified copies of the custody order. The parent can contact the passport office to have a passport alert issued, which would create a red flag if anyone tried to apply for a passport for that child.

# Protecting a Woman's Address

There are a number of steps a woman can take to keep her address private from her abuser. She can:

- use a post office box or a friend's address for mail
- for court documents, use an alternative address, but it has to be an address at which documents can be served (for example, she cannot use a post office box as an address for service)
- do banking on-line
- if applying for credit, use a post office box or alternate address. Addresses will show on a credit search which the abuser may be able to access. Separate her credit files with the credit bureau to avoid him having access to this information
- if she is receiving social assistance, tell her caseworker about the abuse and the need to protect her address

Luke's Place (2011)

# Alternate Dispute Resolution

Many court cases in Alberta are settled using Alternate Dispute Resolution (ADR). The most common forms of ADR are:

- **Mediation** by a counselor or lawyer- Alberta Justice Services and the Legal Aid Family Settlement Services provide free mediation for low income Albertans who qualify for their programmes.
- **Judicial Dispute Resolution (JDR)**-this is mediation with a judge and it is often used in provincial court family law cases.
- **Collaborative Law**-this involves an agreement by lawyers and their clients to settle matters outside the courtroom through meetings and the involvement of other professionals such as counselors.

# ADR and Domestic Violence cases

- Many people use ADR because it is quicker than court resolutions and less costly and less stressful and can result in more creative solutions.
- If domestic violence has occurred often ADR is not an option. However, in some of these cases ADR can be structured in a way that makes the participants feel safe, and which addresses any power imbalances they may feel. e.g their lawyer or support worker may attend with them, or the parties may be in separate rooms with the mediator going back and forth.