

## **Regulation of custody, visitation rights, abduction and return of minors in Saskatchewan**

### **Custody and Access**

Custody means the ability to make decisions about the care and upbringing of the child, such as what school or church the child should go to, or where the child will live. Access means the **right of a child** to spend time with the parent who does not have custody.

Issues of custody and access can be addressed under the federal *Divorce Act* where the parents are divorcing, or under the provincial *Children's Law Act, 1997* if the parents were never married, or were married and are separated but are not divorcing. **See questionnaire completed by the federal government of Canada.**

In Saskatchewan, under *The Children's Law Act, 1997* parents who were married, or lived together when the child was born are joint legal custodians of the child with equal rights, powers and duties. The status of joint legal custodians can be altered by court order or by the parents' agreement. Parents can agree that only one of them will have custody, or that someone else will have custody of their child. They can specify rights and duties of each parent, and set up access by the child to one of the parents or any other person.

When parents cannot agree, the court may grant custody of or access to a child to one or more persons. *The Children's Law Act, 1997* sets out factors to consider in determining what living arrangements will be in the best interests of the child:

- the quality of the relationship the child has with the parent seeking custody or access;
- the personality, character and emotional needs of the child;
- the physical, psychological, social and economic needs of the child;
- the capacity of the person seeking custody or access to care for the child;
- the home environment for the child (for custody determination);
- the plans for the child's future (for custody determination);
- the wishes of the child to the extent the court considers appropriate having regard to the age and maturity of the child.

A relationship with both parents is encouraged. When determining custody or access, a child should have as much contact with his or her parents as is in his or her best interests. The court will not consider the parent's past conduct unless it affects the ability to parent or care for the child. The court will not give preference to either parent based on the fact the person is a mother or father.

An order may describe generally, or in detail, how parenting responsibilities are divided or shared between the parents. Access arrangements may also be described generally, such as "reasonable access on reasonable notice," or the access may be set out in detail such as, "access shall occur every second Friday from 6 p.m. to Sunday at 6 p.m." The court may also state where the access should take place, and whether it should be supervised by anyone.

Under *The Children's Law Act, 1997*, people other than parents who have a close relationship to the child, such as grandparents, aunts, uncles, or close friends of the family, who want to maintain contact with the child, can also apply for an access order. The court must still consider what is in the best interests of the child in deciding whether to make the access order.

Parents who do not have custody, but have access to a child, have the same right to make inquiries and be given information concerning the health, education and welfare of the child. They do not however (unless court ordered) have a right to be consulted about, or to participate in, the making of decisions by the custodial parent.

The court may put restrictions on the right of either parent to move so that the child can maintain contact with both parents. In considering whether to allow a parent to move with the child, the court will look at the parent's plans for the child to maintain contact with the other parent, as well as the parent's motivation for wanting to move. Courts are reluctant to allow a parent to move if it appears the motivation for moving is to deprive the other parent and child from spending time together.

In terms of enforcement, a peace officer can be ordered by the court to apprehend and take the child to the parent with the right of custody or access where:

- parent is not taking the child to the other parent even though the custody/access order or
- agreement states that the child should be with that other parent.

The order or agreement says the child must stay in Saskatchewan and a parent tries to take the child out of Saskatchewan anyway.

Where a parent prevented the other parent from spending time with the child, or the parent has not exercised access in accordance with the order or agreement, and it is in the best interests of the child, a court may:

- order extra access to make up for the missed access (compensatory access),
- require supervision of access,
- require security (ex., a deposit) to ensure the order is followed,
- appoint a mediator, and/or
- change the custody and access order.

Where a parent has intentionally disobeyed court orders, the court may find the parent in contempt. The court can then fine them up to \$5000 or order them to serve 3 months in jail the first time, and \$10,000 or 2 years in jail for any further findings of contempt.

Article 21 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* deals with access enforcement. Article 21 states that countries should cooperate to "promote the peaceful enjoyment of access rights," remove any obstacles to the exercise of access. Under this Convention, a Central Authority is appointed in each province and territory. In Saskatchewan, the Minister of Justice and Attorney General is the Central Authority. The Central Authority may initiate or assist

with proceedings brought to organize or protect access rights, and/or may attempt to negotiate access terms, either directly with the parents or indirectly through a mediator.

### **Abduction and Return of Minors**

When custody rights are violated and a child is abducted by one of the parents to another country, the best interests of the child may require countries to work together quickly. The Hague *Convention on the Civil Aspects of International Child Abduction* is incorporated into the law of Saskatchewan in *The International Child Abduction Act, (1996)*.

The Convention requires a Central Authority to be designated in each Contracting State or jurisdiction to assist in complying with the obligations set out in the Convention. In Saskatchewan, the Minister of Justice and Attorney General has been designated.

Central Authorities are encouraged to work informally as well as to support the formal legal process in trying to ensure that custody and access rights are respected and to ensure that wrongful removals of children are responded to in a timely manner. As a matter of practice, Central Authorities, including Saskatchewan's, try to seek voluntary returns where possible. This can be impractical however where there is a flight risk or risk of real harm to the child.

Parents often do not know where a child has been taken or may have limited means to pursue matters personally. An important element of Saskatchewan's *International Child Abduction Act* is access to information. If it is necessary to determine the whereabouts of the abducting parent or child, the Central Authority can demand information such as current address from any person or public body. The Central Authority may also attempt to locate a child through police, school or other records.

The Central Authority receives and transmits Hague applications. There are standard forms for applicants to complete for any outgoing application (ie, where a child habitually resident in Saskatchewan is taken to another country). The Central Authority ordinarily reviews applications to ensure that everything required under the Convention forms part of the application.

Often the Central Authority will work with local or national police to respond quickly to an abduction. The Central Authority and the local police may work with the Royal Canadian Mounted Police's Missing Children's Services. (See <http://www.rcmp-grc.gc.ca/omc-ned/index-accueil-eng.htm> )

As well, the Central Authority may work with local Child Find agencies.

The Central Authority will work with child protection authorities if

- there is an indication of a child protection risk
- the "custodial" parent is not immediately available to take physical custody of the child on return from the "wrongful removal"

The Central Authority for Saskatchewan does not generally take a role in court proceedings other than to support the provisions and intent of the legislation before the court. For example, the Central Authority may be asked to provide an opinion in an Affidavit that the foreign application falls within the scope of the Convention. Or the Central Authority may be asked for a specific opinion on a matter arising under the Act as it affects the Convention or the role of the Central Authority. The Central Authority may be asked to assist a foreign party in finding counsel to represent him/her. The Central Authority in Saskatchewan has worked in the past with the Law Society of Saskatchewan to provide the names of potential counsel to foreign parents. The Central Authority may also take other action, such as inquiring of the court the status of the case, to try to ensure that processes move quickly under the Act.

When custody rights are not being respected, parties can pursue their civil remedies under family law. This may involve bringing a court application to enforce the custody order or agreement. The *Children's Law Act* allows a court, by order, "to direct a sheriff, peace officer or other person that it considers appropriate to locate, apprehend and deliver a child to a person specified by the court for the purpose of giving effect to the rights of the applicant to custody or access. The court may authorize the sheriff, peace officer or other person to enter and search any place where he or she has reasonable grounds to believe the child may be located. When so ordered, the sheriff, peace officer or other person **shall** do all things reasonably necessary to locate, apprehend and deliver the child in accordance with the order.

The *CLA* also allows a court or applicant to initiate contempt of court proceedings for failure to respect custody/access orders. The court may order imprisonment of up to 90 days for a first finding, and a term of up to 2 years on any subsequent finding.

The court may also make orders to prevent the removal of a child from Saskatchewan or secure the child's prompt safe return to Saskatchewan. The court can also:

- (1) order a person to transfer specific property to a named trustee to be held subject to any terms and conditions that the court considers appropriate;
- (2) in the case of a person from whom payments have been ordered to be made for the maintenance of the child, order that person to make the payments to a specified trustee subject to any terms and conditions that the court considers appropriate;
- (3) order a person to post a bond, with or without sureties, payable to the applicant in the amount the court considers appropriate;
- (4) order a person to deliver the person's passport, the child's passport and any other travel documents of either of them that the court may specify to the court or to a person specified by the court;
- (5) vary the custody or access order or, where the custody or access provisions are contained.

See questionnaire of the federal government of Canada for additional information on the Hague Abduction Convention.

## **Criminal Code**

In some circumstances, parties may also need to use criminal law to enforce custody rights. The federal Parliament has exclusive jurisdiction to make criminal laws pertaining to the abduction of a minor. See questionnaire completed by the federal government of Canada for further information about abduction offenses.