

Chapter 3

Do not use this guide for legal advice. It provides information only, and that information only applies to British Columbia law, services, and benefits. Consult with a lawyer for advice related to your specific situation. Laws, benefits, policies, and procedures are always changing. Always double-check the information you intend to rely on with the appropriate agency or with your lawyer. Indigenous people's traditions and customary laws are outside the scope of this guide; however, we want to acknowledge those customs and traditions and emphasize that nothing in this guide should be misinterpreted as superseding or taking away from them.

Custody and guardianship

Many of the grandparents we spoke with expressed anxiety over not knowing what it meant to have custody or guardianship of their grandchildren. For many, no one ever explained to them what these words mean, or what rights and responsibilities come along with them. This chapter will explain some of the different legal relationships you can have with your grandchild. Later chapters have information about other arrangements, such as adoption and access or contact (the right of a child to visit with important people in his or her life).

First, it's important to understand that there are two different laws that might apply, depending on your circumstances. The [Divorce Act](#), a federal law in force throughout Canada, talks about the care of children in terms of "custody" and "access." The *Divorce Act* only applies where parents are married spouses and have started a court proceeding under the *Divorce Act*. The [Family Law Act](#) is a provincial law that applies to everyone in British Columbia. It talks about people who are "guardians" and make decisions about children by exercising "parental responsibilities." The time a guardian has with a child is "parenting time," and the time someone who isn't a guardian has with a child is called "contact." The *Family Law Act* applies to everyone, including married and unmarried parents and to grandparents.

Custody is a [Divorce Act](#) term that means having day-to-day care and control of a child, and the rights and responsibilities of a parent toward a child. Someone who has custody has the authority to make big decisions for a child, such as decisions about what sort of education, healthcare, or religious training a child will receive.

When married parents separate and have to go to court to resolve their disputes, they may apply for orders about custody under the *Divorce Act*, and the court may give custody to both of them (called "joint custody") or to just one of them (called "sole custody"). Where a custody order has been made in respect of a child, a grandparent who wants to have the day-to-day care of a child must apply for custody under the *Divorce Act*.

Access is a [Divorce Act](#) term that describes a right to have time with a child and the right to ask for and be given information about the education, health and welfare of a child.

Married parents normally ask for orders about access to define their separate schedules of time with the child. Where an access order has been made, a grandparent who wants to have time with his or her grandchild must apply for access under the *Divorce Act*.

Guardianship is a term under the [Family Law Act](#) that refers to the person or people who have the obligation to care for a child and make important decisions on behalf of the child. Most of the time a child's guardians will be his or her parents, and they are usually the child's guardians while they are together and after they separate. It is possible for a parent not to be a guardian and for other people to become a guardian of a child. It is also possible for a child to have more than two guardians, and for a person to be removed as the guardian of a child.

A grandparent who wants to be appointed as a guardian of his or her grandchild must apply to court to be appointed, unless the grandparent has become the guardian of a child through a parent's will or through a special form (Form 2) in the *Family Law Act* Regulation. The *Family Law Act* does not allow people other than parents to be appointed as guardian through an agreement.

Parental responsibilities is the term the [Family Law Act](#) uses to describe the sorts of decisions a guardian may make about a child, and includes things like where the child lives and goes to school and about what sort of education, healthcare, or religious training a child will receive. An agreement or order can make all of a child's guardians jointly responsible for all decisions, or it can make only one or more guardians responsible for certain kinds of decisions to the exclusion of the other guardians. If there is no agreement or order about how parental responsibilities are shared, all guardians are presumed to have responsibility for all decisions involving the child.

Only guardians have parental responsibilities. A grandparent who wants to have parental responsibilities in respect of a child must apply to be appointed as the guardian of a child and apply for parental responsibilities in respect of the child. These applications can be made at the same time.

Parenting time is a [Family Law Act](#) term that means a guardian's time with a child. During a guardian's parenting time, the guardian has day-to-day care and control of the child and the right to make decisions about day-to-day issues involving the child. Only guardians have parenting time with a child.

A grandparent who wants to have parenting time with a child must apply to be appointed as the guardian of a child and apply for parenting time with the child. These applications can be made at the same time.

Parenting arrangements is the general term for any plans that have been made for the sharing of parental responsibilities between guardians and the allocation of parenting time among guardians.

Contact with a child is how the [Family Law Act](#) describes the time someone who isn't a guardian has with a child. Anyone make an agreement or ask for an order about contact with a child, including parents who are not guardians, grandparents and other relatives of a child, and other people who have a relationship with a child.

Someone who has contact does not have day-to-day care and control of the child and does not have the right to make decisions about day-to-day issues about the child.

Parenting arrangements does not include any plans that have been made for a person's contact with a child.

Types of custody arrangements under the [Divorce Act](#)

There are two types of custody: **Sole custody**: when only one person has custody of a child and **Joint custody**: when custody is shared between people.

- **A person may have sole custody of a child** as a result of a court order or an agreement. A person with sole custody has the primary home of the child and the child usually lives only with that person. If you have sole custody of your grandchild, you also get to make all of the decisions when it comes to how to raise him or her.
- **People may have joint custody of a child** as a result of a court order or an agreement. Joint custody does not always mean that a child lives equally in both homes, although it certainly can mean that. People with joint custody share decision-making responsibility for the child.

Custody orders usually say whether a person has sole or joint custody. However, you may come across the terms "split custody" and "shared custody." These terms are part of the federal [Child Support Guidelines](#) and could show up in a child support order. Split custody and shared custody are ways of describing how often a child lives with each parent or guardian in a joint custody arrangement, and these terms are important when the court calculates child support.

Types of parenting arrangements under the [Family Law Act](#)

Under the *Family Law Act*, one, two or more people can be the **guardians** of a child. The act doesn't talk about "sole guardianship" or "joint guardianship," just about people who are guardians and people who are not guardians. If more than one person is the guardian of a child, they are each guardians of the child.

Guardians raise the children in their care by the exercise of parental responsibilities. These are listed in section 41 of the act and include things like deciding where the child will live, deciding where the child will go to school and which activities the child will participate in, and deciding how the child will be treated if the child is sick.

Most of the time, all guardians will be able to exercise all **parental responsibilities**, and if this is the case the guardians are required to consult with each other about important decisions affecting the child. However, a court order or a written agreement can allocate one or more parental responsibilities to one or more guardians, so that just those guardians have the right to make decisions about those issues. It is possible to be a guardian and have no parental responsibilities. This might be the case where the guardian has not been very involved in the child's life or if the guardian and other guardians have a history of conflict.

The relationship between custody and guardianship

Guardianship under the *Family Law Act* and custody under [the Divorce Act](#) mean almost but not quite the same thing. Both include the right and responsibility to make important decisions for a child. An order for custody also includes the right to have the child present, subject to an order for access. A person who is a guardian has been appointed to be the caretaker of child, and acts as a trustee of the child's welfare and interests.

How to apply for custody or guardianship

You should speak with a lawyer if you want to get custody of your grandchild or be appointed as the child's guardian. The lawyer will listen to your story and explain your options to you.

One of the biggest legal issues facing grandparents who seek custody or guardianship of their grandchildren is that the court tends to favour the wishes of the birth parents. Although the only legal consideration is the best interests of the child, the court will generally assume that parents are able to decide what is in the child's interests and have the right to determine how their child is raised. If you want custody or guardianship of your grandchild, you will have to prove that it is in the child's interests that you have custody or be appointed as a guardian, and that often means proving that something is wrong with how the child is being cared for. Grandparents may have a tough case to make, especially if both parents are still in the picture.

Do not be discouraged! Many grandparents have successfully been awarded custody of their grandchildren, who are now leading happy and secure lives. Remember, the chances of success depend entirely upon the facts of each case.

Below is a brief description of the law that applies to custody and guardianship, followed by brief sections on the different legal options available to grandparents if they want to arrange to have their grandchild live with them, with or without the consent of the child's parents. The options are different depending on whether the Ministry of Children and Family Development is involved (about half the grandparents we surveyed had their grandchild placed with them by the ministry). Some of these options require that your grandchild's parents cooperate with you.

There is a table at the end of this chapter that sets out the different options, how to pursue them, and which laws apply to them.

Laws governing custody and guardianship

Each of the following laws has rules about when a grandparent can apply for custody or guardianship of a child. There is a table at the end of this section that illustrates which law might apply to your particular situation, with more information about getting custody in the next section.

Divorce Act

If your grandchild's parents are married and are in court getting a divorce, the [Divorce Act](#) says the court can award custody on application to them or to "any other person." However, because you are not one of the spouses you will have to get the court's permission before you can make such an application. Ask a lawyer or **duty counsel** for help with this. (Duty counsel are lawyers who work at most courthouses; they are available to give you free legal advice, assist with paperwork, and sometimes speak for you in court. However, their help is informal and they do not take on cases long-term.)

A grandparent cannot begin a court proceeding under the *Divorce Act*, since the act only applies to disputes between married people. You must instead ask to be "joined" to the parents' court proceeding before asking for custody. You will also have to go through this extra step if the grandchild's parents already have a divorce order that talks about custody.

Family Law Act

[The Family Law Act](#) says that anyone can apply to be appointed as the guardian of a child. A grandparent can apply to be appointed as the guardian of a child at any time; you do not have to wait for the child's parents to begin a court proceeding. A grandparent who is a guardian can also apply to have parental responsibilities in respect of the child and to have a certain amount of parenting time with the child.

A grandparent can also apply to have a certain schedule of contact with a child without being appointed as the child's guardian.

If a child's parents are involved in a court proceeding, the *Family Law Act* allows grandparents to apply to court to "intervene" in the matter. This would allow you to present an argument to the court to say why the court should or should not make a particular order, such as which of the parents the child should live with and how parental responsibilities should be shared between the parents. It will not allow you to ask for an order for yourself. Intervenors can only make arguments about the orders the parties are asking for.

[Child, Family, and Community Service Act](#)

If a child protection report is made about your grandchild, social workers will assess the report, make a decision about how to respond and take the least disruptive measures to keep the child safe. The ministry can remove your grandchild from the parent’s care only if there is no other less intrusive way to keep your grandchild safe. Whenever a child is removed, a presentation hearing will be scheduled no more than seven days after the child is removed. You can attend the presentation hearing and ask to be made a “party” to the court proceeding, which would mean that you could speak and ask questions in court, and present any evidence you think is important. (Duty counsel can help you ask for this status. They are lawyers who work at most courthouses who are available to give you free legal advice, assist with paperwork, and sometimes speak for you in court. However, their help is informal and they do not take on cases long-term).

The ministry can also apply to the court to intervene in a Family Law Act proceeding if it considered in the best interests of the child to do so (section 97.1 of the CFCSA)

Which laws apply

<i>Situation</i>	<i>Relevant Law</i>
Child’s parents are married/common law	The law regarding custody and access is the federal <i>Divorce Act</i> . The law regarding guardianship, parenting arrangements and contact is the provincial Family Law Act (FLA) .
Child’s parents are unmarried	The law regarding guardianship, parenting arrangements and contact is the provincial Family Law Act (FLA) . The <i>Divorce Act</i> does not apply.
Ministry is involved due to a child safety concern	If there already is a court proceeding under the provincial Child, Family and Community Service Act (CFCSA) regarding your grandchild’s care, the law regarding custody and access is the <i>CFCSA</i> (It is possible for a grandparent to apply for guardianship and parenting time or contact in the Provincial Court under the Family Law Act while a child protection court case is going on. A family court judge will hear both the <i>FLA</i> application and the child protection proceeding at the same time. If grandparents want to become guardians and end the ministry’s involvement, this is the application they make.)

Custody and access under the Divorce Act

It is important to seek legal advice before beginning an application for custody of or access to your grandchild under the *Divorce Act*. For more info see *Chapter 8 – Getting Legal Help*.

Most of the time, grandparents will apply for orders about the care of a grandchild under the [Family Law Act](#). The only times grandparents must apply for custody of or access to a grandchild under the *Divorce Act* are when the parents are married and have started a court proceeding asking for orders about the children under the *Divorce Act* or when there is already an *Divorce Act* order for custody or access.

Orders about custody and access can be temporary or final. However, it is important to note that final orders for custody or access are never really final. A parent or other relative can always ask the court to change them if there is a significant change in circumstances. For more information about the court system, court orders, and how to apply for custody or access, see the *Chapter 9 -Using the Courts*.

Orders about custody and access can also be made with the agreement of everyone involved. These are called “consent orders” and are discussed below.

Only the Supreme Court can make orders under the *Divorce Act*.

Guardianship under the Family Law Act

Most of the time, the guardians of a child will be the child’s parents. However it is possible for a child to only have one guardian and for a parent to be removed as the child’s guardian. If someone other than a parent, including a grandparent, wants to become the guardian of a child, that person must apply to court for an order appointing him or her as the child’s guardian.

It is important to seek legal advice before beginning an application for guardianship in respect of your grandchild under the [Family Law Act](#). For more information see *Chapter 8 – Getting Legal Help*.

Applications for appointment as guardian are made under section 51 of the Family Law Act and notice must be given to the child’s parents, to any adult who lives with a cares for the child, and, if the child is a member of a treaty first nation like the Nisga’a, Maa-nulth or Tsawwassen First Nations, to the first nation government. If the child is 12 years old or older, the child must usually consent to the appointment.

The rules of the Provincial Court and the Supreme Court have special provisions for people who are asking to be appointed as the guardian of a child. Under Rule 18.1 of the Provincial

Court Family Rules and Rule 15-2.1 of the Supreme Court Family Rules, the person applying for guardianship must provide a special affidavit that requires the person to:

- describe their relationship with the child
- describe their plan for caring for the child
- describe any incidents of family violence that might affect the child
- describe any court proceedings about children the person has been involved with, including child protection proceedings
- provide a copy of a recent Ministry for Children and Family Development records check
- provide a copy of a recent protection order registry records check
- provide a copy of a recent criminal records check
- disclose any new criminal charges and any criminal convictions that do not appear on the criminal records check

This affidavit must be completed within a certain number of the days of the hearing of the application to make sure that the information is as up to date as possible. This affidavit must always be completed, even when everyone involved agrees to the appointment.

Orders appointing someone as a guardian can be temporary or final. However, it is important to note that final orders for guardianship are never really final. A guardian, a parent or another relative can always ask the court to terminate someone's guardianship of a child if there is a significant change in circumstances. For more information about the court system and court orders, see the *Chapter 9 - Using the courts*.

Parenting arrangements and contact under the Family Law Act

It is important to seek legal advice before beginning an application for parenting arrangements (parental responsibilities and parenting time) or contact in respect of your grandchild under the [Family Law Act](#). See *Chapter 9 - Getting Legal Help*.

Grandparents can apply for orders about the care of a grandchild under the *Family Law Act* at any time, whether there is a court proceeding between the parents or not. The only time grandparents cannot apply for orders under the *Family Law Act* is when the parents are married and there is already a *Divorce Act* order for custody or access.

Only guardians can ask for orders about parenting arrangements, but an application to be appointed as a guardian of the child can be made at the same time as an application for orders about parenting arrangements. Anyone, including grandparents, can apply for contact with a child.

Orders about parenting arrangements and contact can be temporary or final. However, it is important to note that final orders for parenting arrangements and contact are never really final. A guardian, a parent or another relative can always ask the court to change them if there is a significant change in circumstances. For more information about the court system, court orders, and how to apply for parenting arrangements and contact, see *Chapter 9 - Using the Courts*.

Orders about parenting arrangements and contact can also be made with the agreement of everyone involved. These are called “consent orders” and are discussed below.

Both the Supreme Court and the Provincial Court can make orders under the [Family Law Act](#). However, if a grandparent is asking for an order that would change an existing order, the application must be in the same court that made the earlier order.

Custody and access through a written agreement

Parents can formally give custody rights to a grandparent through a written agreement. There are many different ways agreements can be written. Earlier in this chapter is list of all of the possible arrangements that can be made for custody and access.

An agreement can also spell out access arrangements, which means how often someone, such as a parent or grandparent, can visit the child, whether the person can do so without supervision and whether there are other conditions on the person’s access.

Written agreements on custody and access can be filed in court and have the strength of a court order when it comes to enforcing custody and access rights. You can file a written agreement at your local court registry office.

Parenting arrangements and contact through a written agreement

Anyone who is the guardian of a child, including parents who are guardians and grandparents who are guardians, can make an agreement about how parental responsibilities and parenting time with the child will be shared. An agreement about parental responsibilities can say which responsibilities will be shared and which will not, and how the guardians will resolve disputes about important decisions. An agreement can also spell out parenting time arrangements, which means how often a guardian can visit the child, whether the person can do so without supervision and whether there are other conditions on the person’s parenting time.

Parents cannot make an agreement that anyone other than a parent is a guardian, even if everyone agrees that the person should be a guardian. A grandparent who wishes to be appointed as the guardian of a child must apply to court as described above.

The guardians of a child can make an agreement for contact with anyone who is not a guardian, including a grandparent who is not a guardian. An agreement for contact will spell out how

often the person can visit the child, whether the person can do so without supervision and whether there are other conditions on the person's contact with the child.

Consent orders

If you and the parents agree about who should have custody and access, or how parenting arrangements (parental responsibilities and parenting time) and contact should be shared, you can sign a consent order instead of, or as well as, making a written agreement.

The easiest way to get a consent order is by through the desk order process. No one has to appear in court: your lawyer just prepares the papers, everyone involved signs them, and then they go to a judge for the judge to review. You can get a desk order in both the Provincial Court and the Supreme Court.

If a court proceeding has started, you can also get a consent order if one or all of the parties appear in front of a judge at a hearing and describes the terms of the order and explains why the court should make the order. This can also be done in a less formal way through a family case conference in the Provincial Court or a judicial case conference in the Supreme Court. *See Chapter 7 – Alternatives to Court*

You can also get an order appointing someone as the guardian of a child as a consent order, however the person who is being appointed must complete the special affidavit that is used whenever someone is asking to be appointed as a guardian, and the judge may not make the order if he or she does not believe the appointment is in the child's best interests. Applications for orders appointing someone as the guardian of a child are discussed above.

You can get help with your consent order from family duty counsel (lawyers who give brief advice for free to those who qualify).

Unopposed orders

Sometimes orders about children are made without everyone's consent but without anyone fighting them; for example, the parents might not show up in court, or maybe they cannot be located at all. If this is the case, an unopposed order may be made in their absence.

This kind of order is a little more difficult to get, because the courts are more comfortable when they know that everyone understands what is going on and the nature of the order that is being asked for. However, these orders are also fairly common. To get one, you go to court in much the same way as you would for a consent order, and you have a hearing.

Orders after a court proceeding ends

Judges can also make orders about children after a court proceeding has ended, whether the proceeding ended with a trial or a settlement. However, it is important to remember that final orders about children are never really final. A guardian, a parent or another person can always ask the court to change the order if there is a significant change in circumstances after the court proceeding has ended. *See Chapter 9 – Using the Courts.*

Guardianship after the death of a guardian

Under the [Family Law Act](#), a person who is the guardian of a child, including a parent who is the guardian of a child, can appoint someone else to be the guardian of their child in the event of their death. The person who is appointed can be a grandparent, another family member or anyone else the guardian believes will do a good job.

Appointments like this can be made through the guardian's will or if the guardian completes and signs a special form (Form 2) provided in the Family Law Act Regulation.

Guardianship after the incapacity of a guardian

Under the [Family Law Act](#), a guardian of a child can appoint someone else to be the guardian of the child in the event they become unable to carry out their responsibilities as a guardian. These appointments can only be made by a guardian who is facing a permanent loss of mental capacity or a fatal illness. The person who is appointed can be a grandparent, another family member or anyone else the guardian believes will do a good job.

Appointments like this can be made if the guardian completes and signs a special form (Form 2) provided in the Family Law Act Regulation

Becoming a parent through adoption

Grandparents can legally adopt their grandchildren. The consent of the children's parents is usually required. When you do this, you become the legal parent of the child in place of the child's birth parents, and you get all the same rights and responsibilities as a birth parent, including guardianship of the child. More information about adoption is provided in *Chapter 5 - Adoption.*

Orders from other provinces

Dealing with orders about children from another province or territory, called extraprovincial orders, can be tricky and it is important to get advice from a lawyer.

Extraprovincial orders made under [the Divorce Act](#) can be registered in the in the Supreme Court under section 20 of the *Divorce Act*. These orders can be registered in either the Supreme

Court and the Provincial Court under section 75 of the *Family Law Act*. Extraprovincial order made under the local laws of another province can also be registered under the [Family Law Act](#).

When an extraprovincial order is registered, called being “recognized,” the order can be enforced as if it was an order of a British Columbia court.

You can apply on your own to ask the court to recognize an extraprovincial order (see <http://www.ag.gov.bc.ca/courts/forms/pfa/pfa809.pdf> for the application). However, you should get legal advice first. Information on how to find a lawyer or get advice is provided in *Chapter 8- Getting Legal Help*.

How orders are enforced

There are times when a parent will turn up at a grandparent’s home and take the children, despite the fact that the children live with the grandparents because of a court order, or withhold a child even though the grandparent has access or contact with the child. If a judge awards you custody or access, or parental responsibilities, parenting time or contact, and someone prevents you from exercising those rights, there are serious legal consequences.

The Criminal Code makes it an offence to take a child away from a guardian who has the care of a child or from a person who has custody of a child. It is also an offence to disobey a court order.

You can also apply to enforce an order or agreement for parenting time or contact under section 61 of the [Family Law Act](#). If the court agrees that you have been wrongfully denied parenting time or contact, the court make a number of orders to enforce the order or agreement, including:

- giving you make-up time
- requiring a person to attend counselling
- requiring everyone involved to go to mediation
- requiring repayment of any expenses incurred because of the denial
- requiring supervision when the child is exchanged

When nothing else will make the person obey the order or agreement, the court can make an order requiring the police to intervene and take the child to the person who is entitled to parenting time or contact, or an order sending the person who has denied the parenting time or contact to jail for up to 30 days.

Applications to enforce an order or an agreement about the care of a child can be made without letting the other person know about the application. This is only appropriate in extreme cases. Most of the time, these applications are made following the normal process that requires giving the other person plenty of notice about the application.

Legal options when the ministry is *NOT* involved

Legal option	Law
Written agreement with parent for contact	Family Law Act , section 58
Written agreement with parent for parenting arrangements if all parties are guardians	Family Law Act , section 44
Orders for parenting arrangements or contact	Family Law Act , sections 45, 59
Order for the appointment of a person as a guardian	Family Law Act , section 51
Consent orders for parenting arrangements or contact	Family Law Act , sections 45, 59, 219
Unopposed orders and orders without notice for parenting arrangements or contact	Family Law Act , sections 45, 59, 200
Orders for parenting arrangements or contact after court proceeding has ended	Family Law Act , sections 47, 60, 215
Order for custody or access in divorce proceeding	Divorce Act , section 16
Order for custody or access after divorce proceeding has ended	Divorce Act , section 17
Appointment of grandparent as guardian by will or Form 2	Family Law Act , section 53
Appointment of grandparent as guardian in case of guardian's incapacity by Form 2	Family Law Act , section 55
Adoption	Adoption Act , entire act

Legal options when ministry or DAA (Designated Aboriginal Authority) *IS* involved due to a child safety concern

Legal option	Law
With parent's agreement and ministry approval, child with grandparent;	
Grandparent becomes a restricted foster parent	Child, Family and Community Service Act (CFCSA) , various sections
Ministry places child with grandparent under an Extended Family Program (EFP) agreement (note: the parents	CFCSA section 8

keep guardianship rights)	
Ministry places child with grandparent under a Voluntary Care Agreement	CFCSA , various sections
Apply for guardianship under Family Law Act (<i>Child, Family and Community Service Act</i> and <i>Family Law Act</i> hearings are joined)	Family Law Act , section 51
Interim custody order (grandparent has custody of child until next hearing)	CFCSA , section 35(2)(d)
Temporary custody order (expires on a specified date)	CFCSA , section 41(1)(b)
Transfer of custody from ministry to grandparent before a Continuing Custody Order (permanency option)	CFCSA , section 54.01
Transfer of custody from ministry to grandparent after a Continuing Custody Order (permanency option)	CFCSA , section 54.1
Adoption	Adoption Act, entire act

This Legal Guide will be updated regularly. We are counting on readers to alert us to any errors, omissions or unclear content. Please send your feedback to “Communications” via: office@parentsupportbc.ca.