

Research respecting:
**Divorce, custody and access, child support, restraining
orders and Q & A**

Submitted by:
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Divorce

Married couples who have separated may apply for a divorce in Canada under the *Divorce Act*. You must be divorced before you can remarry someone else. In a divorce proceeding, each spouse can apply for custody of the children of the marriage, child support and spousal support.

Property rights which may arise on the breakdown of a marriage are determined by provincial or territorial legislation.

Only married spouses can commence proceedings under the *Divorce Act*. Typically, married spouses who are separating will apply for custody and support under the *Divorce Act* and under provincial legislation. If married spouses are separating, but do not want to divorce, they can apply for custody, support and property rights under the provincial legislation.

Couples cohabiting in common law relationships, or couples who have entered into civil unions in Quebec, may be entitled to custody of children of the relationship, child support, and spousal support under provincial legislation, but cannot apply under the *Divorce Act*. In Quebec, *de facto* spouses are not entitled to spousal support unless they enter into a written agreement providing for such.

Alternative Dispute Resolution

If you have a family law matter, there are several different ways to resolve problems. You can resolve your matter through the courts or through negotiation, mediation, arbitration and collaborative family law. You may hire a lawyer to assist you in any of these processes.

Mediation is a voluntary process where you and your spouse meet with a mediator to attempt to reach an agreement. The mediator is a neutral third party and cannot give either you or your spouse legal advice. If you do not reach an agreement with your spouse, the mediator cannot force you to agree, or make a decision about your case.

Arbitration occurs when you and your spouse agree to choose a third party to make a decision about your case, and to be bound by that decision. The third party usually has legal training. Each person may present their case and make arguments.

Collaborative family law occurs when both parties retain licensed collaborative family law lawyers in order to try to negotiate and reach an agreement. This includes negotiation and possibly mediation. If you cannot agree and decide to start a court proceeding, both you and your spouse must hire new lawyers.

Requirements for Divorce

Grounds for Divorce

The most common ground for a divorce is that the spouses have lived separate and apart for at least one year at the time the divorce is granted and were living separate and apart when the divorce proceeding was started. It is possible for spouses to continue to live in the same home and still be considered to be living separate and apart so long as they are separated with no reasonable possibility of reconciliation.

Although spouses must be living separate and apart for one year before the divorce is granted, separated spouses do not need to wait one year to claim custody and support under the *Divorce Act*. Custody and support may be claimed immediately after separation.

Other grounds for divorce include adultery and cruelty. Cruelty occurs if one spouse has treated the other with physical or mental cruelty making continued cohabitation intolerable. These two grounds are more complicated to prove, and are therefore rarely relied upon as the basis for a divorce.

Residency Requirements

In order to apply under the *Divorce Act*, one spouse must have been ordinarily resident in a province of Canada for at least one year, immediately before applying under the *Divorce Act*. If you or your spouse satisfies this requirement, you may divorce in Canada, and apply for custody and support, regardless of where you were married.

No Fault

Generally speaking, in Canada, divorce is not based on fault and the court does not engage in assigning blame to each spouse. The circumstances of separation are not relevant in and of themselves; however they may be relevant in determining custody and support if they impact the best interests of the child or a spouses' entitlement and/or need for spousal support. It does not matter which spouse initiated the separation or commenced the divorce proceeding.

Recognition of Foreign Divorce

In general, a divorce which occurred in a foreign jurisdiction will be recognized under Canadian law as long as either former spouse was ordinarily resident in the country granting the divorce for at least one year immediately preceding the application for divorce in that country. If you have been validly divorced in a foreign jurisdiction, you cannot apply under the *Divorce Act*. You may however apply for custody and support under provincial or territorial legislation.

Dissolution of a Civil Union in Quebec

In Quebec, some people chose to enter into a civil union rather than marry. Civil unions resemble marriage in many ways. A couple joined by civil union may dissolve the union by obtaining a court judgment or by a notarized joint declaration that they no longer wish to live together.

If a couple joined by civil union has children together, and the interests of those children may be affected by the dissolution of the civil union, a court order is required. The court judgment will

be granted if the judge is satisfied that the couple has made a permanent decision to live apart.

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Custody

There are two major issues which arise when determining custody of a child: (1) who will make major decisions with respect to the child, and (2) where will the child live?

In each province or territory of Canada, there is legislation allowing the courts to determine who has decision making power over a child. Depending on the jurisdiction, this is called ‘custody’, ‘guardianship’, ‘parental responsibilities’ or ‘parental authority’.

Similarly, the courts can also determine who has physical custody of the child and what the residential schedule will be. This is called ‘access’ or ‘parenting time’.

Parents who are married and separating may also apply for custody of the children of the marriage under the *Divorce Act*.

Decision making

Custody, guardianship, parental responsibilities or parental authority, refer to the right to make decisions with respect to the child. For example, this generally includes decisions with respect to education, health, culture, religious, linguistic and extracurricular activities.

In Quebec, a parent who does not have custody of the child will retain the right to participate in decisions regarding the child. A parent can only be deprived of any aspect of parental authority when there are serious reasons for doing so, and a court orders the deprivation.

Right to information

If one parent is granted sole custody or guardianship, the other parent is generally entitled to make inquiries and be given information with respect to the child’s health, education and wellbeing.

Joint custody

Joint custody means that both parents have equal rights in making decisions about the child’s life. When parties separate, joint custody is normally preferred unless it is not feasible because the parent’s cannot communicate or cooperate, or there is some other reason why joint custody is not appropriate.

Generally, if both parents reside together with the child, each is a joint parent, or equally entitled to custody.

Parallel parenting

Where appropriate, the court may also grant ‘parallel parenting’. Parallel parenting means that each parent acts as the sole custodian while the child is in their care.

The court may also make orders which grant each parent custody in a respective area. For example, one parent may be responsible for issues such as religion, while the other parent is responsible for education.

Parenting time

Where the child will reside, and when visits will occur, is determined by an order for ‘access’, ‘parenting’ or ‘contact orders’.

In some cases, one parent will be the residential parent and the non-residential parent will have the child for visits. The courts will consider the principle of maximum contact, being the principle that unless there is evidence to the contrary, it is in the child’s best interests to have as much contact with the non-residential parent as possible.

Split custody

Sometimes, when there is more than one child, each parent will be the residential parent for one or more children. This is called split custody.

Shared custody

In other cases, the child will reside with each parent more than 40% of the time in one year. This is called shared custody. Shared custody often requires the parents to co-operate as the child changes residences.

Day to day decisions

During access or parenting time, the parent exercising access or contact has the right to make day-to-day decisions about the child’s care.

Who is entitled to custody or guardianship

Parents are entitled to custody or guardianship. Generally, a person is a parent if they are the biological parent of the child or the adoptive parent of the child.

Each jurisdiction has presumptions regarding whether a man is the biological parent of a child. The presumptions regarding paternity vary, but frequently, a man is presumed to be a child’s parent if:

- he was married to the mother at the time of the child’s birth,
- the marriage ended 300 days before the birth of the child,

- the man married the mother after the child's birth and acknowledged that he was the father,
- the parties were cohabiting at the time of the child's birth, or a certain period before the child's birth,
- the man was registered as the child's father with his consent,
- the man has otherwise been found by a court to be the father of the child.

In Alberta and New Brunswick a person who demonstrated a 'settled intention to treat the child as his or her own' may also be a parent.

Although only biological or adoptive parents are generally assumed to be entitled to custody, the provincial and territorial legislation provides that any other person may apply for custody, although leave may be required from the court.

This means that step-parents, grandparents and other interested people may apply for custody or guardianship of a child, although they may have to ask the court's permission before starting an application. In Quebec, a person other than the child's parent may only be granted custody in exceptional circumstances considering the best interests of the child.

Best interests of the child

In each jurisdiction the court must make decision making and parenting orders based on the 'best interests of the child'. Parental conduct is only relevant in so far as it is relevant to the best interests of the child. It is not relevant who initiated the separation or why.

Among other factors, the court will often consider the status quo when determining the best interests of the child. This means that the court will consider the history of care for the child, and the child's need for stability.

When a child is the age of majority (generally 18 years old), they are considered an adult, and can decide for themselves where they wish to live. For children younger than 18 years old, the child's views and preferences will be taken into consideration when determining custody and access. When deciding how much weight to place on a child's views and preferences, the court will consider the child's age and maturity. Generally, more weight is placed on the views and preferences of older children, especially children age 14 and older. However, there is no legislated age, other than 18 years old, at which time a child can decide the issues for themselves.

When making an order for custody and access, the court will also consider any family violence, and the impact of the violence on the child's safety and well-being. This is likely to have an impact with respect to custody and guardianship orders, as well as access and contact orders. If appropriate, supervised access may be ordered.

Jurisdiction

Generally, the court will make orders respecting a child if he or she is habitually resident in the province or territory. In Ontario, the Yukon, the Northwest Territories, New Brunswick and Saskatchewan a child's habitual residence is usually the last place the child resided with both parents, or where the child lives in accordance with an agreement, court order or other parent's consent.

Although a child may only be temporarily resident in a province or territory, in special circumstances, such as domestic violence, the court may invoke its *parens patriae* power to make orders with respect to the child.

Foreign Orders or Agreements

If you have a pre-existing parenting agreement, or court order in a different country but the children are now habitually resident in Canada, the court may vary custody based on the best interests of the child.

Mobility

Custody or guardianship rights include the right to determine where the child lives while in that parent's care. Where the custodial parent wishes to move, as long as the move is proposed in good faith, and not to interfere with access, the decision as to whether the move will be permitted will be based on the best interests of the child.

Abduction

Canada is a signatory to the *Hague Convention on the Civil Aspects of International Child Abduction*. If a child has been wrongfully removed to another country, also signatory to the convention, the court may order the child's return.

In most provinces, when making orders with respect to custody, the court may make an order that the child not be removed from the jurisdiction.

Similarly, in several provinces and territories, if a parent with custody of the child has reasonable grounds to believe that the other parent is withholding the child from them, and is likely to leave the province or territory, the court can order that the child be apprehended and returned.

In these jurisdictions, if there is a court order that the child not be removed from the province or territory, and you have reasonable grounds to believe that the other parent will remove the child, the court may order that:

- the other parent pay money into court,
- if you are paying child support it may be paid to the court rather than the recipient,
- require the parent to post a bond, or
- deliver their passport, the child's passport and any other travel documents.

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Child Support

Where a divorce proceeding has been commenced, child support may be sought under the *Divorce Act* and the *Federal Child Support Guidelines*. Otherwise, each province and territory has legislation respecting child support.

Each jurisdiction of Canada, except for Quebec, has *Child Support Guidelines* similar to the federal guidelines. Quebec's child support guidelines are distinct from the federal guidelines and provide a different method of calculation and different child support tables.

These Child Support Guidelines must be followed unless the parents have made special provisions for the child and because of these provisions, the guidelines would be inequitable. Similarly, parents may agree to reasonable arrangements to provide for a child's support outside of the guidelines.

The Guidelines

Who pays child support

Parents, or people who stand in the place of a parent, have an obligation to support their children. People may stand in the place of a parent if they have shown a settled intention to treat the child as their own.

When determining whether you stand in the place of a parent, the court will consider, among other factors, the child's relationship with the other biological parent, whether you discipline the child, and whether you are held out to the world as being in the position of a parent to the child.

In Manitoba, New Brunswick and Quebec, the presumptive guidelines amount may not apply to a person standing in the place of a parent. In other jurisdictions, the obligation to pay support of a person standing in the place of a parent may be reduced because of a biological parent's support obligation.

Where parentage is in question, it is possible to apply for leave from the court for a blood test or DNA tests. Failure to comply with a blood test may lead the court to presume that the person refusing the test is a parent.

Child support is payable until a child reaches the age of majority in the province or territory. Thereafter, child support may continue if the child is enrolled full-time in education, or is under a disability. Once a child reaches the age of majority, the amount of child support may be reduced in accordance with the child's ability to earn income.

How is the amount of child support determined

While a child is under the age of majority, if the child does not reside with the payor parent more than 40% of the time over the year, the amount of child support is determined in accordance with the child support tables. The table amount is based on the number of children under the age of 18 for which support is sought and the payor's income.

Split custody

If there are two children or more, and each parent has physical custody of one or more of the children, the amount of child support payable is the difference between the table amount that each spouse would otherwise pay the other spouse for the child that is not in their care.

Shared custody

If both parents have custody of the child more than 40% of the time, the court has discretion to determine the amount of child support payable based on the table amount for each spouse, the increased cost of a shared custody arrangement and the conditions, means, needs and circumstances of each spouse.

Special expenses

In addition to the table amount, parents may be obligated to pay for special or extra-ordinary expenses for the children. Such expenses are paid by each parent in proportion to each parent's respective income. These expenses generally include expenses for child care, post-secondary education, medical and dental expenses above what may be covered by insurance and other necessary expenses incurred for the child's best interest, which are reasonable in relation to the means of the spouses and the family's spending pattern prior to separation.

Exceptions

The table amount may not apply if the payor earns more than \$150,000 a year or can show that he or she would suffer undue hardship if they were required to pay the full table amount. The recipient of child support can also claim undue hardship as a basis to claim an increase in the table amount. These circumstances are exceptional.

Similarly, both parents have an obligation to earn income, and income may be imputed to a spouse if they are intentionally under-employed or unemployed.

Quebec

Under the *Quebec Child Support Guidelines*, child support is determined according to the income of each parent, and the amount of time each parent is responsible for the child. Each parent has a basic parental contribution determined by his or her income and the number of children for whom they pay support. The court may also consider certain expenses related to the child and may increase the contribution accordingly.

If you divorce in Quebec and seek child support under the *Divorce Act*, the provincial legislation regarding child support applies if both parents live in Quebec. If one parent lives outside of Quebec child support will be determined under the federal *Child Support Guidelines*.

Out of Country recipients or payors

Generally, the person who pays child support, pays support based on the province or territory in which he or she lives at the time the court proceeding is started.

If the payor lives in a country other than Canada, the payor will pay the table amount based on the province or territory where the recipient of child support lives.

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Restraining Orders

If you are facing domestic violence in the home, there are several types of orders that a court may grant to protect you.

Criminal Offences

Certain behaviour may be considered a criminal offence under the *Criminal Code of Canada*. This behaviour should be reported to the police, anywhere in Canada. Once you have reported the crime, the police may charge the person with a criminal offence. The police have discretion to decide whether they will charge a person with a criminal offence.

For example, in Canada, it is an offence to assault another person. An assault is the intentional application of force upon another person, without that person's consent. Similarly, threatening to apply force, if you have reasonable grounds to believe that the person could immediately carry out the threat, is also an assault. If there is a sexual component to the assault, the person may also be charged with a sexual assault. Assaults with weapons are also a crime. If you are being assaulted, you should call the local police.

Another example of an offence is criminal harassment. This occurs if you are facing harassment which is causing you to fear for your safety, or your child's. Such harassment includes being followed, repeated communications, being watched or followed and threatening behaviour. This may constitute the criminal offence of criminal harassment.

If your spouse is charged with a criminal offence related to a crime against you, the court may force your spouse to enter into a recognizance while waiting for trial and/or sentencing. The recognizance may include terms prohibiting your spouse from attending at your residence or communicating with you. The police or crown attorney may also request that your spouse enter into a Peace Bond, discussed below.

If your spouse is convicted of the criminal offence he or she may face a variety of punishments, depending on the crime, such as a fine, incarceration, and community service. They may also be placed on probation or parole, which could include conditions about non-communication and prohibitions against attending your residence.

If your spouse has been charged with a crime against you, you should contact your local Victim Service office, which will assist you in these proceedings. In many cases, this service will have an office in the local courthouse.

Restraining Order under the *Criminal Code* (Peace Bonds)

In Canada a person may apply for a Surety to Keep the Peace under section 810 of the *Criminal*

Code of Canada if he or she has reasonable grounds to fear that the other person will cause personal injury to him or her or his, or her child, or that the person will damage his or her property.

If the court finds that there are reasonable grounds for the complainant's fears, the court may order the person to comply with certain conditions for 12 months. Those conditions may include prohibiting the person from being within a certain distance of the complainant's home and/or work and may prevent the person from communicating with the complainant and their child.

An order under this section is not a criminal offence. Your spouse does not have to be charged with, or convicted of, a criminal offence for you to apply for a peace bond. If you want a peace bond, speak with the local police. Or, you may be able to apply directly at a Provincial Court. Attend the provincial court, criminal division, and ask about obtaining a peace bond. You may also wish to contact a lawyer.

Restraining Order under Provincial legislation

In addition to the federal legislation, the provinces and territories have legislation to help protect family members at risk of domestic violence.

In most jurisdictions you can apply for an emergency protection order against another family member if that person has committed domestic violence. These orders are not related to the *Criminal Code* and are not criminal offences. The orders may prevent the perpetrator from contacting you and may prevent them from attending your home, place of work, school, or other locations. These applications are most often made by the police or victim services.

Similarly, in many jurisdictions, once a family law proceeding has been commenced, it is possible to apply for a non-harassment order, preventing the other person from engaging in unnecessary communication and contact. Discuss this relief with your lawyer, or seek such an order in your court application.

Also, most jurisdictions have legislation whereby you can claim exclusive possession of your home, and have the perpetrator removed. In some jurisdictions, such as Ontario, you must be married in order to apply for such an order, although similar relief may be available to a common law spouse as an incident of child support or spousal support.

Province or Territory	Provincial Protection Legislation
Alberta	<i>Protection Against Family Violence Act</i> , R.S.A., 2000, c. P-27
British Columbia	<i>Family Law Act</i> , Bill 16 2011: protection order s. 183
Manitoba	<i>Domestic Violence and Stalking Act</i> , C.C.S.M., c. D93
New Brunswick	<i>Family Services Act</i> , S.N.B. 1980, c. F-2.2: no contact and no harassment orders ss. 13 and 128

Newfoundland	<p><i>Family Violence Protection Act</i>, S.N.L. 2005, c. F. 31</p> <p><i>Family Law Act</i>, R.S.N.L. 1990, c. F-2: Order restraining harassment s. 81</p> <p><i>Children’s Law Act</i>, R.S.N.L. 1990, c. C-13: Restraining Order s. 42</p>
Northwest Territories	<p><i>Protection Against Family Violence Act</i>, S.N.W.T. 2003, c. 24</p> <p><i>Children’s Law Act</i>, S.N.W.T. 1997, c. 14: Restraining order s.72</p>
Nova Scotia	<p><i>Domestic Violence Intervention Act</i>, S.N.S. 2002, c. 30</p>
Nunavut	<p><i>Family Abuse Intervention Act</i>, S.Nu. 2006, c. 18</p> <p><i>Children’s Law Act</i>, S.N.W.T. (Nu) 1997, c. 14: restraining orders s. 72</p>
Ontario	<p><i>Children’s Law Act</i>, R.S.O. 1990, c. C.12: restraining order s. 35</p> <p><i>Family Law Act</i>, R.S.O. 1990, c. F.3: restraining order s. 46</p>
Prince Edward Island	<p><i>Victims of Family Violence Act</i>, R.S.P.E.I. 1988, c. V-3.2</p>
Saskatchewan	<p><i>Victims of Domestic Violence Act</i>, S.S. 1994, c. V-6.02</p> <p><i>Children’s Law Act</i>, S.S. 1997, c. C-8.2: Orders restraining Harassment s. 23(1)</p>
Yukon	<p><i>Family Violence and Prevention Act</i>, R.S.Y. 2002, c. 84: emergency intervention Orders and victim assistance orders</p> <p><i>Children’s Law Act</i>, R.Syl 2002, c. 31: Restraining order s. 36</p>

Support Networks

For information and assistance in obtaining restraining orders you should contact your local Family Law Information Center, or any local legal aid clinic. Further, many areas have local women’s centers, shelters (transition homes), YMCA’s or YWCA’s that may be able to assist you or provide information regarding resources in your area. You can also contact a lawyer, who may be able to advise you of your rights and the issues in your particular case.

Please review the directory for specific resources in your province or territory.

Warning – Private Browsing

If you are looking for information online, respecting separation and/or domestic violence, and you are using a computer that your abuser can access, you should ensure that your searches are done in 'Private Browsing', 'Incognito' or 'Hidden'. This will ensure that your browser does not keep a record of the sites you have visited. You can also delete your browsing history. You can find detailed instructions here: <http://www.sexualassaultsupport.ca/Default.aspx?pageId=418116>.

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Q & A

1. Is it a problem to leave Canada with the children for my divorce procedure in Japan?

If you and the child are habitually resident in Canada, you should not leave the country with the children without:

- your spouses' consent,
- an agreement which allows you to leave, or
- a court order.

If you leave the country without such, the Canadian court may remain seized of jurisdiction, and may make court orders in your absence, such as orders to have the child returned to Canada. You may also be charged with the criminal offence of abduction.

2. What is 'joint custody'?

Joint custody means that both parents have equal rights in making decisions about the child's life. When parties separate, joint custody is normally preferred unless it is not feasible because the parent's cannot communicate or cooperate, or there is some other reason why joint custody is not appropriate.

This does not mean that both parents have equal parenting time with the child. A joint custodian may have equal decision making rights, but the child may live with him or her less than 40% of the time.

If the child lives with each parent more than 40% of the time, the parents have shared custody.

3. How does domestic violence impact my family law issues?

When making an order for custody and access, the court will consider domestic violence, and the impact of the violence on the child's safety and well-being. If there has been violence towards the child, or in the presence of the child, the court may be more willing to grant the other parent sole custody.

Further, in serious cases, the court may order that the parent who perpetrated the violence only be allowed supervised access. Supervised access may be at government funded facilities, or supervised by an agreed upon third person.

4. I cannot afford to hire a lawyer. I also have limited language abilities to be able to argue in court. What can I do?

Generally, each jurisdiction provides information centers which will provide you with some initial advice. Further, the courts are normally able to provide translators for court proceedings, as long as they are given advance notice. Duty counsel is usually available to assist you at your court proceeding. You should contact your local court house to determine what services are available.

You may also be applicable for financial assistance to hire a lawyer under provincial or territorial programs, such as legal aid.

You should consult the directory which may provide more specific advice.

5. What is ‘access’? Do I have to let my children see the other parent after the divorce?

Access refers to the parenting time which a non-residential parent has with his or her child. The courts have developed a presumption which states that unless there is evidence to the contrary, it is in a child’s best interests to have maximum contact with his or her access parent. It is the right of a child to have contact with both parents.

Unless there is evidence of physical or mental abuse, you should let the other parent have access to the child, even after separation.

6. The court has previously ordered that children’s other parent is to have access, but I am worried about our children’s safety based on his or her past behaviour. What can I do?

If you have immediate concerns regarding the children’s safety, you should contact the police or child protection authorities, such as Children’s Aid Societies. Otherwise, you may wish to commence a court proceeding to vary the previous court order. Generally, the court may vary a previous court order if there has been a change in the condition, means needs or other circumstances of the child, which has occurred since the making of the order. The new court order will be made based on the best interests of the child.

You should see a lawyer or legal aid in your jurisdiction.