

# CUSTODY & ACCESS

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## PROTECTING CHILDREN FROM SECOND-HAND SMOKE DURING CUSTODY DISPUTES

**You can take steps to protect your children from exposure to second-hand smoke even when they don't live with you anymore**

If you are involved in a separation, divorce or other type of custody action with the other parent of your children, there are many different issues which are important to you, including the health and safety of your children.

Custody situations can be difficult in and of themselves, but the fact that they generally occur during a separation or divorce makes it even harder for you as a parent to focus your energy on a custody dispute. Even though you may be distracted by your

personal situation, your children are important to you and both you and their other parent want what is best for them.

In recent years medical research has confirmed the dangers of exposure to second-hand smoke (sometimes referred to as environmental tobacco smoke).

Many parents worry about the negative effects of second-hand smoke on their children's health but are unsure of how to protect them. Although exposure to second-hand smoke is only one of many issues arising in any custody situation, it is an important one, and there are steps you can take to protect your children.

While this pamphlet deals specifically with the issue of preventing children's exposure to second-hand smoke, the questions and ideas suggested may be useful for many other custody issues.

The information in this pamphlet is not a substitute for legal advice. As you go through the questions below, write down your answers in order to focus your thoughts and to give you a reference for later.

## SECOND HAND SMOKE CAN CAUSE

- Sudden Infant Death (SIDS)
- Low birth-weight
- Bronchitis
- Pneumonia
- Onset of Asthma
- Worsened Asthma
- Middle ear disease
- Respiratory symptoms
- Adverse impact on cognition and behaviour
- Decreased lung function
- Worsened cystic fibrosis.

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# TAKING STOCK OF YOUR SITUATION

## DO YOU HAVE A LAWYER?

While custody and access agreements do not have to go through the courts, they are legal issues and your chances of achieving a positive outcome will increase if you have legal representation. Lawyers can do more than just fight for you in court.

They can also review agreements or informal arrangements and let you know the strength of your legal position on the issues at hand. They can advise you about the law, about your rights, and about the different options available to you.

If you cannot afford a lawyer, some cities and provinces make legal aid lawyers available at low or no cost to people in custody disputes. Check with your local legal aid office to see if your situation qualifies for help. If there is a law school nearby they may have a student legal clinic that can help.

## DO YOU HAVE A CUSTODY AGREEMENT?

### IF SO, WHAT TYPE?

If you already have an informal or formal custody agreement that has been working well for you, it should be a fairly simple matter to add in a clause regarding second-hand smoke. When adding the clause you will need to carefully consider whether the steps necessary to avoid exposure to second-hand smoke will affect any other aspects of the agreement.

If you have a court ordered custody agreement you can try to create an informal agreement on the issue of second-hand

smoke, or you can apply to the court to have the order officially changed.

If you do not yet have an agreement you need to decide what will work best for your situation. That may be determined by your answer to the next question.

## WHAT SORT OF RELATIONSHIP DO YOU HAVE WITH THE OTHER PARENT?

Custody decisions are often influenced by the parents' situation and their ability to get along with each other and work together in caring for the children. The better your relationship with the other parent, the easier it will be to reach an agreement.

If there are problems between the two of you but you have many of the same ideas on what is best for the children, a mediator might be able to help you see past your personal differences and reach an agreement on issues relating to custody and access.

If the two of you are unable to agree on anything, you will probably have to go to court and have a judge decide. This is more expensive and usually takes longer than working out an agreement between yourselves or with a mediator.

## HAVE YOU DISCUSSED CUSTODY WITH THE OTHER PARENT?

### IF SO, WHAT WAS THEIR REACTION?

One of the best ways to start an agreement is by discussing it with the other parent. You may discover that they are receptive to your views on exposure to second-hand smoke and are

willing to make their home smoke-free. Even if the solution is not that easy, discussing the issue with the other parent will help you understand what the next steps should be to resolve the issue.

When discussing exposure to second-hand smoke with the other parent, make sure they are aware that the issue is the best interests of the child and protecting the child's health. It is not a personal attack on them and has nothing to do with their personal habits. You are not trying to stop them from smoking, you just want to make sure they don't smoke around the children.

If the state of your relationship makes a discussion impossible, you should still make them aware that there is an issue as soon as possible, perhaps by communication between your lawyers.

## DOES YOUR CHILD HAVE ANY ILLNESSES RELATED TO SECOND-HAND SMOKE?

If your child has illnesses related to exposure to second hand smoke, your reasons for wanting to protect them are even stronger and more definite. Documented proof of those illnesses, which can be obtained from your doctor, will strengthen your position.

## DO YOU THINK YOU SHOULD RAISE THE ISSUE EVEN IF YOUR CHILD HAS NOT BEEN VISIBLY AFFECTED BY SECOND HAND SMOKE?

Even if your children have not yet suffered noticeable effects from second-hand smoke, the potential effects on your chil-

## Taking Stock (continued)

dren's health give you reason to have a valid concern

### **DO YOU FEEL CONFIDENT ABOUT TALKING TO THE OTHER PARENT ABOUT THE DANGERS OF SECOND HAND SMOKE?**

There is plenty of scientific evidence documenting the dangers of second hand smoke. You can get information on this subject from your family doctor, from the Internet, or from local health societies or public health clinics. Using such outside evidence from reputable sources can often be an effective way of teaching others the realities of second hand smoke. If the other parent is a die-hard smoker and refuses to talk about quitting, try to look for material that focuses only on second-hand smoke and does not discuss personal smoking.

Your family doctor can give you information on the dangers of second-hand smoke. They can also tell you which of your children's illnesses have been related to second-hand smoke.

## CHALLENGING SITUATIONS

**E**ven when the other parent is not a smoker, you may find that there is the need to work for an agreement to protect your children from second-hand smoke.

### **WHEN THE OTHER PARENT DOESN'T SMOKE, BUT HIS/HER RELATIVES DO.**

If the other parent spends a lot of time with relatives who smoke, or takes the children there on vacation, you can mention that in your agreement. Add a clause that prevents the other parent from taking the children to smoke-filled environments, or one that requires the relatives to maintain a smoke-free home while the children are there...

### **WHEN THE OTHER PARENT IS UNWILLING TO CHANGE HIS/HER BEHAVIOUR.**

When one parent is unwilling to change their smoking behaviour to protect the health of the children it will not be possible to reach an informal or even a mediated agreement that will reduce the children's exposure to second hand smoke. Such a case would need to be resolved by the court. When the case got to court, the judge may see the parent's unwillingness to change behaviour that has a strong probability of harming the children as an indication of a general unwillingness to put the best interests of the children first. If you decide to take it before a judge the judge can order the other parent to change their behaviour. If such an order is ignored, the parent's custody or access may be affected.

### **WHEN THE OTHER PARENT LETS HIS/HER FRIENDS SMOKE IN THE HOUSE**

It doesn't matter who the smoke is coming from, it is still dangerous. If you want your children to be fully protected from second-hand smoke, discuss with the other parent the importance of not allowing anyone to smoke inside the house, whether they live there or are only visiting.

### **WHEN THE OTHER PARENT MOVES OUT OF PROVINCE.**

Both custody agreements and custody orders from the court are valid and enforceable throughout the country regardless of where in Canada they were made. Many foreign countries will also enforce Canadian custody orders.

### **WHEN GRAND CHILDREN ARE BEING EXPOSED TO SECOND HAND SMOKE.**

If the court allows it, someone other than the actual parents of the child may make an application for custody. However, in a situation where the custody and access arrangements are working well, and exposure to second-hand smoke is the only main concern, you can always talk to the custodial or other parent. Take the same approach you would if it was your own child – research the dangers of second hand smoke and explain them to the parents, focussing on protecting the children and not

## MEASURES YOU CAN TAKE TO PROTECT YOUR CHILD

When discussing the situation with the other parent you may not be able to reach what you see as the ideal arrangement, but there are a number of possible options for reducing or preventing your children's exposure to second hand smoke. You may need to start with small steps like smoking in a different room, then work towards a completely smoke-free home.

The following is a list of options for reducing your children's exposure to second-hand smoke. Note that this is not an exhaustive list, and there may be other options that fit well with your situation.. Be sure to tailor any suggestions you make to the individual circumstances of your children and of the other parent.

**100% smoke-free homes are the best way to protect your children.**

### OPTIONS TO SUGGEST TO THE OTHER PARENT:

- **A 100% SMOKE-FREE HOME** — this means that no one, visitors or people who live there, can smoke in the home.

The safest situation is a home that is permanently smoke-free. If this is not an acceptable option you may be able to agree that the home will be smoke-free while the children are there, and perhaps for a certain period of time before they arrive.

- **KEEP THE CAR SMOKE-FREE** — even if you smoke with the windows open, there will still be tobacco smoke in the car. Although people tend to spend less time in the car than in the house, the exposure in a car may be just as bad because the same amount of smoke is trapped in a much smaller space.

If the other parent is unwilling to keep the car completely smoke-free, try for an agreement that it will be smoke-free while the children are in the vehicle.

- **CHANGE THE CUSTODIAL PARENT** — if both parents are equally willing and able to take responsibility for the children's upbringing, you may want to give custody to the parent who can provide a smoke-free environment.
- **INCREASE THE ACCESS TIMES** for the parent with the smoke-free home
- **HAVE SMOKE-FREE ROOMS** — If the other parent is unwilling to smoke outside, they may be willing to smoke only in a certain room of the house where the children will not enter. Because the smoke travels throughout the house, this option does almost nothing to protect the children in the house from second-hand smoke. However, it may be a necessary first step towards a smoke-free home.

## GOING TO COURT

While settling a custody dispute in court is usually an inexpensive and lengthy experience, there are times when it may be the only viable option. If your relationship with your child's other parent is such that you cannot agree on anything, even with the help of a mediator, or in-person negotiations undesirable, the only solution may be the court system. For those of you who need to go to court, remember that the court case is not a battle against the other parent, it is a way to establish the rights and protection of your children. In this contest, the judge will be your child's greatest ally.

### **WILL THE JUDGE REALLY CARE ABOUT SECOND-HAND SMOKE?**

Yes.

Over the past decade the issue of children's exposure to second hand smoke has been raised in an ever-increasing number of custody cases in Canada, and judges recognize that it is a serious issue. Judges are required by both federal and provincial law to make the best interests of the children the major factor in their decisions. That legislation also states that the physical health of the child is an important factor to be used in determining what exactly the children's best interests are. Courts have realized that protecting the physical health of children includes protecting them from second-hand smoke.

Judges will often not see exposure to second-hand smoke as the most important issue in determining custody. However, if a parent knowingly allows the children to be exposed to second-hand smoke, the judge may take that as evidence of a lack of concern for the children's welfare.

### **HOW DOES THE JUDGE DECIDE ISSUES RELATED TO CUSTODY AND ACCESS?**

In the small percentage of

custody cases that do go to court, smoking is occasionally an issue. Sometimes it is just mentioned as one of many factors affecting the ability to parent, and other times it can have an effect on the outcome. There does not seem to be any solid guideline regulating the use of second-hand smoke as a factor in custody decisions, with the judge instead making his or her decision based on the distinct facts of the case. They will take into account all of the factors listed above where applicable, but to what degree is not specified. Also none of the factors mentions smoking specifically, so it then truly depends on the facts of the case. If a child does not have smoking related illnesses parental smoking will be a less persuasive factor. If the child is sick and the illness can be linked to second-hand smoke exposure then the presence of second-hand smoke in the home will have a larger effect on the judge's decision.

### **HOW WILL THE COURT KNOW WHAT IS BEST FOR MY CHILDREN?**

Federal legislation and most provincial legislation set out issues to look at when determining the best interests of the child. Those elements include many which are relevant to issue of children's exposure to second-hand smoke, such as the child's

physical needs and the appropriate care or treatment to meet those needs; the home environment proposed to be provided for the child; and the ability of each parent seeking the custody or access to act as a parent.

### **HOW WILL THE COURT KNOW HOW MUCH EXPOSURE TO SMOKE MY CHILDREN ARE GETTING?**

To help them determine what type of custody arrangement will be in the best interests of the children, courts can order an assessment, where a social worker, psychologist or other professional will interview the children, the parents and any other adults closely involved with the children (including new partners of either parent) and write a report for the court detailing both the good and bad parts of the children's lives. An assessment report can include details such as the smoking habits of a parent (whether they smoke in the house, how much they smoke etc.), the health of the children and the willingness of the parent to take steps to protect the child from second-hand smoke. The results of an assessment are not binding on the court, but can be very persuasive evidence.

### **WHAT ARE THE POSSIBLE RESULTS IF AN AGREEMENT IS REACHED?**

An agreement reached

## GOING TO COURT (CONTINUED)

between you and the other parent or a court order from a judge can have various effects depending on the severity of the situation and on the other factors involved.

- The custody and access arrangements will remain the same
- The conditions for custody and access will change to require the parents to ensure greater levels of protection from second hand smoke for the children
- The custodial parent will be changed

- Access may be increased or decreased

### WHAT HAVE THE COURTS DONE IN THE PAST?

Unless both parents are equally qualified to care for the children, the judge will not use a parent's smoking habits as the deciding factor in awarding custody. But often judges will make conditions either to the custody or the access order, that the smoking parent must not smoke around the children and must make efforts not to expose them to second-hand smoke. The judge will use parental smoking as one of the

many factors affecting the children's best interest. Smoking has been looked at when the children have second-hand smoke exposure related illnesses and when they don't. the judge may question whether the parent's smoking habit is done in such a way that it puts the child at harm.

Judges have put access conditions which restrain the parent from smoking in the home while the child is there and also restrain anyone else from smoking in the home while the child is present.

## DEFINITIONS

**CUSTODY:** the right to make decisions about your child's care and upbringing. Children usually live with the parent who has custody.

You can have sole custody, where you are the only one entitled to make the decisions (this does not prevent you from working with the other parent to decide how best to raise your children), or joint custody, in which both parents share responsibility for deciding how to raise the children.

**ACCESS:** the legally enforceable right to spend time with a child. Access is generally granted to the parent who does not have custody, although in situations where it is not in the best interest of the children, the non-custodial parent will not be granted access. It is also possible for someone other than the child's parents, like grand-

parents, to be given access.

Terms of access can be clearly defined or can be open and flexible, done by allowing the non-custodial parent "reasonable access."

**CUSTODY AGREEMENT:** the agreement between the parents setting out which parent has custody (or whether they will have joint custody), and the terms for access for the non-custodial parent. The agreement can also include conditions for custody and access as well as details on how the children should be raised.

A custody agreement can be informal (an oral agreement), formally written up and signed by both parents, whether decided on their own or as the result of mediation, or it can be the result of a court decision, with the judge setting out any

terms and conditions for custody and access. The form of any custody agreement will depend on the relationship between the parents and whether or not they can reach an agreement without outside help.

**COURT ORDER:** if the parents are unable to resolve the custody and access issues by themselves, they can take their dispute to court where a judge will decide the issues for them. The judge will issue a court order which can deal with custody arrangements, access arrangements, and terms and conditions for custody and access.

If either parent does not follow the court order they will face penalties as set out in the legislation. These penalties can be fines, change of the terms of the order, or even imprisonment.

## OTHER RESOURCES ON CUSTODY

Information regarding custody and divorce can be found in the following legislation.

**Divorce Act** R.S.C. 1985 c.3  
<http://laws.justice.gc.ca/en/D-3.4/index.html>

**Provincial Court Act**, R.S.A. 1980, c. P-20  
<http://www.qp.gov.ab.ca/documents/acts/P31.cfm>

**Domestic Relations Act**, R.S.A. 1980, c. D-37  
<http://www.qp.gov.ab.ca/documents/acts/D14.cfm>

**Child Welfare Act**, S.A. 1984, c. C-8.1  
<http://www.qp.gov.ab.ca/documents/acts/C12.cfm>

**Family Relations Act**, R.S.B.C. 1996, c. 128  
[http://www.qp.gov.bc.ca/statreg/stat/F/96128\\_01.htm](http://www.qp.gov.bc.ca/statreg/stat/F/96128_01.htm)

**The Family Maintenance Act**, C.C.S.M. c. F 20  
<http://www.gov.mb.ca/chc/statpub/free/legdbindexena-f.html>

**The Child Custody Enforcement Act, C.C.S. M. c. C 360**

**Family Services Act, S.N.B. 1996, c. 13**  
<http://www.gnb.ca/acts/acts/f-02-2.htm>

**Child Youth and Family Services Act**  
<http://www.gov.nf.ca/hoa/statutes/C12-1.htm>

**Children's Law Act, RSN 1990, c. C-13**  
<http://www.gov.nf.ca/hoa/statutes/c13.htm>

**Maintenance and Custody Act**,  
R.S.N.S. 1989, c. 160  
<http://www.gov.ns.ca/legi/legc/>

**Children's Law Reform Act**,  
R.S.O. 1990, c. 12  
[http://192.75.156.68/DBLaws/Statutes/English/90c12\\_e.htm](http://192.75.156.68/DBLaws/Statutes/English/90c12_e.htm)

**Custody Jurisdiction and Enforcement Act**,  
R.S.P.E.I. 1988, c. C-33  
<http://www.gov.pe.ca/law/statutes/pdf/c-33.pdf>

**Civil Code of Quebec**, S.Q. 1991, c. 64  
<http://publicationsduquebec.gouv.qc.ca/en/frame/index.html>

**Children's Law Act**, S.S. 1990, c. C-8.1  
<http://www.qp.gov.sk.ca/publications/index.cfm?fuseaction=details&c=1628&id=2>