

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 Nunavut:

Family Law Act – rights and responsibilities of married and common law spouses before and after separation – spousal support and property division

Children's Law Act – custody, access, child support, parentage

Child and Family Services Act – child protection

Maintenance Orders and Enforcement Act – program to enforce payment of child and spousal support payments.

Key Terms

- Best Interests of the Child
- Custody
- Access
- Restraining Order
- Exclusive Possession of Family Home
- Child Support
- Spousal Support

...it is difficult to describe "best interests of the child" in Inuktitut, because of the language and because the concept is inherently southern.

Participants attempted to translate the concept into Inuktitut and came up with "best way to go for the child." They pointed out that there is greater deference towards children in the North than in the South, and that children traditionally have more say about where they go after a divorce or separation.

Federal Department of Justice Consultations, 2001

The term *custody* is also a difficult one to use in the North. In the South it implies defined procedures and parameters for contact, which is not a system that works in Nunavut.

In Inuit culture, the woman normally gets custody of the children from a common-law relationship. Inuit tradition considers this arrangement to be in the best interests of the children.

Federal Department of Justice Consultations, 2001

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

Nunavut Family Law Act

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.

Split Custody - where there are two or more children and children are split between the homes with different variations of legal responsibilities by parents (eg. Sole custody of one or more children, joint custody of all children, sole custody of one (or more) and shared custody of others)

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.

- *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?

In Custody and Access decisions, the “best interests of the child” is paramount

The judge considers many factors when deciding what is in the best interest of the child, including:

- the child’s normal routine;
- how settled the child is in his school and community;
- who the child’s primary caregiver was before the parents were separated;
- whether there has been violence against a member of the household or family;
- which parent the child is closer to;
- what cultural issues, if any, need to be considered;
- how open each parent is to providing ongoing contact with the other;
- whether there will be ongoing interaction with the child’s extended family; and
- what each parent’s parenting plans are.

Best Interests of the Child Test: Children's Law Act, s.17

(2) In determining the best interests of a child for the purposes of an application under this Division in respect of custody of or access to a child, **the court shall consider all the needs and circumstances** of the child including:

(a) the love, affection and emotional ties between the child and

- (i) each person entitled to or seeking custody or access,
- (ii) other members of the child's family, and
- (iii) persons involved in the care and upbringing of the child;

Best Interests of Child Test (cont'd)

- (b) the child's views and preferences if they can be reasonably ascertained;
- (c) the child's cultural, linguistic and spiritual or religious upbringing and ties;
- (d) the ability and willingness of each person seeking custody to, directly or indirectly, provide the child with guidance, education and necessities of life and provide for any special needs of the child;

Best Interests of the Child Test (cont'd)

- (e) the ability of each person seeking custody or access to act as a parent;

- (f) who, from among those persons entitled to custody or access, has been primarily responsible for the care of the child, including care of the child's daily physical and social needs, arrangements for alternative care for the child where it is required, arrangements for the child's health care and interaction with the child through, among other things, teaching, playing, conversation, reading and discipline;

Best Interests of the Child Test – Cont'd

- (g) the effect a change of residence will have on the child;
- (h) the permanence and stability of the family unit within which it is proposed that the child live;
- (i) any plans proposed for the care and upbringing of the child;

Best Interests of the Child – Cont'd

- (j) the relationship, by blood or through adoption, between the child and each person seeking custody or access; and
- (k) the willingness of each person seeking custody to facilitate access between the child and a parent of the child who is seeking custody or access.

Family Violence and Best Interests of the Child

...the court shall also consider any evidence that a person seeking custody or access has at any time committed an act of violence against his or her spouse, former spouse, child, child's parent or any other member of the person's household or family and any effect that such conduct had, is having or may have on the child.

This provision relating to a parent's conduct towards the other parent makes it clear that **violence or abuse** perpetrated by an individual is **relevant** to his or her **ability** to act as a **parent** and require the **judge** to consider it.

However...

Partner abuse remains **under-recognized** by judges due to the evidence presented

Judge may still perceive joint custody or extensive access as in **children's best interest**

Key Concepts

- The importance of the “Status Quo”
- The importance of being reasonable
- The best interests of the child and the parenting ability of the ex-spouse

Custody and Access

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

Joint Custody and Violence

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.

Joint Custody and 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.

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

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

CUSTODY AND VIOLENCE AGAINST CHILDREN

Custody will rarely be granted to a parent who has abused the child directly, although access is not uncommon. Despite the legislation described above, 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.

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.

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

Presenting evidence of abuse

- **Pattern**
- Length of **time**
- Whether it is getting **worse**
- Physical **injuries**
- What the **children** know
- **Impact** of the abuse
- **Safety** concerns

Organizing the information

- Organizing the information
 - Be direct and **specific**
 - Stay **focused** on the legal issues
 - Be **factual** and don't exaggerate
 - **Don't underplay** the seriousness
 - Start with the **most recent** event, then move back
 - **Categorize** information in a chart

Testifying about abuse in family proceedings

- Therefore...
- frame **evidence** of the abuse as having an **impact** on the **abuser's** ability to act as a **parent**.
- Gathering evidence
 - • Be **specific**
 - • Describe **effect** on children
 - • Stay **focused**
 - • Be direct and give **factual** information
 - • Avoid **over**-representing or **under**representing the facts

Sources of evidence

- **RCMP** calls
- **Police** incident reports
- Criminal **charges**, bail conditions, terms of probation etc.
- **Breaches** by her ex-partner of any family court restraining orders, EPOs
- **Comments** by the criminal court judge that verify there was abuse

Sources of evidence

- **Hospital** reports
- Records from her family **doctor**
- Evidence from her **religious leader**
- **Neighbours** who witnessed abuse or violence
- **School** teachers and **day care** workers
- **Photographs** of injuries or property damage
- Evidence of post-separation **stalking**

evidence

- • Her notes or **diary**
- • **Communication** by her ex-partner that demonstrate his abuse, violence, control or harassment (email, voice mail, text, etc.)
- • **Child welfare** records
- • **Employer** information about her abuser's violence, control or harassment

affidavits

- • **Written** document presenting **evidence**
- • Information that the person promises is **true**

Credibility will be negatively affected if anything in the affidavit is not true

- In custody and access cases

Both parties will prepare affidavits

- An affidavit should be
 - • Clear, detailed and **precise**
 - • Written in **logical** order
 - • **Legible**
 - • Paragraphs should be **numbered**
 - • Written in **first person**

Contents of affidavit

- Answer these 3 questions
- **Who** is my family?
- **What** do I want?
- **Why** should I get it?
- *Who is my family?*
- • The **children**
- • The **parents**
- • Where everyone is **living**
- • Informal **custody** and **access** arrangements
- • When parents **separated** and *briefly* why

Contents of affidavit

- *What do I want?*
- • Child **custody** and **access**
- • Child and spousal **support**
- • Division of **property**
- • Exclusive possession of the matrimonial **home**
- • **Restraining** order

Contents of affidavit

- *Why should I get it?*
- • **Custody** – who cared for the children before
- and what is her plan now
- • **Access** – why it should be restricted or
- supervised
- • **Child and spousal support** – what are his and
- her work histories and income
- • **Family home** – what is in the best
- interests of children
- • **Restraining order** – why she has safety fears

Helpful tip

- *It is very helpful if*
- the woman can have a **support person** or
- friend with her when she reads her
- **ex-partner's affidavit**

affidavit

- If the woman has a lawyer
- • Lawyer **prepares affidavits**, including affidavits from other sources
- • The woman must **gather the information** for the lawyer
- • The woman must **read** the affidavit and request necessary **changes** before she swears that it is **true**

Affidavit – non represented

- If she does **not** have a lawyer
- • Use a **computer** or print very carefully
- • Be **clear**
- • Give **details**, but not too many
- • Find someone to **commission** her signature
- • **File** the affidavit with the court and have her ex-partner served

A Sample Affidavit/Statement:

Credit: Affidavit Adapted for Manitoba from

Family Court Support Worker Program Resources

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Funded by the Ministry of the Attorney General (Ontario) Victim and Vulnerable Persons Division

[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 Occupation of the Family 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:

*The government office in Manitoba 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 is through the Family Conciliation Office.**

You may get outside parenting assessments conducted 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.

Requesting a custody and access assessment continued ...

4. In rare cases a judge may speak directly to the child.
5. 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.

Alternate Dispute Resolution

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

- **Mediation** by a counselor or lawyer- Manitoba Justice Services through the Family Conciliation Services Office, provides free mediation for Manitobans who qualify for their programmes.
- **Arbitration**- Outside the court, an independent third party (often a lawyer) is agreed to by the parties to hear and decide the matter.
- **Collaborative Family 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 life coaches, counselors, and financial experts.

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, ADR may not be an appropriate option. However, in some cases, ADR can be structured in a way that makes the participants feel safe, and addresses any power imbalances that may exist. 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.

Strategies used by the abuser

- **Deny** or minimize the abuse
- **Blame** the woman for his behaviour
- Alleging that **she is the perpetrator**
- Claims she is **incompetent**
- His goal is to
- **discredit, intimidate and harass.**