

Resources

Legal Aid Ontario

www.legalaid.on.ca or call 1-800-668-8258, Monday to Friday, from 8 a.m. to 5 p.m. for general information and referrals to lawyers who may assist low-income clients

Law Society Lawyer Referral Service

<http://lsrs.lsuc.on.ca/lsrs/> or call 1-800-268-8326 for referrals to private lawyers; first 30 minutes free

Community Legal Education Ontario

www.cleo.on.ca, for information on family law, immigration law and the court system in general. Its online booklet, *Family Law Resources in Ontario*, provides information on how to find a lawyer, look up information online, and get help at the courts.

Custody and access issues for immigrants and people at risk of deportation



LEGAL AID ONTARIO
AIDE JURIDIQUE ONTARIO

This brochure provides important information for refugee claimants who are parents and separated from their partners.

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Immigration status and custody issues

I'm not a Canadian citizen and don't have legal status in Canada. Can I still get custody of my children?

Your immigration status has no effect on your rights to child custody and access, your ability to bring a custody or access claim, or your ability to respond to a claim.

As long as your child lives in the province, Ontario courts can hear your case and make a decision. This is true for anyone who is:

- a Canadian citizen
- a permanent resident
- a conditional permanent resident
- a person with no legal status in Canada
- a person who has submitted an immigration application.

What if I have to leave Canada?

If the court thinks that either you or the other parent may leave Canada and move to another country, the courts can take this information into account in making a custody or access order. This is true if you are leaving voluntarily or because you're being deported.

Maria and Filip had a brief relationship and broke up shortly after Bobby was born.

Filip visited from time to time and paid some expenses, but Maria has always taken care of Bobby. Maria does not have legal status in Canada and is at risk of being deported back to her home country.

The judge will base the decision on Bobby's best interests. The decision might be that Maria should have custody of Bobby, whether or not she must return to her country of origin.

I don't have legal immigration status, but I want to go to family court on a family matter. Will going to court affect my status?

If you do not have legal immigration status in Canada, starting a family proceeding could put you at risk of deportation.

When you go to family court, the proceedings require you to provide contact information on family court documents. This means immigration authorities may find out where you are, start the deportation process by sending you a letter requiring that you attend an immigration interview.

What does the judge consider in making a custody or access order?

Generally, the court places a high level of importance on the child spending time with both parents. The judge will make a decision based on the best interests of the children, and that means considering issues such as:

- which parent can best provide the child with a stable, loving, and safe home environment?
- what are the child's preferences?
- which parent is best able to meet the child's needs?
- is it in the best interests of the child to live in another country or to stay in Canada (if the court believes that one parent may leave the country with the child, either voluntarily or because they face deportation)?

The judge may:

- make a temporary order granting custody and access terms while both parents are in Canada, and order that different terms will apply if one parent leaves Canada
- feel that it is in the child's best interests to be in the custody of one specific parent, regardless of whether or not that parent remains in the country
- make a non-removal order, stating that the child cannot be removed from Canada. Such an order will not stop your deportation. If you are facing deportation, are awarded custody and then receive a non-removal order for your child, speak to an immigration lawyer right away.

Leila and Peter have been divorced for two years. Their seven-year-old son Joey spends each week with Leila and most weekends with Peter.

Joey is being treated for difficult medical problems at the local children's hospital. Leila is at risk of being deported back to her home country.

Based on the best interests of the child, it is possible that the judge could decide that both parents should have joint custody while Leila is in Canada, but that sole custody should be granted to Peter if Leila is deported.

Can I be deported without my child?

Yes. If you do not have custody of your child, you can be deported without the child.

If you do have custody of your child, the court will work with you to make sure that your child can leave the country with you, even if there is a non-removal order for your child. However, you will need to take active steps to make sure that the non-removal order is cancelled. You should speak to a lawyer as soon as possible.

Can I prevent my deportation by bringing a case to family court?

No. Ontario's family courts do not have the ability to stop a deportation order.

It is possible for your deportation to be delayed until a final custody order is made:

- if a final custody order has not yet been made
- you are still making arguments before the judge and
- you and the other parent are in a genuine custody dispute over who can best care for the child.

Even then, your deportation may not be delayed. The courts will, in general, not delay deportation where a custody claim is brought solely to try to avoid or delay a deportation order.

Is there anything I can do to avoid deportation and stay in Canada with my child?

You may be able to bring an immigration application to try to obtain legal status to remain in Canada, and in some cases, to try to stop or delay your deportation.

For example, you may be able to submit a **Humanitarian and Compassionate (H&C) application** to Citizenship and Immigration Canada, asking that you be allowed to stay in Canada. For this application to succeed, you must show that you are established in Canada and that it would be a hardship for you to return to your country of origin. In deciding your H&C application, immigration officials must take into account the best interests of your child.

Immigration officials have the authority, however, to deport someone whose H&C application has not yet been decided – and then decide whether to grant the application once the person is already outside of Canada.

In a small number of cases, you may be able to take additional steps to delay or stop deportation:

- Once your H&C application is submitted, you may be able to hire a lawyer to ask the Federal Court to delay your deportation until your H&C is decided.
- If you are fearful of returning to your home country, you may also want to speak to an immigration lawyer about the possibility of making a refugee claim, or another application called a **Pre-Removal Risk Assessment**.
- You can also talk to an immigration lawyer to see if there are any other options available to you, such as family sponsorship.

Dmitri and Jenna have a difficult relationship. Both want sole custody of their daughter Marika.

Dmitri has threatened to take Marika back to his country of origin.

He does not have legal status in Canada. He has submitted a H&C application, but remains at risk of deportation.

The judge makes a ruling granting Dmitri sole custody, with weekend access to Jenna.

Legal issues with the other parent

I am afraid the other parent will leave Canada with my child and move back to their country of origin. Is there a way to stop that?

Once a parent leaves the country with a child, it is very hard to get the child returned to Canada. It is better to try to stop the child from leaving Canada. Here are some strategies:

- You can ask the court for a non-removal order for your child. This order says that the child cannot leave Canada without a court order or written permission from you. When someone crosses the border with a child, immigration officials generally ask to see the court order or letter before they allow the person to leave Canada with the child.

- You can ask the court for an order allowing you or the court to keep the child's passport. Sometimes the court can also keep the other parent's passport.
- You can refuse to sign your child's passport application. In order to obtain a Canadian passport for a child, both parents must sign the passport application.

If you have custody, and the other parent takes your child out of the country without a court order or your permission (also called "parental child abduction"), you should:

- contact a lawyer for advice and/or
- contact the Vulnerable Children's Consular Unit, which is part of Canada's Department of Foreign Affairs, Trade and Development, for advice and help. You can reach them at 1-800-387-3124 or find more information online at travel.gc.ca/child.

To ensure that Dmitri does not voluntarily leave the country with Marika, the judge may make a non-removal order that says Marika cannot be taken outside of Canada.

If immigration officials tell Dmitri he will be deported soon, Dmitri can bring an emergency motion to the family judge, asking for the non-removal order to end. Dmitri may also be able to ask the judge to specifically state that the emergency motion will be granted unless there are big, unexpected changes in the situation.

The judge made a non-removal order stating that my child cannot leave Canada unless I get a court order or permission from the other parent. What happens if I am deported?

Whether or not you can take your child with you depends in part on whether you have custody of the child. In some cases, the family court judge will give one parent sole custody, whether or not both parents remain in Canada. In other cases, the judge will make two custody and access orders: one will apply during the time both parents live in Canada, and the other will apply if one parent is deported.

What can I do to take my child with me?

Your situation	What to do
The judge makes a non-removal order, and you know you may be deported	You can bring an emergency motion to the family court, asking the judge to cancel the non-removal order of your child. You also can ask that the judge grant the emergency motion that will be in effect unless there are significant, unexpected changes in your case.
You have custody	The family court will help to make sure that you can take your child with you when you leave Canada.
You have custody, but are facing deportation, and a non-removal order is in place	Speak to an immigration lawyer as soon as possible.

When my spouse and I were married, we made an agreement stating that if we ever separated, I would lose custody of our children. Now we're separating. Does that mean I have no chance of getting custody or access?

No. Ontario's *Family Law Act* says that when a couple marries, they cannot agree, in advance, on who gets custody or access should they later separate. The part of your agreement that sets out custody or access arrangements cannot be enforced.

Does it matter if we made the agreement in Canada or in our country of origin?

No. It does not matter whether the agreement was made in Canada or in another country. The court will make a decision based on the best interests of the child.

Notes

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