

Regulation of custody, visitation rights, abduction and return of minors in Canada

Custody and Visitation

National Perspective

In Canada, matters of parental authority and custody are governed by the *Divorce Act* if the parents were married and are divorced or divorcing. Provincial and territorial legislation govern these matters if the parents were never married or were married and are separating but not divorcing. Thus there are at least fourteen different statutes and fourteen different statutory provisions governing custody and access in Canada. Some provinces and territories have more than one statute that affects custody and access.

None of the statutory provisions in the 14 Canadian jurisdictions are exactly the same, although there are important common elements. All provide that the governing and fundamental principle is the best interests of the child. All but Alberta (where, since 2005, “parenting orders” are made) use the term custody. Other terms such as guardianship (in British Columbia and Alberta) and parental authority (in Québec) are also used to define parental rights and responsibilities. *Access*, as it is used in the legislation, refers to the non-custodial parent's contact with the child, through visits or otherwise.

Legislation in Canada generally allows the court wide discretion to fashion the kind of order it considers appropriate in the circumstances. The courts can and do order a wide variety of parenting arrangements, both under the *Divorce Act* and under provincial and territorial legislation. Some examples are:

- orders that do not use the terms custody or access at all but that may specify where the child shall live or when the child shall spend time with either parent;
- sole custody to one parent with access to the other;
- joint custody with primary residence, or primary physical care and control, to one parent, and physical care and control to the other parent at specified times or times to be agreed;
- joint custody, but with one parent to have ultimate decision-making authority;
- shared custody;
- joint parental exercise of authority;
- orders restricting mobility; and
- joint guardianship.

The legislation also does not preclude the parents from entering into, by agreement, whatever parenting arrangement in their view best suits their divided family. Parents are not bound to use the statutory terminology in their own agreements, although precision in a custody order is essential to enforcement should disputes arise.

[See questionnaire completed by the province of Saskatchewan].

Federal Divorce Act

Section 16 of the *Divorce Act* sets out the process for making a custody order. Under the *Act*, one or both parents may have custody of the children. If parents cannot agree on a parenting arrangement, the *Act* sets out some basic principles that a judge must use when making decisions about the care of children.

- The best interests of the children come first.
- Children should have as much contact as possible with both parents so long as this is in the children's best interests.
- The past behaviour of a parent cannot be taken into consideration by the court unless that behaviour reflects on the person's ability to act as a parent.

Sometimes both parents want a divorce, but want to continue to share their responsibilities as parents equally. Joint custody means that both parents have custody of the children. In other words, both continue to share in making all the major decisions concerning the children (about discipline, school, major outings, holidays, etc.). If there is joint custody, many different living arrangements are possible. The children may live with each parent about the same amount of time or live mostly with one parent. Joint physical custody or shared custody usually means that the child spends nearly equal time with each parent.

The *Divorce Act* provides that a Canadian court may vary an order for custody or access when there has been a significant change in the condition, means, needs or other circumstances of the child and/or either parent since the last order was made. The *Act* does not recognize having a foreign court amend one of its orders.

Abduction and Return of Minors

Abduction Convention

Canada ratified the *Hague Convention on the Civil Aspects of International Child Abduction* (Abduction Convention) in June 1983 and extended its application to all the provinces and territories by 1999. The federal Central Authority for the Abduction Convention is located in the federal Department of Justice Legal Services Unit at Foreign Affairs and International Trade Canada. There is a Central Authority in each province and territory within their respective Ministry of the Attorney General or the Department of Justice. [See questionnaires completed by the province of Saskatchewan].

The Federal Central Authority plays a coordinating and liaison role in Canada by exchanging and facilitating appropriate information exchanges amongst key stakeholders involved with Convention cases (e.g., immigration authorities, consular officials, non-profit organizations and provincial/territorial Central Authorities) and works closely with Canada's *Our Missing Children Program*, a collaborative effort of the R.C.M.P., the Canada Border Services Agency, Citizenship and Immigration Canada, the Department of Foreign Affairs and International Trade Canada and Justice Canada. This program helps prevent abductions and locate and recover abducted and missing children. For example, on request from a Central Authority or local police, the program may be able to obtain transportation support for the parent to travel to retrieve the child or for the child and abducting parent to return voluntarily. Canada Customs can alert border authorities

to assist in recovery of abducted children. More information about the *Our Missing Children Program* is available at: <http://www.ourmissingchildren.gc.ca/>).

The Federal Central Authority handles requests for information about the Hague Convention and its implementation in Canada from the public, government departments, community organizations, other Central Authorities and the Permanent Bureau in The Hague. It participates in and coordinates stakeholder meetings and training/public education activities.

The Department of Foreign Affairs and International Trade has published an information booklet, *International Child Abduction - A Manual for Parents* that is available at: http://www.voyage.gc.ca/main/pubs_menu-en.asp#5.

Criminal Code

The federal Parliament has exclusive jurisdiction to make criminal laws pertaining to the abduction of a minor. Four specific offences exist under Canada's *Criminal Code* pertaining to the abduction of a minor. These offences are broken down by the relationship of the perpetrator to the abducted minor.

The first offence deals with all persons who abduct persons under the age of 16 (section 280), regardless of the relationship of the minor to the abductor.

The other three offences apply when the person abducted is under the age of 14. One offence applies where the abductor is not a parent or guardian (which includes any person who has in law or in fact the custody or control of the minor) or person having the lawful care or charge of the minor (sections 281).

The last two provisions apply where the minor has been abducted by a parent, guardian or person having lawful care or charge of the minor, with the intent of depriving the other parent of the possession of that minor. The purpose of these provisions is to have parents turn to the courts to settle irreconcilable custody disputes, and have family law orders define the boundaries of what parents can and cannot do in these situations. One provision defines offences in which the minor has been abducted in contravention of the custody provisions of a Canadian custody order (section 282), and the other provision applies whether or not a custody order is in existence, but where the existence of parental rights of custody are evident in other ways, for example, the existence of parental rights under an order other than a Canadian custody order, in a written agreement or at common law. The conditions under which charges of abduction may be laid are described in the *Model Parental Child Abduction Charging Guidelines* adopted by the federal, provincial and territorial Ministers of Justice.

The civil aspects pertaining to the abduction of minors fall under the jurisdiction of the provinces and territories.