

Know Your Rights



Disclosure, privacy and parenting



Canadian HIV/AIDS
Legal Network | Réseau
juridique
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VIH/sida

The information contained in this publication is information about the law, but it is not legal advice. For legal advice, please contact a lawyer in your region.

Copies of this brochure are available at www.aidslaw.ca



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1. I am living with HIV. Do I have to tell my child (or children) about my condition?

In most cases, you do not have to tell your child that you have HIV. Your personal health information, including your HIV status, is private, personal information. It is your choice whether or not to disclose your HIV status to your children and to other family members, with the exception of those with whom you have a sexual relationship.

Almost all household interactions and parenting roles pose no real risk of

transmitting HIV to anyone else. Your child cannot get HIV from hugging you, sharing meals with you, or playing games with you, for example. However, note that, in the rare case that your child is exposed to a risk of HIV transmission (e.g., in the case of an accident where blood may have mixed), you are required to disclose your HIV-positive status to your child and/or to health-care providers in order to ensure that your child receives appropriate medical care.

2. What can I do if someone tells my child or my child's friends that I am living with HIV?

The answer depends on who tells them. While no one should reveal your personal health information to your child without your consent, if it does happen you may not have legal recourse. In Canada, privacy laws are somewhat of a patchwork. In practice, it is often difficult to control the flow of information, and legal remedies are limited if a breach of privacy occurs.

If you choose to disclose your HIV status to a person with a legal obligation

to maintain your privacy, such as your employer, that person would be prohibited from telling your child without your consent. If a neighbour, co-worker or acquaintance tells your child about your HIV status, they may not have the same legal duty of confidentiality. If you believe that your privacy has been violated, contact a lawyer, legal clinic or your provincial/territorial privacy commissioner for advice.

3. Can my child be taken away from me because I am HIV-positive?

No. People living with HIV can be excellent parents and there is nothing about being HIV-positive, on its own, which justifies taking your children

away from you. HIV is not transmitted through casual contact, so there is usually no risk to a child who lives with a person living with HIV.

4. I have separated from my spouse. Will my HIV-positive status affect our custody agreement, child support payments, or the primary residence of the child?

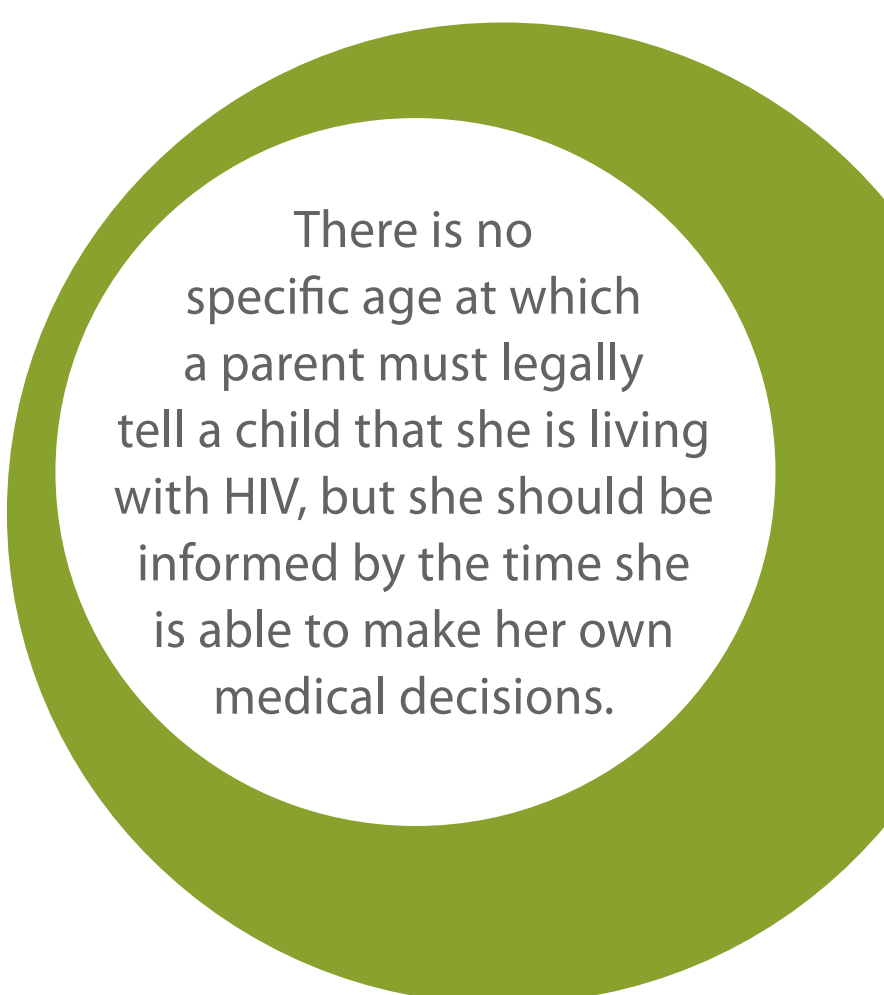
Your HIV status on its own should not affect decisions regarding custody or residence of your children. Your rights and responsibilities as a parent do not change because you are HIV-positive.

The key consideration in determining where your children will live, who will have the ability to make decisions for them, and who will have a duty to care for them, is the best interests of the children. Factors considered in determining children's best interests include such things as: their wishes and feelings; their physical, emotional and/or educational needs; their age, sex, background and other relevant characteristics; any harm suffered or risk of suffering harm; and the capacity of each parent (and other involved persons) to meet the child's needs, now and in the future.

While your HIV status alone should not be a determining factor with respect to your custody agreement, child support payments, or the primary residence of the child, issues related to your HIV-positive status or your child's HIV-positive status may be taken into consideration. For example, if you have HIV-related disabilities which affect your ability to care for your child, these limitations and how they can be accommodated are legitimate considerations in deciding what arrangement is in the best interests of your child. Similarly, any special needs of the

child, including specialized medical care and support services, will likely be considered in determining what arrangements are in the best interests of the child.

It is important to note that while your HIV-positive status on its own should not be a determining factor, HIV remains a stigmatized condition and in bitter disputes, an ex-partner may try to use it to discredit or demoralize you. Speak with your lawyer and your support workers for advice if you fear that your ex-partner may breach your privacy or try to use your HIV-positive status to undermine your parental rights.



There is no specific age at which a parent must legally tell a child that she is living with HIV, but she should be informed by the time she is able to make her own medical decisions.

5. A child protection worker or social worker is involved with our family. Am I required to disclose personal health information about my HIV-positive status or my child's HIV-positive status to that person?


Social workers can be involved with families for many reasons, and in most situations it would not be legally necessary to disclose HIV status to a social worker. It may, however, be helpful to disclose that you or your child is living with a chronic illness or episodic disability, in order for the social worker to be able to provide appropriate supports and referrals. Whether to disclose HIV-positive status is a personal decision, unless knowledge of it is required for the protection of the child or someone else who has been exposed to a significant risk of infection.

Child protection workers (some of whom are social workers) are specifically mandated to protect children from abuse and neglect. Each province/territory has its own child protection legislation, but the underlying rationale and powers are very similar throughout the country. Child protection agencies (e.g., Children's Aid Society or Child and Family Services) investigate allegations of physical, sexual and emotional abuse, neglect, abandonment and caregiver incapacity. They provide guidance and counselling to families, and provide care to children under their protection.

In the majority of cases, knowing your HIV status or that of your child's would not be necessary in order for child protection workers to do their work. However, certain HIV-related issues may be relevant considerations. For example, whether you and/or your child are taking recommended treatment and accessing support services, or whether ill-health or periods of disability were affecting your ability to meet your child's needs — this information would be relevant to a child protection worker who is assessing your family situation or providing support and counselling to your family. If an HIV-positive child is being taken into care by a child protection agency, the child's medical information should be provided to the child protection agency and/or foster parent in order to ensure that the child receives uninterrupted treatment and support.

If HIV-positive status is known by a social worker or child protection worker, the worker is required to keep that information confidential and use it only with respect to official duties. Sometimes it is helpful to disclose so that the worker can facilitate engagement and cooperation of different agencies. Generally, it is advisable to stay engaged constructively and cooperatively with child protection workers, and to try to understand the specific concerns they are investigating. It could have a negative impact on your relationship if a worker discovers later on that a relevant issue or problem was not shared with them.

Note that cooperating with child protection workers does not necessarily mean that you need to disclose everything about your life to them or give them consent to access all of your records. You have the right to set limits and only reveal information that is relevant to their concerns, or only consent to them accessing relevant information from third parties (e.g., daycare or school staff, health-care providers). Consulting with a lawyer can help you understand where to set the limits and how best to protect your rights and the rights of your children. Asking to speak with a lawyer or to have a reasonable amount of time to think through your options is not a reason for child protection to apprehend a child; these are reasonable requests, but you must follow through on them and not use them in an attempt to delay the process.



**Your
rights and
responsibilities as a
parent do not change
because you are
HIV-positive.**

6. My daughter is living with HIV. At what age do I have to tell her that she is HIV-positive?

There is no specific age at which a parent must legally tell a child that she is living with HIV, but she should be informed by the time she is able to make her own medical decisions. Therefore, by the time the child has the capacity to begin consenting to medical care, someone should explain her HIV-positive status to her so that she can be involved in her own care, treatment and support.

There is no set age when a child becomes capable of consenting to medical care. Doctors have to use their best judgment in each case to decide if a child is capable. Courts have decided that children of different ages are capable of consenting — it depends on how mature the child is and how serious the medical treatment is. Generally, children are considered legally capable of consenting if they understand the need for a medical treatment, what the treatment involves, and the benefits and risks if they receive the treatment. If the health-care provider explains these things and decides that the child understands them, and that the health care is in the child's best interests, the health-care provider can treat the child without permission from the parents or guardians.

Another consideration about the timing of disclosure is sexual activity.

As HIV is a sexually transmitted infection, youth should be informed of their HIV-positive status before they are sexually active so that they can make informed decisions regarding their sexual activities and safer sex. As well, under Canadian criminal law, people living with HIV are required to disclose their HIV-positive status to sexual partners before engaging in any activities that pose a “realistic possibility of HIV transmission.” Sexually active HIV-positive youth therefore need to understand not only HIV prevention options but also legal obligations. (Please see the resources at www.aidslaw.ca/criminallaw for further information regarding the criminal obligation to disclose HIV-positive status.)

Disclosure is complex. It can be difficult deciding when to tell a child about HIV in the family. But, even if parents try to protect their children from learning about the illness, children may sense that something is wrong, overhear a conversation, or wonder about medications and medical tests. It's therefore advisable to seek support from a pediatric clinic or AIDS service organization experienced in dealing with children. Such facilities can assist with providing age-appropriate information and support.

For further information

- The Theresa Group, *How Do I Tell My Kids?* (1999, revised 2009).
- Family Law Education for Women, *Dealing with the Children's Aid Society: What Parents Should Know* (2013), webinar based on Ontario law.
On-line: www.onefamilylaw.ca/en/webinar.

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