



Asking for a custody or access order

A Self-Help Guide:

How to complete Form 35.1: Affidavit in Support of Claim for Custody or Access

This guide is not legal advice. If you have questions or need advice about your case, you should speak to a lawyer.

If you do not have a lawyer, you may contact the Lawyer Referral Service operated by the Law Society of Upper Canada. The Lawyer Referral Service will provide the name of a lawyer in your area who practices family law. This lawyer will provide a half-hour consultation for free. The telephone number for the service is 1-800-268-8326 or 416-947-3330, if you are calling from within the Greater Toronto Area.

If you cannot afford a lawyer, you may be able to get legal aid. Legal Aid Ontario's toll-free line is 1-800-668-8258. To learn more about Legal Aid Ontario, you may wish to visit their website at www.legalaid.on.ca.

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INTRODUCTION

This guide is intended for people who are asking the court for an order for custody of or access to one or more children. This guide can be used by anyone, but is intended particularly for people who do not have a lawyer.

1. Do I need an order for custody or access?

You might need a custody order if:

- You are not living with your child's other parent and have not been able to negotiate or mediate custody or access arrangements; or
- You are looking after a child whose parents have died or are unavailable, unable or unwilling to care for him or her.

You might need a court order to prove you have custody if you have to:

- register a child for school;
- consent to medical treatment; or
- apply for a passport.

You may wish to speak to a lawyer about whether you need a custody or access order because you may be able to resolve issues relating to the children without going to court.

2. What does custody mean?

“Custody” means the legal ability and responsibility to make major decisions for a child's care and upbringing such as:

- where they will live;
- where they will go to school;
- what medical treatment they will receive; and
- what religion they will practise.

Different types of custody include:

Sole custody: One person has the responsibility and authority to make major decisions about a child's care and how they will be raised. Usually, but not always, the child lives primarily with the person with sole custody.

Joint custody: Two people, usually the parents, share the responsibility for making decisions for a child. It does not necessarily mean that a child will spend “equal” time with both parents.

Shared custody: Both parents share the responsibility for making decisions and caring for the child. Under the *Child Support Guidelines*, shared custody is where a child lives at least 40% of the time with each parent.

Split custody: Parents have more than one child together and each parent has one or more child(ren) living primarily with him or her.

3. What does access mean?

If the child lives with one parent, the other parent usually has a right to have contact with the child. In most cases, the parent who does not have custody spends time with the child. This is called visitation or access. Sometimes, other relatives, like grandparents, apply for access.

If there are safety concerns, a parent may not be allowed to have contact with his or her child or the access may be supervised or restricted in some way.

A person who has access to a child also has the right to receive information about the child's health, education and general situation.

Each family's situation will guide how often access will take place and for how long. If there are no safety concerns, it is usually best for children to spend enough time with both parents to develop and maintain strong and healthy relationships.

When deciding what type of access arrangements you would like for your child, you should think about what arrangements would work best for him or her. Consider the child's schedule and how far he or she has to travel to have access. Keep in mind that as children grow older, their schedules may change and access arrangements may have to be flexible.

4. What does "best interests of the child" mean?

Many parents are able to decide together what is best for their child. They know their child, what he or she needs, and are prepared to work together to make that happen even after they separate or divorce. Some parents work things out on their own—others get help from a professional such as a mediator, social worker or lawyer.

Some parents are unable to agree on custody/access arrangements and need a judge to review the child's circumstances and make an order. When a judge makes custody and access decisions, the law requires him or her to make the decision based on the best interests of the child.

The judge will make a decision based on **evidence**. If you are asking for custody of or access to a child, you must show how what you are asking for is best for the child. The judge will focus on the child, not the adults. The court will weigh the options available and make a decision about what arrangement he or she believes is best for the child.

Even if you and the other parent agree, the judge will still need to understand why the arrangement you have agreed to will be safe and appropriate for the child.

In Ontario, the laws governing custody and access cases are the [Divorce Act](#) and the [Children's Law Reform Act](#). Section 24 of the *Children's Law Reform Act* tells the court what things to consider when making an order in a child's best interests.

Best Interests Test

The law says that the judge must consider the following when making a decision in a child's best interests:

- The love, affection and emotional ties between the child and
 - each person who is entitled to or is making a claim for custody or access;
 - other members of the child's family who live with the child; and
 - the people involved in the child's care and upbringing.
- The child's views and preferences (if they can be determined).
- The length of time the child has lived in a stable home environment.
- The ability and willingness of anyone presenting a plan to:
 - provide guidance and education;
 - provide the essential things the child needs; and
 - take care of any special needs the child may have.
- Any plans that are proposed for the child.
- The permanence and stability of the family the child will live with.
- The ability of each person applying for custody or access to act as a parent.
- The relationship between the child and each person who is asking for custody or access (through blood or adoption).

The judge will not consider a person's past behaviour unless it is relevant to his or her ability to care for a child. The law says that it matters when determining custody or access if a person committed violence or abuse against:

- The person's spouse;
- A parent of the child who is the subject of the claim for custody or access;
- A member of the person's household; or
- Any child.

APPLYING FOR CUSTODY OR ACCESS

5. How do I know what steps I have to take?

The Family Law Rules set out the steps that you must take when you are involved in a family court case. The rules also contain the forms you must complete.

You can find the Family Law Rules and forms on the Ministry of the Attorney General's website at www.attorneygeneral.jus.gov.on.ca. On the home page, click "Family Justice" and then scroll down and click on "Family Law Rules" or "Family Law Rules Forms".

You can also find the forms at www.ontariocourtforms.on.ca.

6. What forms do I need?

If you are **starting a claim** for custody or access, you will need to complete the following forms:

- [Form 8: Application \(general\)](#)
- [Form 35.1: Affidavit in support of claim for custody or access](#)

If you are **responding to a claim** and want to ask for custody or access, you will need to complete the following forms:

- [Form 10: Answer](#)
- [Form 35.1: Affidavit in support of claim for custody or access](#)

If you are **bringing a motion to change** a final custody order, refer to the [Self Help Guide for Motion to Change a Final Court Order or a Support Agreement—How to Make a Motion to Change](#), which is available at the court house or at www.ontariocourtforms.on.ca.

The focus of this self-help guide is how to complete a Form 35.1: Affidavit in support of a claim for custody or access.

7. What if I need an order right away?

If possible, you should seek legal advice. If you do not have a lawyer, there are duty counsel and/or advice counsel available in many court locations. These lawyers may be able to assist you to complete your forms.

If your situation is an emergency and you must get an order immediately, provide as much information as possible in the affidavit. If you are in a crisis and are not sure what the details of your plan will be, indicate what your immediate plans are.

You can file an amended form with more details and updated information when your situation becomes clearer.

If you need to ask the court for an order right away, you will also have to file:

- [Form 14: Notice of Motion; and](#)
- [Form 14A: Affidavit \(general\)](#)

Refer to subrules [14 \(4\)](#) and [\(4.2\)](#) if your motion is urgent.

8. Will information in the court file be confidential?

Generally, members of the public can look at family court files, other than child protection files.

If you believe that the disclosure of any information contained in documents in your court file could lead to physical, mental or emotional harm to someone, including a child, you can file a motion with the court asking for an order restricting access to the court file.

TIPS FOR COMPLETTING FORM 35.1

- 1. Read the form carefully.**
- 2. Follow the instructions.**
- 3. If you are starting the case, you are the applicant.**
- 4. If you are responding to someone else's claim, you are a respondent.**
- 5. If you are not sure who should be a party, refer to [rule 7](#) of the Family Law Rules.**
- 6. If you are asked for a "full legal name", include the first, middle (if any) and last names.**
- 7. If you have legally changed your name or used any other names during your life, including when you married or remarried, include those names in paragraph 1.**

9. How should I start?

Before you start filling in the form, it would be a good idea to read Form 35.1 all the way through. Read the instructions and think about what information the judge will need to make a decision.

This affidavit is your chance to tell the court what your plan is to care for your child is and why it is a good one. **This affidavit is about your plan.** It is not about the other parent or person who might want custody or access. Focus on how your plan will give your child stability and the best chance to meet his or her potential.

When you have finished completing Form 35.1, it must be sworn or affirmed. This means that when you sign this form, it is the same as taking the witness stand and promising to tell the truth. (See question 23 for details.)

Everyone must complete Part A of the form. You only have to complete Part B if you are not the child's parent. (See Completing Part B at page 13.)

10. Where do I get the form?

If you have access to a computer, you can complete the form using a “guided interview” process by going to www.ontariocourtforms.on.ca. You will be asked a series of questions and the program will complete the form for you. Make sure to provide details in your answers. Check the completed form carefully and make any necessary changes before you take your documents to court.

If you have a computer and would prefer to fill out the form yourself, you can get a fillable word version of [Form 35.1](#) at www.ontariocourtforms.on.ca.

If you want to complete the affidavit by hand, you can get a copy from the court office or print off the [PDF version](#) from www.ontariocourtforms.on.ca.

11. How do I know if I “acted as a parent”? (Paragraph 3)

The court wants to know if you have any other children and if you have taken on a parenting role for any children other than those included in the application.

Include information about:

- Your biological children;
- Your adopted children;
- Your step-children;
- Children who have been in your legal custody; and
- Children for whom you were named a “legal guardian”.

If you have been a **foster parent** for a children's aid society (CAS), it is not necessary for you to list each of the children who have been placed with you. You can simply indicate that you are or were a foster parent and give the names of the CAS or foster care agency you worked for. You may also include the approximate dates when you were a foster parent.

12. How do I know if I was a party in a case? (Paragraph 4)

You were a party if you were:

- the applicant;
- the respondent; or
- added as a party by the court.

If you went to court to be a witness or to support someone, you were not a party.

13. What should I do if I am asked to attach court orders or endorsements? (Paragraphs 4 and 5)

Wherever possible, the court wants to see copies of any child protection, custody or access orders that were made in other family court cases involving you or the children. You should include copies of temporary and final orders if you have them.

If you have a copy of the order, attach it to the affidavit. If you do not have an order, but have a copy of the judge's handwritten endorsement, you can attach the endorsement instead.

If you don't have either the order or endorsement and you have time, you can ask the staff at the court office where the order was made for a copy.

14. In a child protection case, how do I know if I was a party or person responsible for the care of a child? (Paragraph 5)

You are a party to a child protection case if you are the child's parent or legal caregiver. You were a party to a child protection case if you were:

- the applicant;
- one of the respondents named in the case; or
- if the court added you as a party.

If a court placed a child in your care as part of a child protection case but did not make you a party, you would be a "person responsible for the care of a child" and should complete paragraph 5. Some examples would be if a court ordered that a child be placed with you:

- as a kinship care provider;
- under a supervision order; or
- under a s. 57.1 of the *Child and Family Services Act* custody order.

**15. What information does the court need about violence or abuse?
(Paragraph 8)**

The *Children’s Law Reform Act* requires a judge to consider whether anyone who is asking for custody of or access to a child has committed violence against certain people, when assessing that person’s ability to act as a parent.

You must disclose if you have committed violence or abuse against any of the following people:

- your spouse;
- a parent of the child in your application;
- a member of your household; or
- any child

In addition, if you are aware that any other party in your case has committed violence or abuse in any of the circumstances listed above, you should include information about that under paragraph 8.

16. Who should be included as a “caregiver” of the child? (Paragraph 9)

Anyone who had custody or legal responsibility for a child would be considered a “caregiver”. A caregiver would include a:

- parent;
- legal guardian; or
- children’s aid society.

Do not include babysitters or nannies or a person who looked after the child for a short period of time while the main caregiver was away.

If the child was in the care of a children’s aid society, you do not have to include the names of the foster parents. Just give the name of the CAS and the approximate dates the child was with that CAS.

**17. Why does the court need to know about people who live with me?
(Paragraph 10 (b))**

The court wants to know who else will be living with you to ensure that the child will be safe. If you are living with anyone (other than the children who are part of the application) and you do not know if he or she has a criminal record or if any of his or her children were in the care of a CAS, you must ask the person for this information. Make sure you tell him or her that you will be providing this information under oath, so it must be the truth.

18. What does “regular contact” mean? (Paragraph 10 (f))

If you are asking for custody of a child, the court wants to know what your plans are for the child to have contact or access with others. The court’s main concern is what contact the child will have with his or her parents, although it will want to know what the contact will be with other family or community members if those people are important to the child.

Remember, the court will only order no contact between a parent and a child if contact would be harmful to the child.

If you have worked out an access schedule with the other party, you can include that information here.

Examples of access arrangements:

Specific: “Every Tuesday and Thursday from 5:00 p.m. to 8:00 p.m. and every other weekend from Friday after school to Sunday at 6:00 p.m.”

Flexible: “Reasonable access as agreed by the parties.”

Flexible arrangements may be suitable for extended family members or if it is not possible to fix a schedule.

The access or contact plans should take into account the child’s schedule and what will work best for him or her.

19. What are “special needs”? (Paragraph 10 (g))

A child with “special needs” has needs above and beyond those that are typical for a child of his or her age and stage of development. The court wants to make sure that if a child needs extra help or services, you will do your best to make sure they are provided.

Some examples of special needs are:

- a medical condition that requires ongoing attention from doctors or visits to a clinic or hospital; or
- learning difficulties that require placement in a specific class, school or program.

**20. What kind of support from my family and friends should I include?
(Paragraph 10 (h))**

You do not have to include financial support. You could include if they will help out with babysitting or be available to help in times of emergency. The judge will want to know what supports you have to make your plan work for the child. For example: “My sister has agreed to look after the children every Tuesday afternoon.” If you do not have anyone who will be a reliable support person, it is fine to say “not applicable.”

21. What if the information in my affidavit changes?

Your situation may change several times, particularly if you have recently separated from your partner.

If the change is minor, you can swear an affidavit ([Form 14A](#)) in which you explain what has changed and if or how it might affect your plan. For example, you could file a short affidavit explaining that the child’s daycare has changed to an after-school program.

If the change is more substantial, you must complete a new affidavit so that the court has accurate and up to date information.

22. What if I made a mistake or forgot something in my affidavit?

If the mistake or inaccuracy is minor, you can file an affidavit ([Form 14A](#)) explaining the correct information.

If there is a lot of information that needs to be corrected, file an updated [Form 35.1](#).

23. How do I swear or affirm my affidavit?

If you are the parent of the child you are asking for custody of or access to, you will swear or affirm your affidavit at the end of Part A. If you are not a parent, you will need to swear or affirm your affidavit at the end of Part B.

To swear or affirm your affidavit, you will need to sign it in front of a:

- lawyer;
- notary public;
- justice of the peace; or
- commissioner for taking oaths.

If you do not have a lawyer, you can go to a court office. Many of the court staff are commissioners for taking oaths.

What is the difference between swearing and affirming?

Swearing: a faith-based oath to tell the truth

Affirming: a solemn promise to tell the truth

It is a criminal offence to knowingly swear or affirm a false affidavit.

COMPLETING PART B

You must only complete Part B if you asking for **custody** of a child and you are NOT the child's parent. **Parents are not required to complete Part B.**

You are a parent of the child if:

- you are the child's biological parent;
- you are the child's adoptive parent;
- a court has declared you to be the child's parent under Part II of the [Children's Law Reform Act](#); or
- you are presumed to be a father under [s. 8 of the Children's Law Reform Act](#).

24. When would I be presumed to be a father?

Unless there is proof that you are not a child's father, you will be presumed to be a child's father if you are male and one of the following circumstances applies to you:

- a. You were married to the child's mother at the time the child was born;
- b. You were married to the child's mother 300 days before the child was born;
- c. You married the child's mother after the child was born and acknowledged that you were the child's biological father;
- d. You were living with the child's mother 300 days before the child was born;
- e. You certified on the statement of live birth that you are the child's father; or
- f. A court has found you to be the father of the child.

25. What extra information do I have to give the court if I am not a parent? (Paragraphs 13 and 15)

You have to provide the court with a police records check that was completed not more than 60 days before you started your case.

You have to complete a form at court authorizing children's aid societies (CASs) to advise the court if they have or ever had a protection file concerning you.

26. How do I provide the police records check? (Paragraph 13)

You must provide a police records check that includes more information than a list of any convictions. The check will be similar to the checks done for people who apply to work or volunteer with children or other potentially vulnerable people.

If you received a police records check for the purpose of a custody application by a non-parent within the last 60 days:

- attach a copy of that document to your Form 35.1; and
- indicate in paragraph 13 if you have been found guilty of any criminal offences since the record check was produced.

If you do not have a recent police records check for the purpose of a custody application by a non-parent:

- go to your local police station and tell them that you are applying for a custody order and need a police check for court;
- make a note of the date you asked for the check; and
- indicate in paragraph 13 what date you asked for the check and the name of the police department.

Unless you have made arrangements to pick up the police record check, the police will send you a copy. You must serve and file a copy of the report within 10 days of receiving it.

27. What CAS information do I have to provide? (Paragraph 15)

You must ask for a report from every CAS operating in any place in Ontario where you have lived since you turned 18 or became a parent (whichever came first). Court staff will assist you to determine which CASs you have to request a report from.

The form you will complete will identify the appropriate CASs and authorize those CASs to send the form back to you and the court indicating:

- If they have or had any protection records open in your name;
- When the file or files were opened; and
- When the file or files were closed, if applicable.

Example: If, as an adult, you have lived in Windsor, Ottawa and Hamilton, you will have to request a report from:

- The Windsor-Essex Children's Aid Society;
- The Children's Aid Society of Ottawa;
- The Hamilton Children's Aid Society; and
- The Hamilton Catholic Children's Aid Society.

The CASs have 30 days to send a response to you and the court. You can indicate on the form whether you want the CAS to mail or fax the form back to you.

28. What kind of information will be included in the CAS report?

The CAS will only report that they had records relating to you if you were an adult who was:

- the subject of a protection investigation; or
- receiving services from the CAS.

Types of files that will be included in the report include situations where:

- the CAS investigated an allegation of abuse or neglect where you were a parent or caregiver to the child;
- the CAS started a court application involving one or more of your children; or
- one or more of your children were or are in the care of the CAS.

Types of files that will NOT be included in the report include situations where:

- you were a child in the care of a CAS, including on extended care and maintenance;
- you were the child of a family receiving service;
- you were an employee of a CAS;
- you were a foster parent;
- you were a kinship care provider; or
- you adopted a child through the CAS.

29. What if I don't want the court or other parties to know that I was involved with a CAS? (Paragraph 16)

Most of the time, the judge will want to know if you were a client of a CAS. You may, however, be able to make a case that the information is not relevant to your current claim for custody and should be kept private.

If a CAS sends you a report that says you have a record with them and you do not want this information to be shared, you should immediately file a motion with the court asking that the report not be given to the other parties or put in the court file.

You do **not** have to give notice to the other party that you are making this request.

You can use a [Form 14B: Motion Form](#) and include a short affidavit ([Form 14A](#)) explaining why you were involved with the CAS and why you do not think this information is relevant to the current case. You should also ask the court to seal your motion material so that it will not be shared with the other party.

IMPORTANT: This motion must be brought within 20 days of the date the court receives the last CAS report. You will get a notice from the court telling you when they received the last report. If you do not bring a motion within the 20 days, the reports will be shared with the other party and included in the court file.

30. Will the court have any other information?

Court staff will search court records and produce a report indicating if you or the child or children have been involved in any other family court cases. Court staff will give you an associated case list, which will list any family cases involving people with your name.

If the list contains cases that did not involve you, you can swear or affirm an affidavit that says in which cases you were not a party.

The judge can also ask court staff to conduct a search of criminal court files and produce a list of cases involving you or people with your name.

31. When do I swear the affidavit?

Wait until you have completed all of the paperwork with the court staff before you swear your affidavit. You cannot swear that you have done something before you have done it. (See question 23 for more information on swearing or affirming Form 35.1.

It is a criminal offence to knowingly swear or affirm a false affidavit.

Finding the legislation, rules and forms

Children's Law Reform Act: http://www.e-laws.gov.on.ca/Download?dDocName=elaws_statutes_90c12_e

Family Law Rules: http://www.e-laws.gov.on.ca/html/regis/english/elaws_regs_990114_e.htm

Court forms: www.ontariocourtforms.on.ca/english/