Family law

Sarah Hannigan – FALL 2016 (Redmond/Jimale)

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| OVERVIEW |

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|  | ***FLA* (BC)** | ***DA* (Fed)** |
| **Superior Court** | * Property division
* Debt/assets division
* Child custody (after *separation*)
* Spousal support (after *separation*)
* Adoption
 | * Divorce
* Custody (after *divorce*)
* Child support (after *divorce*)
* Spousal support (after *divorce*)
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| **Lower Court** | * Child custody (after *separation*)
* Spousal support (after *separation*)
* Child protection
 |   |

* Family law matters are dealt w/under provincial legislation (***FLA***)
* **Exception:** The federal ***DA***deals w/divorce—thus, only superior courts can hear divorce cases

**Conflict b/w federal & provincial orders**

* Since introduction of ***DA***, there has been the possibility of conflict between provincial & federal law orders
* *McKee v McKee* [1951] 🡪 ONSC had Jx to make an order for the custody of a child resident in ON, despite the existence of an inconsistent custody order made in another jurisdiction (California)
* When there’s a conflict between provincial & federal law orders, the provincial order is deemed **inoperative** if the two are inconsistent (e.g. require payments of different amounts of support)
* *Emerson v Emerson* [1972] 🡪 Wright J held that the welfare of the child was the primary consideration, and that he was free to order maintenance under the provincial law despite an inconsistent order under the ***DA*** (but the authority of this case is limited/destroyed by *Ramsay v Ramsay* [1976] ONCA & *Re Hall and Hall* [1976] BCCA)
* In some Canadian Jxs (not BC), Unified Family courts have been established to simplify complex jurisdictional issues

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| CREATING RELATIONSHIPS |

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| MARRIAGE |

### ESSENTIAL VALIDITY (FEDERAL Jx)

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| **1. CAPACITY** |
| **Age** 🡪 Governed by BC’s ***Marriage Act*** (**PRESUMPTION of VALIDITY** [**30**]**:** nothing in either 28/29 *invalidates* a marriage)

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| < 19 | **28(1)** Marriage must not be solemnized/licensed unless **consent** is given in writing by: **(a)** living parents, **(b)** legal guardians, or **(c)** the Public Guardian & Trustee or BCSC**28(2)** If consent is being withheld “unreasonably or from undue motives”, apply to BCSC for declaration |
| < 16 | **29** Must not be solemnized/licenced unless the BCSC makes an order |

**Consanguinity & affinity** 🡪 Federal ***Marriage (Prohibited Degrees) Act***

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| ✓ | **2(1)** Subject to (2), persons related by consanguinity/affinity/adoption aren’t prohibited from marrying each other by reason only of their relationship |
| ✗ | **2(2)** No person shall marry another person if they’re related lineally, as bro/sis, or half-bro/half-sis, including by adoption |

**Single** 🡪 If not single, then marriage is void *ab initio* (treated as invalid from the outset)Bigamy: knowing you’re married and marrying someone else without the 2nd spouse knowing / Polygamy: being married to multiple partners at once / Polyamory: being in a consensual relationship between ≥2 partners**Sanity** 🡪 Test: must understand the nature of the marriage K and the duties & responsibilities it createsCts have interpreted *insanity* very narrowly—it’s difficult to establish that a person didn’t understand the nature of the marriage**Opposite sex** 🡪 No longer req’d for capacity as per *Reference re Same Sex Marriage*, [2004[; now in ***Civil Marriage Act***:

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| **Preamble** Every individual is equal before & under the law; courts in the majority of provinces have recognized the right of s-s couples to marry; only equal access to marriage would respect the rights of s-s couples to equality |
| 2 Marriage, for civil purposes, is the lawful union of 2 persons to the exclusion of all others |
| **3** Officials of religious groups are free to **refuse** to perform marriages that aren’t in accordance w/religious beliefs |

* Sask Human Rights Tribunal held that marriage commissioners = part of gov’t (only PEI allows marriage commissioners to refuse)
* Commissioners in Sask/MB unsuccessfully complained about being obliged to state their willingness to marry all couples or resign
 |
| **2. CONSENT** (*CMD*) 🡪 no consent = marriage *void* |
| **Test:** Whether s/he was capable of understanding the nature of the K s/he was entering into (*Hunter v Edney*, 1881)* **Requisite understanding** 🡪 “the essence of a marriage K is an engagement between a man & a woman to live together and to love one another as husband & wife to the exclusion of all others” (Wong LJ in *Durham v Durham, 1885*)
* Subsequent conduct can ratify a marriage w/o consent (seems inconsistent if marriage is found void—there’s nothing to ratify)

**Duress** 🡪 Genuine & reasonable fear [AUS court held that it included non-violent, controlling parental coercion]**Mistake/fraud** 🡪 Voids consent; must go to the **nature of the ceremony** or the **identity of a party*** Interpreted very strictly—lying about name/age/race/wealth/occupation is insufficient grounds to void consent
* If you don’t know that you are going through the ceremony = grounds for an **annulment**
 |
| **3. CAPACITY to PERFORM SEXUAL ASPECTS** (*CMD*; *Juretic*) 🡪 no consummation = marriage *voidable* (\*high threshold\*) |
| **Rationale:** Not *procreation*, but belief that heterosexual sexual relationships are the foundation of marriage (outdated?)**Consummation** 🡪 **Test**: Practical impossibility of consummation—must be caused by phys/psych’l defect (*Deo v Kumar*)* Willful & persistent refusal/obstinacy ≠ not ground for an annulment (*Deo v Kumar*, [1993] BCSC)
* Not enough for parties to simply establish that they haven’t had intercourse since date of marriage
* If party alleges that spouse is impotent by reason of psych defect, that defect must amount to “an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only w/incapacity”
* A marriage on the basis of immigration reasons, even when there’s no consummation or intention to live together, is not alone sufficient grounds to dissolved the marriage (*H v H*, 1953)
* A mere capricious refusal to consummate the marriage doesn’t qualify as a psych defect—however, refusal to *attempt* consummation *may* justify the inference of impotence if refusal prolonged or based on the circumstances
* Court won’t grant a declaration of nullity unless claimant has demonstrated the elements noted above
* Even if undefended, courts haven’t granted declarations where relevant facts haven’t been established
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| ***CMD v RRS*,** [2005] BCSC Couple married in Vegas only hours after meeting, then retired to their separate hotel rooms (no consummation). Wife claims marriage is void *ab initio* bc: **(1)** No consent (drunkenness) 🡪 **MARRIAGE ≠ VOID**—Went through deliberate & time-consuming steps to marry**(2)** Lack of consummation 🡪 **MARRIAGE ≠ VOID**—Failed to prove an inability to consummate (high burden) |
| ***Juretic v Ruiz*,** [1999] BCCA Posted ad for spanish-speaking wife, but wife didn’t want to be touched. Husband stopped trying after 2 attempts. Lived together & represented themselves as a couple for ~1yr. Husband claims marriage is void due to lack of consummation. **MARRIAGE ≠ VOID**—Husband’s situation fell short of an “unconquerable repugnance” |

### FORMAL VAILIDY (PROVINCIAL Jx)

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| **FORMALITIES** (BC’s ***Marriage Act*** functions to validate marriages) |
| **9 Religious marriages** 1. Presence of 2 witnesses + the religious rep.
2. The ceremony must be performed in a public manner
3. Both parties to marriage must be present at the ceremony
 | **20 Civil marriages**1. Presence of 2 witnesses + marriage commissioner
2. Parties + witnesses must declare they don’t know of any lawful impediment to the marriage
3. Must say to each other: “I call on those present to witness that I, X, take Y to be my lawfully wedded wife/hubby/spouse”
 |
| **Marriage licences** (req’d by **8**)**15(1)** Marriage licence is req’d for religious rep. to solemnize a marriage **15(2)** Licence must **(a)** bear the date on which it’s issues, and **(b)** authorize the solemnization of the marriage within 3mo |
| **Manner of registration*** Must register in a book [**25(1)**]
* **25(2)** Memorandum must be signed by **(a)** each party to the marriage, **(b)** ≥2 witnesses **(c)** the religious rep./marriage commissioner/treaty First Nation designate who solemnized the marriage
* If you negligently lose/injure the marriage register, you’re liable to a penalty of up ≤$50 [**27**]
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**Validity of foreign marriage** (*CMD v RRS*)

* *Formally valid* under the place of celebration; *essentially valid* under the place of each party’s pre-nuptial domicile
* **Equality rights** apply to everyone—they recognize a marriage that’s *formally* & *essentially* valid, even if not recognized in country of domicile

**Validity of customary marriage**

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| ***Connolly v Woolrich*,** [1867] LC Couple lived for ~30yrs in accordance w/Cree customs (wife = Cree). Husband married another woman in accordance w/Qc civil law & the Catholic faith. Husband left his entire state to his new kids, but half-Cree son claimed he was entitled because his parents had been legally married & they never divorced. **🡪 CUSTOMARY MARRIAGE = VALID** (can be proved by *oral evidence* + *prolonged cohabitation* even if not accompanies by any religious/civil ceremony) |

**Polygamous marriages**

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| ***Criminal Code*** [**293(1)**]1. Indictable offence to enter into any form of polygamy/conjugal union w/≥1 person at a time, whether/not it’s a binding marriage
2. Indictable offence to celebrate/assist/be a party to rite/ceremony/K/consent that purports to sanction a polygamous relationship
 |
| ***Polygamy Reference*,** [2011] BCSC [**Bauman CJ**] 🡪Court considered the constitutionality of ***CC* 293**:**293 is constitutional** 🡪 compelling evidence of harm to women, children, society & institution of marriage* **293**’s objective: prevention of harm to women, children & society = pressing & substantial
* Having found a reasoned apprehension that polygamy is associated w/numerous harms; criminalization = way of limiting them
* **293** seeks to advance the institution of monogamous marriage, a fundamental value in Western society
* The prohibition is consistent with, & furthers, Canada’s international human rights obligations
* “the prevailing view through millennia in the West has been that exclusive & enduring **monogamous marriage** is the best way to ensure paternal certainty and joint parental investment in children. It best **ensures that men & women are treated w/equal dignity & respect**, and that husbands & wives (or s-s couples), and parents & children, provide each other with mutual support, protection, and edification through their lifetimes

**Exception** 🡪 provisions that could criminalize the actions of young people (women b/w ages 12-17) should not stand* In criminalizing “every one” in a prohibited union, **293** includeswithin its ambit young persons who are parties to such unions
* To the extent **293** is contrary to principles of fundamental justice guaranteed by ***Charter*** **7**, by criminalizing young persons (12-17) who marry into polygamy, AG hasn’t demonstrated that this infringement is justified in a free & democratic society
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| MARRIAGE-LIKE RELATIONSHIPS (COMMON LAW SPOUSES) |

***FLA* s3(1):** Spouses & relationships between spouses

**(1)** A person is a spouse under the ***FLA*** if the person

1. is married to another person, or
2. has lived with another person in a ***marriage-like relationship***, and

**(i)** has done so for a continuous period of at least 2 years, or

**(ii)** Has a child with the other person (*\*except in Part 5\**)

**(2)** A spouse includes a former spouse.

**(3)** A relationship between spouses begins on the earlier of the following:

**(a)** the date on which they began to live together in a marriage-like relationship;

**(b)** the date of their marriage.

**(4)** For the purposes of this Act,

**(a)** spouses may be separated despite continuing to live in the same residence, and

**(b)** the court may consider, as evidence of separation,

**(i)** communication, by one spouse to the other spouse, of an intention to separate permanently, and

**(ii)** an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

**Indicia of a marriage-like relationship** (*Takacs v Gallow*)

[**Huddart J:** These organizing Qs permit a TJ to view the relationship as a whole in order to determine whether parties lived together as spouses. Reference to them will prevent an inappropriate emphasis on one fact to the exclusion of others & ensure that all relevant factors are considered.]

1. ***SHELTER***
* *Did the parties live under the same roof?* 🡪 *Takacks v Gallow*
* *What were the sleeping arrangements?*
* *Did anyone else occupy/share the available accommodation?*
1. ***SEXUAL & PERSONAL BEHAVIOUR***
* *Did the parties have sexual relations? If not, why not?* 🡪 *Takacks v Gallow*
* *Did they maintain an attitude of fidelity to each other?* 🡪 *Takacks v Gallow*
* *What were their feelings towards each other?* 🡪 *Takacks v Gallow*
* *Did they communicate on a personal level?*
* *Did they eat meals together?*
* *What—if anything—did they do to assist each other w/problems or during illness?*
* *Did they buy gifts for each other on special occasions?*
1. ***SERVICES***
* *What was the conduct of the parties in relation to:*
	+ *preparation of meals?*
	+ *washing & mending clothes?*
	+ *shopping?*
	+ *household maintenance?*
	+ *other domestic services?*
1. ***SOCIAL***
* *Did they participate together or separately in neighbourhood & community activities?*
* *What was the relationship & conduct of each of them towards members of their respective families, & how did families behave towards the parties?* 🡪 *Takacks v Gallow*
1. ***SOCIETAL***
* *What was the attitude & conduct of the community toward each of them, and as a couple?*
1. ***ECONOMIC SUPPORT***
* *What were the financial arrangements between the parties regarding the provision of or contribution toward the necessaries of life (food/clothing/shelter/recreation/etc.)?*
* *What were the arrangements concerning the acquisition & ownership of property?*
* *Was there any special financial arrangement between them which both agreed would be determinant of their relationship?*
1. ***CHILDREN***
* *What was the attitude & conduct of the parties concerning children?*

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| ***Takacs v Gallow*,** [1998] BCCA **Huddart J** 25yo man died in MVA. Lived w/GF in a committed, exclusive, & intimate relationship from 1988-92 while studying @ university. Effectively lived together, but maintained separate residences. Intended to marry upon GF’s graduation. Man had “indiscretion” w/3rd party—GF found out & affair ended. **🡪 Q:** *Was the relationship sufficiently marriage-like as to consitute “living together as husband & wife”?* **YES**—“[They] were living together as husband & wife, in a **relationship analogous to marriage**, however troubled” |

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| ENDING RELATIONSHIPS |

**Divorce Statistics**

* Over the last century, w/the introduction of “no fault” divorce & changes to the ***DA*** (e.g. 3yr separation 🡪 1yr separation), there has been a **steady increase in the divorce rate**
* 2008: 70,226 divorces in Canada (approx. 21.1 divorces per 10,000 population)
* 2008: 19.4% were for marriages ≤5yrs; 22.6% for marriages 5-9yrs; 41.6% for marriages 10-24yrs; 16.4% for marriages ≥25yrs
* 2008: 93.6% of divorces due to separation of ≥1yr; 3.7% due to adultery; 1.6% due to mental cruelty; 1.2% due to physical cruelty
* 37.6% of marriages entered in 2008 are expected to end in divorce before the 25th year of marriage
* 43.1% of marriages entered in 2008 are expected to end in divorce before the 50th year of marriage
* Steady increase of “silver separations”/”grey divorces”—*potentially the result of extended lifespans?*

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| The *DIVORCE ACT* |

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| **8 (1)** Court may grant a divorce on the ground that there has been a **breakdown of the marriage****(2)** Breakdown of a marriage is established only if:**(a)** spouses have lived **S&A for ≥1yr** immediate preceding the determination of the divorce profeeding and were living SA at the commencement of the proceeding; or**(b)** spouse against whom the divorce proceeding is brought has, since celebration of the marriage:**(i)** committed **adultery**, or **(ii)** treated the other spouse with **physical/mental** **cruelty** of such a kind as to render intolerable the continued cohabitation of the spouses |

**Separate & apart** (*not fault-based*)

* Must have been living separate & apart for **≥1yr immediately preceding** the determination of the divorce proceeding and at the **commencement** of the proceeding [**8(2)(a)**]
* The 1yr period won’t be considered to have been **interrupted**/**terminated** when the spouses resume cohabitation in order to attempt reconciliation, so long as the period(s) of cohabitation is **<90days** [**8(3)(b)(ii)**]

**Other grounds** (*fault-based*; rarely invoked)[**8(2)(b)**]

* **Benefit:** Immediate divorce (no need to wait 1yr)—however, sometimes proving fault will take >1yr anyways…
* The onus of establishing fault (adultery/cruelty) is on the claimant; must be proven on case-by-case basis

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| **Adultery** [**8(2)(b)(i)**] | **Cruelty** [**8(2)(b)(ii)**] |
| **Def’n:** Voluntary sexual intercourse b/w a married person and another person of the opposite sex other than spouse (*Orford v Orford*, [1921] ONSC; *Kahl v Kahl*, [1943] ONSC) | **Def’n:** Physical/mental cruelty that makes the continued cohabitation of the spouses intolerable (***DA* s 8(2)(b)(ii)**) |
| **Appl’n:** In recent years, courts have moved towards a “broader” definition of adultery (*P(SE) v P(DD)*) | **Appl’n:** Case law has established that the treatment must be grave & weighty, going beyond incompatibility |
| **Case Law:***Orford* 🡪 Artificial insemination = adultery (hubby unaware); but *Maclennan*, [1958] Scotproduced opposite result *P(SE) v P(DD)*, [2005] BCSC 🡪 “Broader” def’n of what constitutes adultery (i.e. intimate sexual activity) | **Case Law:** *Balasch v Balasch*,[1987] Sask 🡪 It’s not the *intention* of the spouse to be cruel, but rather the ***subjective effect*** of the treatment on the other spouse |

**Bars to divorce** [**11(1)**] 🡪 *It’s the duty of the court to satisfy itself that…*

1. there has been no collusion in relation to the divorce application (collusion = dismissal of application)
* **Collusion** [**11(4)**] 🡪 agreement/conspiracy for purpose of subverting the administration of justice
1. reasonable child support arrangements have been made for any children of the marriage
2. there has been no condonation/connivance on the part of the spouse bringing the proceeding
* If so, court can dismiss the divorce application unless granting divorce would serve the public interest
* This provision only applies to divorces under **8(2)(b)** (other grounds)

**Duties imposed by the *Divorce Act***

* **Duty of legal advisors** [**9**] 🡪 to discuss possibility of reconciliation & inform spouse of marriage counseling or guidance facilities (unless it’s clearly inappropriate to do so)
* **Duty of court – reconciliation** [**10**] 🡪 to be satisfied that there is no possibility of reconciliation

**Jurisdiction** [**3**]

1. Court has Jx to hear divorce proceeding if either spouse has been ordinarily a **resident in the prov for ≥1yr**
2. When spouses file for divorce in 2 different Jxs, the Jx **where the 1st proceeding was commenced** prevails
3. If proceedings were commenced on the same day, the **Federal Court** has exclusive Jx

**Same-sex divorce**

* First same-sex marriages were performed in Canada on June 10, 2003 after the common law heterosexual def’n of marriage was affirmed as unconstitutional by the ONCA
* However, ***DA***’s def’n of “spouse” wasn’t changed at the same time 🡪 **Result:** same-sex couples were legally able to marry, but unable to divorce without also bringing a constitutional challenge
* This anomaly was corrected on July 20, 2005: **spouse** 🡪 either of 2 persons who are married to each other
* On June 26, 2013, the ***Civil Marriage of Non-Residents Act*** (amendment to the ***Civil Marriage Act***) was enacted, making valid in Canadian law all marriages of non-residents whose marriages were performed in Canada
	+ **Result: *CMNRA***allows same-sex couples to marry & divorce in Canada if not possible in country of residence

**Same-sex adultery**

* BC (*P(SE)*) + NB (*Thebeau*) = only provs in which CL def’n of adultery has been expanded to incl. same-sex adultery
* *Thebeau v Thebeau*, [2006] NB: Consequence of infidelity shouldn’t be confined to heterosexual spouses—to do so grants licence homosexual spouses to be sexually unfaithful & violate vows, untrammeled by the prospect of a fault-based dissolution of their marriage (this ≠ equal treatment)

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| ***P (SE) v P (DD)*, [2005] BCSC** → **ADULTERY ENCOMPASSES SAME-SEX RELATIONS** |
| **Facts:** | Couple been married 17yrs. Wife discovered husband was having affair w/ man. Wife filed for divorce on the basis of adultery. Husband signed an affidavit acknowledging the adultery & didn’t contest the divorce. TJ initially refused to rule on divorce because the common law def’n of “adultery” didn’t incl same-sex relations.  |
| **Issue:** | Does the common law def’n of “adultery” include sexual acts w/individuals of the same sex? **YES** |
| **Bauman CJ:** | * ***Charter*** values should guide consideration of current CL def’n of adultery
* The CL would be anomalous if same-sex spouses weren’t bound by the same legal & social constraints against extra-marital sexual relationships that apply to heterosexual spouses
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| CAPACITY to SEPARATE |

* Basically, court in *Wolfman* adopted the hierarchy of capacity from *Calvert*

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| ***Wolfman-Stotland v Stotland*, [2011] BCCA** → **CAPACITY TO SEPARATE = ABILITY TO INFORM THE INTENT TO SEPARATE** |
| **Facts:** | 57yr marriage w/o children. Wife (92) sought divorce; husband (93) opposed on basis that she lacked requisite capacity. Husband handled family’s finances, but hadn’t lived in same residence for 10yrs due to health reasons. |
| **TJ:** | Wife lacked requisite capacity bc she was unable to manage her own affairs. **Test:** *capacity to instruct counsel* |
| **Issue:** | Does the wife have the requisite capacity to separate? **YES**—appeal allowed  |
| **Reasons:** | * **Test for capacity to separate:** ability to form the intent to separate (minimal; reqs lowest level of understnd’g)
* The TJ’s standard (*capacity to instruct counsel*) is too high—reqs ability to understand financial & legal issues
* *Calvert*: Wife lacked capacity to instruct counsel, but could still make basic personal decision to sep & divorce
* Court adopted the **hierarchy of capacity** from *Calvert v Calvert*, [1997] ONSC:
1. **Capacity to separate** (lowest level) 🡪 Simply need to know with whom you don’t want to live
2. **Capacity to divorce** (slightly higher) 🡪 Requires desire to remain separate; undoing of the marriage K
3. **Capacity to instruct counsel** (highest) 🡪 Involves the ability to understand financial & legal issues
* Evidence that individual could instruct counsel can be used to establish that he had requisite capacity
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| DATE of SEPARATION |

**Significance** 🡪 Determining when spouses began to live S&A is imprtnt for purposes of determin’g **(1)** property interests **(2)** debt responsibility **(3)** excluded property & debt (accumulated post-sep’n) **(4)** support claims (retroactive support)

**Residency arrangement** 🡪 Need not change—spouses can continue to live in same home & still meet criteria

**Notice of intent to separate** 🡪 Only 1 spouse is req’d to inform intention to separate, but that intent must be communicated in words or demonstrated in action

* **Indicators of separation** (*case-by-case assessment*, but *Oswell v Oswell*, [1990] ON provides guidance)**:**
* Physical separation (often indicated by spouses occupying separate bedrooms
* Withdrawal by 1/both spouses from the matrimonial obligat’n w/intent of destroying the matrimonial consortium
* Absence of sexual relations (not *conclusive*, but a factor to be considered)
* Discussion of family probls & communication b/w spouses (presence/lack of joint social activities, meal pattern)
* Significant change in relationship (*Riha v Riha*, [2001] ON: ceasing of sexual relations & occupation of separate bedrooms are factors, but not determinative—separation occurred when divorce docs were served & server accepted marriage was over)
* *Routley v Paget*, [2006] BCJ 🡪 lived separate since ‘97, but maintained intimate relationshp = ct says **separated** in ‘97
* **Ask:** *Objectively, what does outside world think?* 🡪 If problems are just b/w couple (internal) = likely not separated

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| BEST INTERESTS of the CHILD (BIotC) |

The importance of considering the BIotC is perhaps best illustrated in *Keith*, where the children shared incidents of family violence that neither parent had disclosed

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| LEGISLATION |

* ***DA*** has a **maximum contact provision** [**16(10)**], but it must be read in the context of the “best interests of the child”
* ***FLA*** doesn’t have an equivalent provision, but is more comprehensive & applies to both divorced & CL couples

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| ***Divorce Act* s16** | ***Family Law Act* s37** (*BDM*; *Hokhold*; *Keith*) |
| **CUSTODY ORDERS** [**(1)**] 🡪 Court of competent Jx may make an order respecting the custody of and/or access to any/all children of the marriage**LENGTH of ORDERS** [**(6)**] 🡪 Definite or indefinite period, or until the happening of a specified event—court may impose other terms/conditions/restrictions as it thinks fit & just**BEST INTERESTS of CHILD** [**(8)**] 🡪 In making an order, the court shall take into consideration only the best interests of the child of the marriage* Determined by reference to the child’s condition, means, needs, & other circumstances

**PAST CONDUCT** [**(9)**] 🡪 The court shall not consider past conduct unless it’s relevant to person’s parenting ability**MAXIMUM CONTACT** [**(10)**] 🡪 In making an order, the court shall give effect to the principle that a child of the marriage should have as much contact w/each spouse as is consistent w/the best interests of the child* For that purpose, court shall consider the willingness of the person for whom custody is sought to facilitate such contact \**this is why someone might choose to rely on* ***FLA****\**
 | **BEST INTERESTS of CHILD** [**(1)**] 🡪 In making an order/ agreement respecting guardianship, parenting arrangements, or contact w/child, the court must consider the best interests of the child only * **3 Best interests of child** = the agreement/order must protect, to greatest extent possible, *child’s physical, psychologic’l & emotion’l safety, security & well-being*

**FACTORS** [**(2)**] 🡪 To determine best interests of a child, consider *all* of the child’s needs & circumstances, incl.:1. child’s health & emotional well-being (*BDM*; *Hokhold*)
2. child’s views (unless it’s inapprop. to consider them) (*BDM*; *Hokhold*)
3. nature & strength of relationships b/w child & significant persons in the child’s life (*BDM*);
4. history of the child’s care (*who is best suited to continue child’s care?*)
5. child’s need for stability (*BDM*; *Hokhold*)
6. ability of ea. person to exercise his responsibilities (*BDM*)
7. impact of any FV on child’s well-being, incl. whether FV is directed toward child or other family member
8. whether the actions of a person responsible for FV indicate that the person may be impaired in his ability to care for child & meet child’s needs (*Keith*: it’s crucial to hear child’s evidence here, since parents may not disclose)
9. appropriateness of an arrangement that would req guardians to cooperate on issues affecting the child, incl. whether req’ing cooperation would increase risk to child’s safety/security/well-being (*BDM*; *Hokhold*) \**inconsistent w/ max. contact principle\**
10. any civil/criminal proceeding relevant to the child’s safety, security, or well-being

**PAST CONDUCT** [**(4)**] 🡪 Ct may consider person’s conduct only if it substantially affects a factor set out in (2), & only to the extent that it affects that factor |

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| ***BDM v AEM*,** [2014] BCSC (Bauman CJ) **High conflict case** involving 6yo girl. Court addressed some ***FLA* s37(2)** factors in determining what parenting arrangement was in child’s best interests. **Result:** Child to spend majority of time w/mom.* **(a)** child’s health & emotional well-being + **(f)** ability of person to exercise parenting responsibilities 🡪 *father had difficulty discriminating b/w his own objectives & perceptions vs. the child’s best interests*
* **(b)** child’s views 🡪 not relevant here—child was too young to be consulted
* **(c)** relationship b/w child & others 🡪 court considered child’s relationship w/both parents + parents relationship w/their own immediate & extended families, finding that the father led a very socially isolated life
* **(e)** child’s need for stability 🡪 both parents had v different parenting philosophies = child should spend maj. of time with 1 parent
* **(i)** whether an arrangement that reqs cooperation is appropriate 🡪 v limited cooperation—had already adversely affected child
* **Result:** “best interests of [child] require that any parenting arrangement ordered cannot be dpndnt upon coop’n b/w the parents”
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| ***Hokhold v Gerbrandt*,** [2014] BCSC **Mobility application** for 6yo + 4yo children. Parents had dysfunctional relationship.* **(a)** child’s health & emotional well-being 🡪 father was using children’s distraught emotions to bolster his ct application for increased access (= children to attend counselling)
* **(b)** child’s views 🡪 the **4yo** was too young, but the **6yo** was clear w/his views
* **(e)** child’s need for stability 🡪 animosity b/w the parents created instability
* **(f)** ability of person to exercise parenting responsibilities 🡪 mother lacked financial means bc father wouldn’t pay support, but she was more capable of meeting parental responsibilities (e.g. father was unable to get kids to school on time)
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| ***Keith v MacMillan*,** [2014] BCSC **2 teenagers**. Court had the beneift of a *Views of the Child Report*.* Children were asked to rate how their parents “got along” on scale of 1–10 (0 = no cooperation)—older child said 6, other said 0!
* Children share the family violence they witnessed & experienced (*which neither parent had disclosed*!!!)
* **Result:** Court ordered a comprehensive *Section 211 Report* to further investigate the issues raised by the children in the *VotC Rpt*
* **Ratio:** In litigation involving children, including children’s voices is of critical importance
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| EXPERT REPORTS (*FLA* s211) |

**211 Report** [**211**]

* While recommendations made in these reports aren’t determinative, judges will likely rely on them (*persuasive*)
* **(1)** allows the court to appoint a person to assess, for purposes of determining care of & time w/children, any of:
1. the needs of a child in relation to a family law dispute
2. the views of a child in relation to a family law dispute
3. the ability & willingness of a party to a family law dispute to satisfy the needs of a child
* Lack of financial means shouldn’t result in the denial of parenting rights—argue that a transition period should be allowed for the parent to get it together
* **Qualifications** 🡪 The person appointed must meet the following criteria [**(2)**]:
1. must be a family justice counselor, social worker, or another person approved by the court
2. can’t have had any previous connection w/the parties **unless** each party consents (i.e. must be *neutral*)
* **Notice not req’d** [**(3)**] 🡪 An application under this section may be made w/o notice to any other person
* **Assessment report** [**(4)**]🡪 Person who carries out the assessment must: **(a)** prepare an assessment results report, **(b)** give a copy to each party (unless court orders otherwise), and **(c)** give a copy to the court
* **Fees** [**(5)**] 🡪 The court may allocate assessment fees among the parties (or require one party alone to pay)

**Views of the Child Report** (*Keith v MacMillan* 🡪 court ordered a comprehensive *211 Report* based on the *VotCR*)

* Useful tool, but not a full assessment where the needs & views of the child and the ability & willingness of each parent to meet child’s needs are considered
* **Qualifications** 🡪 Can be completed by a number of professionals, including lawyers

**Other ways to get child’s evidence** [**202**]

* In trying to determine the best interests of a child, the court may:
1. **admit hearsay** evidence it considers reliable of a child who’s absent (i.e. allow parents to give evidence of what children have said to them)
2. **give any other direction** that it considers appropriate concerning the receipt of a child’s evidence (e.g. judge may interview child directly, but this may create problems of intimidation, no opp’ty for x-examination, etc.)

**Children’s lawyer** [**203**]

* The court may appoint a lawyer to represent the interests of a child if it’s satisfied both that [**(1)**]:
1. **degree of conflict** b/w parties is so severe that it signif’ly impairs their capacity to act in child’s best interests
2. it’s necessary **to protect the BIotC**
* **Fees** 🡪 The court may allocate lawyer’s fees & disbursements among parties (or require one party alone to pay [**(2)**]

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| WHO is a PARENT? |

**Legal parentage established for all purposes** [***FLA* s23**]

* **Starting point** 🡪 A determination under this part of the ***FLA*** is a determination for the purposes of all laws of British Columbia (if you’re deemed a parent under these provisions, you’re a legal parent, conclusively)

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| DEFINING PARENTAGE: *FRA* vs. *FLA* |

**Improvements in the *FLA***

* “**Parent**” under Part 3 is now a “parent” for all the purposes of B.C. law [**23**] = a sensible & economical development
* The status of a donor is now clear: unless a sperm donor is using the sperm for his own reproductive project (including a multi-parent project), the sperm donor is never a “parent” [**24**]
* The ability under the ***FLA*** to have a surrogacy agreement and register the child as the child of his or her ‘**intended parents**’ w/o a court order = a helpful change
* The ability to create families with **≥2 parents**—although this is used by a minority of potential parents, it’s parents in these circumstances who are among the most vulnerable to a challenge of their parental status
* The status of a co-parent whose partner conceives via ART has also been clarified: s/he continues to be able to be registered as a parent when the child is born and, unlike the old regime, doesn’t require a declaration of birth or an adoption in addition to registration of the birth.

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| ***Family Relations Act*** (old) | ***Family Law Act*** (new) |
| No def’n of **legal parentage**—determined under ***Law and Equity Act* s61** (repealed in 2013)  | **Legal parentage** is defined in Part 3 of ***FLA*** and is the interpretation to be used for all purposes of BC laws [**23**] |
| Birth certificate = evidence, but not proof, of parentage | Birth certificate = proof of parentage (***FLA*** combined w/ the ***Vital Statistics Act***) |
| “**legal parentage**” determined based on child’s genetic cxn to parent (the ***FRA*** included *presumptions of paternity*) | “**legal parentage**” determined:non-ART 🡪 by birth mother & biological father [**26**]* Presumption of who’s biological father [**26(a)**-**(f)**]

ART 🡪 pursuant to scheme in Part 3 [**20**-**36**] |
| No legislation re: ART-conceived children | Comprehensive scheme re: legal parentage of ART-conceived children |
| No reference to status of “**donors**” or whether a person was a legal parent bc s/he had donated sperm/eggs | **Donors** are never legal parents by virtue of being donors [**24**] *unless donation was for the purpose of the donor’s own reproductive use* [**20**: “donor”] |
| Maximum of 2 parents | Multiple parents by pre-conception agreements [**29**; **30**] or by a declaration of parentage [**31**] |
| Co-parent of a child conceived via ART could be registered as “parent” on birth certificate, but req’d a *declaration of Parentage/Adoption* to be a legal parent | The co-parent w/the birth mother of a child of a child conceived via ART is presumed to be legal parent [**27**] *unless consent to parental project was withdrawn before conception or was never consented to* [**27(3)**] |
| *Declaration of Parentage* wasn’t contemplated by legislation—rather, courts relied on their inherent Jx | *Declaration of Parentage* specifically provided for in **31** |
| No provision for determination of parentage of children carried by surrogate mothers: *Declaration of Parentage* req’d | Provides a scheme for [**29**]:* Pre-concept’n agrmnt b/w *intended* parents & surrogate
* Relinshquishment of child to intended parents
* Birth registrat’n of intended parents based on agrmnt
 |
| No dispute resolution section re:legal parentage determinat’n | **31** permits a court to make a declaration of legal parentage when there’s “uncertainty or dispute” (*Family Law Act (Re)*, [2016] BCSC 598) |
| Any declaration of parentage had to be done in **Supreme Court**—no legislation, so no inherent Jx | **Provincial Court** can do a declaration of legal parentage wherever the issue arises, assuming the issue is otherwise in the PC’s Jx [**30**] |
| No provision for parentage of children conceived w/genetic material from a person who died before conception | Specific provision for children conceived w/genetic material from person who died prior to conception [**31**] |
| “Parenting” rights & responsibilities assigned to legal parents & others who played a role in child’s life (e.g. step-parents) | “Parenting” rights & responsibilities assigned to legal parents & others who played a role in child’s life (e.g. guardians & step-parents—not dependent on determination of parentage under Part 3 |

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| DETERMINING PARENTAGE |

**Determining who the father is (if no ART)** [***FLA* s26**]

1. **STARTING POINT** 🡪If child isn’t born via ART, then the child’s parents are the birth mother + biological father
2. **PRESUMPTION** 🡪 Male person is presumed to be a child’s biological father in any of the following circumstances:
3. he was married to birth mother on the day of the child’s birth
4. he was married to birth mother &, within 300 days before the child’s birth, the marriage was ended **(i)** by his death, **(ii)** by divorce, or **(iii)** as referred to in **21** (*void & voidable marriages*)
5. he married the child’s birth mother after the child’s birth & acknowledges that he’s the father
6. he was living w/birth mother in marriage-like relationship within 300 days before or on the day of the birth
7. he, along w/birth mother, has acknowledged he’s the father by signing statement under ***Vital Statistics Act* s3**
8. he has acknowledged that he’s the child’s father by signing agreement under ***Child Paternity & Support Act* s20**
9. **IF >1 PERSON IS PRESUMED TO BE FATHER** 🡪 *No presumption of paternity may be made*

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| ASSISTED REPRODUCTION TECHNOLOGIES (ART) |

* Where the parties require the assistance of donors for human reproductive genetic materials, embryo, and/or the assistance of surrogates and/or fertility treatments
* Often considered if there’s an issue of infertility, inability to carry child, no partner, same-sex couple, transgender, desire for donor/surrogate parent in 3-parent family
* Includes donor insemination, *in vitro* fertilization (IVF), inter-uterine insemination (IUI), and surrogacy

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|  ***Family Law Act*** |
| **Assisted reproduction** [**20**] 🡪 method of conceiving a child other than by sexual intercourse**Donor ≠ automatic parent** [**24**] 🡪 Donor isn’t, by reason of donation only, the child’s parent* Donor [**20(1)**] = person who, for purposes of assisted reproduction, provides **(a)** reproductive material/**(b)** embryo

**Parentage if assistant reproduction** [**27**] 🡪 Default = **birth mother is parent** (even if not genetically related to the child)* Person who was married to (or in a marriage-like relationship w/) the birth mother when child was conceived is also a parent unless there’s proof that, before child was conceived, the person **(3)(a)** didn’t consent to be child’s parent, or **(3)(b)** withdrew consent to be child’s parent

**If person who provided genetic material dies before child is conceived** [**28**] 🡪 **(1)** This section applies if: **(a)** child conceived via **ART**, **(b)** deceased who provided material/embryo did so for his **own reproductive use** & **died before child’s conception**, &,**(c)** there’s **written proof** that the deceased: **(i)** gave **written consent** providing that the person s/he was married to (or in marriage-like relationship w/) when s/he died could **use genetic material after death****(ii)** gave **written consent to be the parent** of a child conceived after death**(iii)** **didn’t withdraw** either consent**(2)** **RESULT**: On birth of the child born via ART, the child’s parents are **(a)** deceased person, and **(b)** the person who was married to (or in marriage-like relationship w/) the deceased person at the time of death**Parentage if surrogacy arrangement** [**29**] 🡪 Default = surrogate mom is both birth mom & parent (*FLA (Re)*, **598**)* Intended parents & surrogate must have **written agreement** prior to conception confirming that surrogate ≠ parent
* If agreement exists, surrogate will surrender child to the intended parents & intended parents = parents of the child
* **(4)** Court may **waive surrogate’s consent** if surrogate is **(a)** deceased/incapable of consenting **(b)** can’t be located after reasonable efforts have been made
* **(5)** **If intended parents die** b/w conception & birth, the decease intended parents are the child’s parents if the surrogate gives written consent to surrender the child to the deceased’s personal representative
* **(6)** **If surrogate doesn’t consent**, the agreement isn’t sufficient for her to relinquish the child, but can be used as evidence of parties’ intentions

**Parentage if other arrangement** [**30(1)**] 🡪 Allows a surrogate/donor to be a legal parent to an ART-conceived child if:* The intended parents & birth mother enter into a written agreement *before the child is conceived* [**(b)(i)**]
* The birth mother, her partner, & the donor enter into a written agreement *before the child is conceived* [**(b)(ii)**]

\*\*\***RESULT:** there could be ≥3 parents per child\*\*\** When such an agreement exists, the child’s parents are parties to the agreement [**(30(2)**]
* If any party withdraws/dies before consent, the agreement is revoked [**(30)(3)**]

**Court order** [**31**] 🡪 If there’s any “dispute/uncertainty” as to who is/isn’t a parent, a person can apply to court for an order declaring whether the person is a child’s parent (*FLA (Re)*, **598**; *FLA (Re)*, **22**) |

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| ***JCM v ANA*,** [2012] BCSC (Russell J) **Human tissue (e.g. sperm straws) can be considered property**Separated couple disagreed on how to divide their remaining sperm straws. π wanted children w/new partner who would be biologically related to her existing children; ∆ wanted them destroyed. **Q:** *Are sperm straw considered property?* **YES**—equal division**RESULT:** Parties have the right to use straws for their own beenfit, but ∆ won’t be the parent of any child conceived using the straws (won’t have any parental obligations). Sperm straws were divided b/w parties (6:7).* Look @ precedent: *CC w AW* treated embryos as property; *Yearworth* treated sperm as property
* Sperm straws became property after they were purchased by the couple (treated like property = property
* Rejection of ∆’s moral argument—it’s not the court’s role to engage in a philosophical debate
* Need to balance the *right to procreate* with the *right to avoid procreation*—but here, no need to balance these rights
* The best interests of a child who may possibly be conceived using the sperm is, at best, speculative
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| ***Yearworth v North Bristol NHS Trust*,** [2009] EWCA **Body parts (or genetic material) can amount to property** πs elected to freeze sperm before chemo, but it thawed & was damaged. πs claim damage to *property*. **Q:** Did πs have valid ownership over sperm? **YES**—πs generated sperm; merely consented to have it stored = never relinquished their proprietary rights |

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| ***Rypkema v HMTQ*,** [2003] BCSC (Gray J) **1st BC case on *surrogacy*** Although the surrogate had surrended & released all claims to the child, Vital Statistics refused to register the genetic parents: the ***Vital Statistics Act***defined birth as the expulsion of the product of conception from the mother. **Held:** Application allowed—Vital Statistics must register the *genetic* parents |

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| ***FLA (Re)*,** [2016] BCSC **22** (Fitzpatrick J) **31 allows for *Declaration of Non-Parentage*** (granted to surrogate here)Same-sex couple from Qc sought *Declaration of Parentage* following a surrogacy agreement. The child was born using eggs from female donor, which were fertilized *in vitro* using one of the petitioner’s sperm. Egg was then implanted in surrogate, who gave birth in BC. Uncertainty arose from Qc law, which req’d a *Declaration of Parentage* to recognize the parents’ status & allow them “to function more fully as a legal family unit in their home province of Qc”. |

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| ***FLA (Re)*,** [2016] BCSC **598** **Verbal surrogacy agreement may still have effect if in the BIoTC + family**Petitioners entered into a *verbal* surrogacy agreement, but it didn’t comply w/***FLA* s29**. Since **29** didn’t apply, surrogate was presumed to be a parent—this conflicted w/the agreement, which provided that the surrogate had renounced any parentage rights.* Pursuant to **31**, “uncertainty” arose from both birth registration & in terms of petitioners’ & child’s rights
* To allow surrogate to remain parent didn’t give effect to the *purpose* of the agreement & wasn’t in the BIoTC
* Neither the child nor the family unit should be denied a *Declaration of Parentage* in these circumstancs
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| PARENTAGE TESTS |

***FLA* 33** authorizes the court to order a parentage test where required

***FLA* s33(2)** parties may apply to the court for an order that an individual undergo a parentage test; application may be brought in Provincial Court

***FLA* s33(3)** court may order a party to pay all/part of the cost of the test

***FLA* s33(4)** court may draw any inference if a party fails to comply

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| ADOPTION |

* *Creature of statute* (***Adoption Act***) 🡪 didn’t exist under English CL because of concerns regarding bloodlines
* **Jx** = provincial responsibility (property & civil rights); falls within the Jx of the BCSC

***Adoption Act***

* Came into effect in 1996 (although the 1st ***AA*** was enacted in 1920
* **Changes w/new *Adoption Act*:**
	+ Private adoptions must follow same procedures as Ministry adoptions
	+ All birth parents are informed about their choices before consenting to adoption
	+ Children have a greater say—those ≥12yo can consent, while those b/w 7–11yo will have their views considered
	+ The rights of birth fathers have been enhanced
* Allows for an **open model**:
	+ Birth parents can enter into openness agreements w/adoptive parents or register w/search & reunion services
	+ There can also be disclosure vetos & no-contact declarations if there’s a wish to retain privacy

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|  ***Adoption Act*** |
| **Purpose** [**2**] 🡪 To provide for new & permanent family ties through adoption, giving paramount**Best interests of child** [**3**]* In determining child’s best interests, all relevant factors must be considered, including [**(1)**]:
1. child’s safety
2. child’s physical & emotional needs & level of development
3. the importance of continuity in the child’s care
4. the importance of child having a positive relationship w/a parent & a secure place as a member of a family
5. quality of the relationship the child has w/parent or other individual, & the effect of maintaining that relationship
6. the child’s cultural, racial, linguistic, & religious heritage
7. the child’s views
8. the effect of a delay in making a decision on the child
* If child is **aboriginal**, must also consider the importance of preserving cultural identity

**Effect of an adoption order** [**37**] 🡪 Child becomes child of adoptive parent; adoptive parent becomes parent of child [**(1)**]* Birth parents cease to have parental rights/obligations unless they remain parents jointly w/adoptive parent [**(1)(c)**]
* Same process repeated if the child is adopted for a 2nd time (the adoption order has the same effect on the child) [**(3)**]

**Things an adoption does not affect** [**37**]* Adoption doesn’t apply to incest laws & prohibited degrees of marriage [**(4)**]
* Adoption doesn’t affect an interest in property if the interest is vested before the adoption order [**(6)**]
* Adoption doesn’t affect any aboriginal rights the child has

**Def’ns** [**1(1)**]**CHILD** 🡪 unmarried person <19yo; **BIRTH MOTHER** 🡪 person who gives birth to child, whether/not her reproductive material was used (*unless surrogate*: **29**); **DIRECT PLACEMENT** 🡪 parent/guardian places child for adoption with 1 or 2 adults, none of whom is child’s relative; **RELATIVE** 🡪 person related to another by birth/adoption**Who is the father?** [**26**]🡪 Various ways to fall within this category—no longer “man married to birth mom” (see above)**Who can place child for adoption** [**4(1)**] 🡪 **(a)** DIR w/care & custody of child or is child’s guardian **(b)** adoption agency **(c)** parent/guardian of child *by direct placement* **(d)** parent/guardian related to the child if the child is placed w/relative**Who can adopt a child*** **5(1)** Child may be placed for adoption w/**one or two adults jointly** (each must be BC resident: **(2)**)
* **29(2)** One adult may apply to **jointly** tobecome a parent of a child w/a birth parent
* Each applicant must be a BC resident (6months)
* There’s no requirement for a spousal relationship
* Courts have no Jx to expand the group of qualified applicants (e.g. aboriginal community)

**Consent to adoption** [**13**]* **(1)** Each of the following consents are req’d: **(a)** child (if ≥12yo) **(b)** child’s parents **(c)** child’s guardians
* **(2)** The consent of a biological father isn’t req’d unless he **(a)** acknowledges that he’s the child’s father, and **(b)** is named by the child’s birth mother as the child’s father
* **(3)** If child’s in the continuing custody of DIR of child protection, only need consent from **(a)** DIR, & **(b)** child (if ≥12yo)
* **BIRTH MOTHER’S CONSENT**[**14**] **🡪**Only valid if child is **≥10days old** when consent is given
* **PARENTS <19yo** [**15**] 🡪 May give a legally valid consent to the adoption of a child

**Dispensing w/consent** [**17**] 🡪 On application, the court may dispense with a consent req’d by this Part if the court is satisfied that it’s in the child’s best interests to do so or that:1. person isn’t capable of giving informed consent
2. reasonable but unsuccessful efforts have been made to locate the person whose consent is to be dispensed with
3. the person **(i)** **abandoned**/deserted child, **(ii)** hasn’t made reasonable efforts to meet **parental obligations**, or **(iii)** **isn’t capable of caring** for the child
4. other circumstances justify dispensing w/the consent
* **HOWEVER:** The court can only dispense w/a child’s consent if the child is incapable of giving an informed consent

**Revocation of consent*** **Birth mother** [**19(1)**] 🡪 can revoke consent to adoption ≥30days of child’s birth, even if child has been placed for adoption if her revocation is **(a)** in writing, and **(b)** is received by DIR/adoption agency before the end of the 30days
* **Child** [**20**] 🡪 can revoke consent to adoption at any time before the adoption order is made

**Father’s entitlement to notice** [**10**]🡪 Must give notice if a contact order or access order is in place**Dispensing w/notice** [**11**] 🡪 On application, court may dispense w/notice of a proposed adoption if satisfied that **(a)** it’s in child’s best interests to do so, or **(b)** the circumstances justify dispensing w/the notice**Access orders** [**38**] 🡪 **(1)** When adoption order is made, any order/agreement for contact with/access to the child terminates unless court orders otherwise (ct can say the order/agreement is enforceable if in child’s best interests: **(2)**)**Adoption of adults** [**44**]1. One adult alone or two adults may apply to the court to adopt another adult
2. The court may make the adoption order w/o the consent of anyone except the person to be adopted if it:
3. is satisfied that the person, as a child, lived w/the applicant as family member & was maintained by the applicant until the person became self-supporting or became an adult, and
4. considers the reason for the adoption to be acceptable

**International adoptions** 🡪 Governed by *Convention on Protection of Children & Co-operation in Respect of Intercountry Adoption** Canada became signatory in 1997; came into force in BC in 1997; **principal features:**
* BIoTC = paramount
* Subsidiary principle
* Safeguards to protect children from abduction, sale, & trafficking
* Co-operation b/w states & within states
* Automatic recognition of adoption decisions
* Recognizes competent authorities, central authorities, & accredited bodies
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| ***BC Birth Reg No 2004-59-020158*,** [2014] BCSC **Father’s consent req’d for adoption** Parents w/1 child divorced after violent relationship. Mom got custody; dad got reasonable access. Mom remarried & wanted new spouse to adopt child, dispensing w/the biological father’s consent. **Held:** Ct refused to dispense w/consent because it wasn’t in the BIoTC |

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| FAMILY VIOLENCE |

***FLA* s37(2)(g)** reqs court to consider the *impact of any FV on the child’s well-being* in determining child’s best interests

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| DEFINITION |

**Who is a “family member”?** [***FLA* s1(1)**] 🡪 w/respect to a person, means:

1. the person’s current/former spouse
2. the person with whom the person is living (or has lived) in a marriage-like relationship (CL partner)
3. a parent/guardian of the person’s child
4. a person who lives with, & is related to, **(i)** the person, or **(ii)** anyone listed in **(a)**-**(c)**
5. the person’s child

also includes a child who’s living with, or whose parent/guardian is, a person referred to in **(a)**-**(e)**

**What is “family violence”?** [***FLA* s1(1)**] 🡪 ***FLA*** provides a *broad* def’n, & the court in *MWB v ARB* alsotook a *broad* view

1. physical abuse of family member
2. sexual abuse of family member
3. attempts to physically/sexually abuse family member
4. psychological/emotional abuse of family member (*JCP v JB*)
* Incl. intimidation, harassment (*DNL v CNS*), coercion, threats against person/pets/property, unreasonable restrictions on family member’s financial/personal autonomy (*MWB v ARB*), stalking family member, intentional damage to property
1. in the case of a child, direct/indirect exposure to family violence

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| ***MWB v ARB***, [2013] BCSC 🡪 Ct should take *broad* view of what constitutes FV; litigation abuse, failure to cooperate = FV***DNL v CNS***, [2014] BCSC 🡪 Demeaning remarks, blaming parent to a child = FV***DNL v CNS***, [2013] BCSC 🡪 Derogatory outburts, demeaning comments = FV***Hokhold v Gerbrandt***, [2014] BCSC 🡪 Behaviour causing financial hardship & stress, threats to cause financial hardship = FV***JCP v JB***, [2013] BCPC 🡪 Deliberate failure to pay child support ***intended*** to inflict emo harm or control behaviour = FV |

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| FAMILY DISPUTE RESOLUTION PROFESSIONALS (FDRiPs) [*FLA* s8] |

* Incl. family law lawyers/mediators, parenting coordinators, family justice counselors, & arbitrators [***FLA* s1(2)**]
* The Law Society of BC has specific training requirements for lawyers who want to be qualified as mediators, parenting coordinators, or arbitrators—the process includes 15hrs of training in family violence
* ***FLA* s197(1)** requires lawyers to sign a statement certifying that they’ve complied w/their duties under **8(2)**

**Duties of FDRiPs** [***FLA* s8**]

* **To assess whether FV is present** & the extent to which the FV may adversely affect [**(1)**]: **(a)** the safety of the party or family member of that party, & **(b)** the ability of the party to negotiate a fair agreement
	+ In essence, this imposes a *positive duty* on FDRiPs to screen for FV
* To **discuss the advisability of using various types of FDR** to resolve the matter [**(2)(a)**]
* To **inform the party of the facilities & other resources**, known to the FDRiP, that may be available to assist in resolving the dispute [**(2)(b)**]
* To advise clients that agreements & orders respecting guardianship, parenting arrangements, & child contact must be made in the ***best interests of the child*** only [**(3)**]

**When notice isn’t req’d in the context of FV** [***FLA***]

* **Guardianship orders** [**52(3)**] 🡪 Court can exempt a party from the requirement to give notice for applications for guardianship
* **Relocation orders** [**66(2)(a)**] 🡪 Court can exempt a party from all/part of the requirement to give notice when a guardian wishes to relocate himself or a child, if the court is satisfied that notice can’t be given without incurring a risk of FV by another guardian or a person with contact
* **Disposition of property orders** [**91(1)**] 🡪 The court can make an order restraining a party from disposing of property without giving notice to the other party
* **Protection orders** [**186**] 🡪 Protection orders can be sought on a without-notice basis

**Best interests of the child** [***FLA* s37**]

1. In making an order/agreement respecting guardianship, parenting arrangements, or contact w/child, the parties & the court must consider the best interest of the child **only**.
2. To determine what’s in BIotC, all of the child’s needs & circumstances must be considered, incl.:
	1. child’s health & emotional well-being
	2. child’s views (unless it would be inappropriate to consider them) (*DNL v CWS*—child didn’t want to spend time w/dad)
	3. nature & strength of relationships b/w child & significant persons in the child’s life
	4. history of the child’s care
	5. child’s need for stability
	6. ability of ea. person to exercise his responsibilities
	7. impact of any FV on child’s well-being, incl. whether FV is directed toward child or other family member
	8. whether the actions of a person responsible for FV indicate that the person may be impaired in his ability to care for child & meet child’s needs
	9. appropriateness of an arrangement that would require guardians to cooperate on issues affecting the child, incl. whether requiring cooperation would increase risk to child’s safety/security/well-being
	10. any civil/criminal proceeding relevant to the child’s safety, security, or well-being
3. An agreement/order isn’t in the BIotC unless it **protects, to the greatest extent possible, the child’s physical, psychological, & emotional safety, security, & well-being**
4. In making an order, a court may consider a person’s conduct *only if it substantially affects a factor set out in* **(2)***, and only to the extent that it affects that factor*

**Assessing FV** [***FLA* s38**] 🡪 For the purposes of **37(2)(g)**&**(h)**, court must consider all of the following:

* 1. the nature & seriousness of the FV
	2. how recently the FV occurred
	3. the frequency of the FV
	4. whether any psychological/emotional abuse constitutes, or is evidence of, a pattern of coercive & controlling behaviour directed at a family member
	5. whether the FV was directed toward the child
	6. whether the child was exposed to FV that wasn’t directed toward the child
	7. the harm to the child’s physical, psychological, & emotional safety, security, & well-being as a result of the FV
	8. any steps the person responsible for the FV has taken to prevent further FV from occurring
	9. any other relevant matter

**When denial of parenting time/contact isn’t wrongful** [**62(a)**] 🡪 If there’s an agreement/order for parenting time/contact, denial of parenting time/contact isn’t wrongful if the guardian *reasonably believed the child might suffer FV if the parenting time/contact were exercised*

* *MLF v RDJ*, [2013] BCSC 🡪 Although many child protection social workers held the belief that they could direct a parent to withhold contact between a parent & child as part of a “**safety plan**” even when there’s an order for access in place, Master Young held that the Ministry of Child & Family Development doesn’t have the authority to override an existing court order *unless* they have removed the child [**Essentially:** Social worker’s concerns < order for access]

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| PROTECTION ORDERS [*FLA* Part 9 (s182-191)] |

**Def’ns** [**182**]

* **at-risk family member** 🡪 person whose safety & security is or is likely at risk from FV carried out by a family member
* **residence** 🡪 place where at-risk family member normally/temporarily resides, incl. place that was vacated due to FV

**Who can apply for a protection order** [**183(1)(a)**]

* A family member who is claiming to be an “at-risk family member”
* A person on behalf of an at-risk family member
* The court can either make the protection order on application by one of the above, or *on its own initiative*
* A protection order can be sought as a *stand-alone application* (it doesn’t have to be made in conjunction w/any other proceeding/claim [**183(1)(b)**]

**When the court may grant a protection order** [**183(2)**] 🡪 If the court determines that **(a)** FV is likely to occur, and **(b)** the other family member is an at-risk family member

* Unless otherwise ordered, a protection order **expires in 1yr** [**183(4)**]
* Applications for a protection order can be made on a without-notice basis [**186**]

**Types of orders that can be made** [**183(3)**]

* No direct/indirect communication w/the at-risk family member [**(a)(i)**]
* No attending/entering place regularly attended by the at-risk person (e.g. residence, school, workplace, etc.) [**(a)(ii)**]
* No following the at-risk person [**(a)(iii)**]
* No possessing weapons [**(a)(iv)**]
* Direction to police to remove person from property, accompany person to move belongings, or seize weapons [**c**]
* Requirement to report to court [**d**]
* Any terms/conditions the court considers necessary to protect the safety & security of the at-risk family member [**e**]

**Factors to consider** [**184(1)**] 🡪 In determin’g whether to make order, ct must consider at least the following risk factors:

1. any history of FV by the family member against whom the order sought
2. whether any FV is repetitive/escalating
3. whether any psychological/emotional abuse constitutes, or is evidence of, a pattern of coercive & controlling behaviour directed at the at-risk family member
4. the current status of the relationship b/w the family member against whom the order is sought & the at-risk family member, incl. any recent separation or intention to separate
5. any circumstance that may increase the risk of violence by the family member against whom the order is sought (e.g. substance abuse, employment/financial probs, mental health probs associated w/risk of violence, access to weapon, history of violence)
6. the at-risk family member’s perception of risks to his/her own safety & security
7. any circumstance that may increase the at-risk family member’s vulnerability (e.g. pregnancy, age, family circumstances, health/economic dependence)

**Realities of FV**

* **Mutual protection orders** 🡪 court must consider whether to make the order against *one person only*, taking into account the history of/potential for FV, the extent of injuries/harm, and respective vulnerabilities
* **Self-defence** 🡪 Person who initiates an incidence of FV isn’t necessarily the one against whom order should be made
* **Protection order may be made regardless of whether…**
	+ the family member has complied w/a previous order
	+ the family member is temporarily absent from home
	+ the at-risk family member is in a shelter/safehouse
	+ criminal charges have been laid
	+ the at-risk family member has a history of returning
	+ there’s an order restricting communication under **225**

**Protection orders – children** [***FLA* s185**] 🡪 If a child’s involved, the court must consider (in addition to **184** factors):

1. whether the child may be exposed to FV if an order isn’t made, and
2. if an order is made respecting the parent/guardian, whether an order should also be made respecting the child

**Enforcement of protection orders**

* Protection orders may not be enforced under the ***FLA*** or ***Offence Act*** [**188(1)**], but they’re enforceable under ***CC* s127**
* Protection orders from another Canadian Jx are enforceable under the ***Enforcement of Canadian Judgments & Decrees Act*** [**191**]
* A police officer having reasonable grounds to believe that a person has contravened a protection order may take action to enforce the order & use reasonable force if necessary [**188**] (proof of service isn’t req’d)
	+ **Proof of service** isnt’ required but, for successful prosecution under ***CC* s127**, actual service of the order seems essential given that the *mens rea* has to be established

**Conflict b/w orders** [***FLA* s189**] 🡪 In case of conflict, **protection order prevails**

* Where there’s conflict/inconsistency b/w protection order & another order under the ***FLA*** (e.g. parenting time), then that order is suspended until either is varied so there’s no conflict/inconsistency, or protection order is terminated

**Exclusive occupancy** [***FLA* s90**] 🡪 The BCSC (not Prov Court) may grant an order that a spouse has **(a)** exclusive occupancy of the family residence, or **(b)** possession of specified personal property stored at the family residence

* **TEST** (from ***FRA* s124**)**:** **(a)** the practical impossibility of sharing the residence, and **(b)** the balance of convenience

**Restraining orders** [***FLA* s255**] 🡪 Restraining order under ***FRA*** remains in force in accordance w/the terms of the order

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| CHILD PROTECTION |

* >8,000 children in government care (foster homes)
* Aboriginal children continue to be disproportionally represented among children in the Ministry’s care—while Aboriginal people make up approx. 5% of the BC population, 55% of children in Ministry care are Aboriginal
* 40% of homeless youth were, at some point, in foster care
* 65% of youth in care have been diagnosed with a mental health issue at least once during childhood
* **Goal:** Place more children, both Aboriginal & non-Aboriginal, w/extended family members & friends for best outcome

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| “Permanent, stable relationships are a major determinant of whether children feel safe and secure. If a child has to leave their parental home, the Ministry or delegated Aboriginal agency, strive to place the child with people who know the child and will maintain a positive, life-long relationship with them, their families and communities, thereby minimizing disruptions to children and their families.” – BC Ministry of Children and Family Development (2010) |

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| POST-SEPARATION PARENTING |

* Custody of a child has traditionally been defined as: *almost all rights incidental to guardianship of a person (right to determine a child’s education, health care, religion, etc.) and physical care & control of a child*
* Note that “guardianship” isn’t mentioned (or defined) in the ***DA***

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| ***Divorce Act*** [**best interests of child** & **max. contact principle** = governing factors] |
| **Def’ns** [**2(1)**]* **Child of the marriage** 🡪 child of 2 current/former spouses who **(a)** is < age of majority (BC = 19) & hasn’t withdrawn from their charge, or **(b)** is ≥ age of majority & is unable to withdraw from their charge or obtain the necessaries of life by reason of illness, disability, or other cause
* **Spouse** 🡪 either of 2 persons who are married to each other
* **Custody** 🡪 includes care, upbringing, & any other incident of custody
* **Access** 🡪 the right to visit; spend time w/child (strangely, this term is only defined in the French version of the ***DA***)

**Custody & access orders** [**16(8)**] 🡪 In making an order concerning access/custody, the court shall take into consideration only the BIoTC of the marriage as determined by reference to the condition, means, needs, & other circumstances of the child**Past conduct** [**16(9)**] 🡪 Ct shall not take past conduct into consid unless it’s relevant to that person’s parenting ability**Maximum contact principle** [**16(10)**] 🡪 In making order, court shall give effect to the principle that a child of the marriage should have as much contact w/each spouse as is consistent w/BIotC—thus, court will consider the willingness of the person for whom custody is sought to facilitate such contact (not incl. in ***FLA***)**Variation of orders** [**17**] 🡪 Court can make an order varying a custody order if satisfied that there has been a “change in the conditions, means, needs, or other circumstances of the child since making the order [**(15)**] |

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|  ***Family Law Act*** |
| **Def’ns** [**1(1)**]* **Child** 🡪 person <19yo [except in Part 3 (parentage) & 7 (child & spousal support), & **s247** (child support)]
* **Guardian** 🡪 a guardian under **39** (parents are generally guardians) & Division 3 of Part 4

**Who is a guardian?** [**39**] 🡪 To establish you’re a guardian, try to qualify here first, then **50**, then **51*** Presumption: Parents = guardians while living together & after separation [**(1)**]
* A parent who has never resided w/child isn’t a guardian *unless* [**(3)**]:
1. the parent is a parent under **30** (surrogacy/donor context);
2. all the child’s guardians make an agreement saying the parent is a guardian; or
3. the parent regularly cares for the child
* Person w/custody of child under ***CFCSA*** **54.01(5)** or **54.1** is deemed to be a guardian under the ***FLA*** [**51(5)**]

**Child’s estate** [**176**] 🡪 Being the child’s guardian doesn’t automatically mean you’re **(a)** a trustee to child’s property, or **(b)** entitled to give valid discharge on receiving property on child’s behalf **Appointing guardian by agreement** [**50**] 🡪 A person can’t become a child’s guardian by agreement except: **(a)** if the person is the child’s parent, or **(b)** as provided by **51** (below), the ***Adoption Act***, or ***CFCSA*****Court may appoint a person as a child’s guardian** [**51(1)(a)**] 🡪 Applies to non-parents & parents who haven’t lived with or taken regular care of the child* **TEST:** Applicant must establish it’s in the *BIotC* [**51(2)**]
* If child is ≥12yo, the child’s written approval is also req’d [**51(4)**]

**Termination of guardianship*** If parents separate, an agreement/order can provide that a parent isn’t the child’s guardian [**39(2)**]
* Court can terminate a person’s guardianship *except* when DIR = guardian under the ***Adoption Act*** or ***CFCSA*** [**51(1)(b)**]
* **TEST:** Termination of guardianship is only appropriate in:
* Extreme situations (it’s important to give parents “maximum opportunity to remain a significant part of child’s life” (*D v D*, [2013] BCPC)
* The rarest & clearest of cases where terminating is clearly in the child’s best interests (*STH v RMG*, [2013] BCPC)

**Parenting arrangements** 🡪 arrangements respecting the allocation of parental responsibilities and/or time [**1(1)**]* Only a guardian can have parenting responsibilities & parenting time
* **Informal parenting arrangements** 🡪 If “normal” part of child’s routine, can’t be changed w/o consulting other guardians first unless it’s unreasonable or inappropriate to consult [**48(1)**]
* **45(1)** Court can make an order respecting: **(a)** allocation of parental responsibilities (*DAM*), **(b)** parenting time, **(c)** the implementation of a parenting order, and **(d)** that parties participate in FDR
* **NO PRESUMPTIONS** [**40(4)**] 🡪 No particular arrangement is presumed to be in child’s best interests; can’t presume:
1. that parental responsibilities should be allocated equally among guardians
2. that parenting time should be equally shared among guardians
3. that decisions among guardians should be made separately/together (*DAM*)

***BUT*** the ***FLA*** essentially sets up a “joint” guardianship regime: each guardian is entitled to exercise parenting responsibilities unless an agreement/order provides otherwise**Parental responsibilities** [**41**] 🡪 **(a)** day-to-day decisions affecting child, **(b)** where child resides (*DAM*), **(c)** w/whom child lives & associates (*DAM*), **(d)** education & extracurriculars (*DAM*), **(e)** cultural, linguistic, religious, & spiritual identity (*is child* *aboriginal?*), **(f)** health-related treatments (*DAM*), **(g)** applying for passport/licence/permit/etc, **(h)** giving/refusal consent for the child when req’d (*DAM*), **(i)** receiving notice entitled to by law, **(j)** requesting info from 3rd party (*DAM*), **(k)** starting/defending a proceeding involving the child, and **(l)** exercising any other responsibilities reasonably necessary to nurture child’s development**Allocation of parental responsibilities** 🡪 A guardian must exercise parental responsibilities in the BIotC[**40**; **43**]* Guardians must exercise parental responsibilities in consultation w/all other guardians *unless* there’s an agreement/ order to the contrary or consultation would be unreasonable/inappropriate (*DAM*)
* Responsibilities my be allocated among guardians by agreement—they need not be shared [**44(1)(a)**; **45(1)(a)**]
* **Note:** Agreement is only binding & order can only be made if the parents/guardians are separated [**44(2)**; **45(2)**]

**Parenting time** [**42**] 🡪 time that a child is with a guardian, as allocated under an agreement/order [**(1)**]* During parenting time, guardian may make day-to-day decisions affecting child (unless agreement/order says no) [**(2)**]

**Contact** 🡪 Time someone who isn’t a guardian has with a child, including people other than parents [**1**; **58**] (*DAM*)* Agreements for contact are only binding if made w/all guardians having parental responsibility [**58**]
* Orders for contact may include T&Cs (e.g. “supervision req’ments” if court is satisfied that supervision is in BIotC [**59**]
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**Joint Custody & Guardianship (*Master Joyce Model*)** [***DA*** & ***FRA***]

* Joint guardians of child’s estate
* If either dies, other becomes sole guardian of person/estate
* Custodial parent must inform the other of any significant matters affecting the child and discuss any **significant decisions** with the other (e.g. non-emergency health matters), education, religious instruction, general welfare)
* The parent w/o custody must discuss these w/custodial parent & try to agree on major decisions
* In event of **disagreement**, custodial parent prevails (has the right to make the decision) but other parent can ask the court to review the decision [via ***FRA* s32**]
* Each parent has the right to get information about the child directly from 3rd parties (e.g. medical records?)

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| ***DAM v DAT*,** [2014] BCSC (Fisher J) **Orders in a very high-conflict case.** It was alleged that the father had sexually abused the childen and the mother had alienated the children against the father. The court’s order provided that:* Children will continue to reside w/mother (provided her residence is different from that of her parents)
* Mother will exercise all parental responsibilities, & will consult w/the father about decisions concerning where children will reside, school/education, & their health (incl. giving/refusing/withdrawing consent to medical/dental/other health-related treatments)
* Father will be entitled to request & receive health, education, & other information about the children from 3rd parties
* Father gets parenting time at the direction of a counselor for 12mo.—counselor will then provide a report w/recommendations
* Cost for the counselor’s services will be *shared equally between the parties*
* Mother must refrain from conduct that conveys a negative message about the father to children—must follow counselor’s advice
* “I have crafted this order in contemplation of the **BIotC** & I urge the parties to move forward w/this process w/the best interests of their children in mind”
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| SPECIFIC PARENTING ISSUES |

### FAILURE to EXERCISE PARENTING TIME [FLA s63]

* **Def’n** [**(1)**] 🡪When a person repeatedly fails to exercise parenting time/contact agreed to or granted in an order, *whether or not reasonable notice was given*
* **Consequences** [**(1)**] 🡪 Court may make an order to:
1. deny parenting time/contact via **61(2)**
2. require person to reimburse the other for expenses reasonably incurred as a result of the failure (incl. travel, lost wages, & child care)
3. order the person to comply by requiring a security or reporting to the court
* **Costs** [**(2)**] 🡪 The court may allocate among the parties the fees relating to FDR or counseling (@ judges’ discretion)
* New to the ***FLA***—the ***FRA*** didn’t have remedies for dealing w/this scenario

### DENIAL of PARENTING TIME [FLA s61, 62]

* New to the ***FLA***—the ***FRA*** also didn’t have specific remedies for dealing w/this scenario
* Application must be made ≤12mo. after the person entitled to parenting time/contact was denied it [**61(1)**]
* **Remedies** [**61(2)**] 🡪 If court’s satisfied that applicant was ***wrongfully*** denied parenting time/contact, it may:
1. require parties to participate in FDR
2. require parties to attend counselling
3. order compensatory time/contact
4. require guardian to reimburse for expenses reasonably & necessarily incurred (incl. travel, lost wages, child care)
5. require that transfer of child be supervised
6. order guardian to give security or report to court (if satisfied that s/he might not comply with an order)
7. require guardian to pay an amount/fine ≤$5K
* **When denial of parenting time isn’t wrongful** [**62**]
1. guardian reasonably believed that child might suffer FV if parenting time/contact were exercised
2. guardian reasonably believed the applicant was impaired by drugs/alcohol at the time
3. child was ill & guardian has a written statement from a doctor/nurse saying denial was appropriate
4. in 12mo before denial, applicant failed repeatedly & w/o reasonable notice/excuse to exercise time/contact
5. applicant gave guardian notice, and didn’t subsequently retract it
6. other circumstances the court considers to be sufficient justification for the denial
* Even if court finds that time/contact wasn’t wrongfully denied, it can still order compensatory time/contact [**62(2)**]

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| ***DNL v CWS*,** [2014] BCSC **Child doesn’t want to spend time w/father = termination of parenting time/contact** 12yo refused to spend time w/father. Father sought to enforce parenting time; mother sought to terminate it.* ***Views of the Child Report*:** Child didn’t want to spend time w/father bc of his angry outburts, accusations against mother, refusal to let her go to mother’s home when upset, insults towards mother & grandmother, blaming child for his own behaviour. Father claimed mother turned child against him; psychologist found it was his own conduct.
* Court considered **37** factors (BIotC) in relation to father’s conduct 🡪 it was in child’s best interests to **terminate parenting time**
 |

### CHILD ABDUCTION

* **Types of court orders** [***FLA* s64**] 🡪There are 2 types of orders court can make w/respect to the removal of a child:
	+ 1. To restrict a person from taking child out of a certain geographical area
		2. To take action to stop person from leaving w/child if there’s a concern that the person may remove & not return the child (e.g. surrender passports [**(b)**], provide security to motivate the person to stay [**(a)**])
* **Hague Convention on the Civil Aspects of International Child Abduction** (*Kubera*)
* Removal/retention of child is wrongful if it breaches the custody rights under the law of Jx in which the child was **habitually resident** immediately before removal/retention, & those custody rights were actually being exercised.
* A **court** **must order return of the child “forthwith”** (unlessone of the narrow exceptions apply)

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| ***Kubera v Kubera*,** [2008] BCSC (Martinson J) Child was **wrongfully retained** in Canada, but court held that she **shouldn’t return** to Poland because she was now **settled** in her new environment (applied **Hague Convention** here). |

* **International child abduction** [***FLA* s80**] 🡪 Links the **Hague Convention** to BC family law—return child to place where s/he habitually resident

### MOBILITY/RELOCATION [FLA s46, 65-70]

* **1ST STEP:** *Is there an existing agreement/order in place?* **No** 🡪 **46:** *Changes to child’s residence if no agreement/order*

 **Yes** 🡪 **65-70:** *Division 6 – Relocation*

* **ROUTE #1: If no agreement/order** [**46**]
	+ **(1) Application:** This section only applies if:
1. there’s no written agreement/order respecting parenting arrangements,
2. a guardian applies for such an order (via **45**), **and**
3. the guardian plans to change the location of the child’s residence, and the change can reasonably be expected to significantly impact the child’s relationship w/the other guardian
	* **(2)** To determine the parenting arrangements that would be in the BIotC, the court:
		+ 1. must consider the factors set out in **37(2)** (BIotC)
			2. must not consider whether the guardian who’s planning to move would do so w/o the child
	* **TEST** (*Gordon v Goertz*, [1996] SCC)**:**
4. Threshold req’ment: demonstrate a **material change of circumstances** affecting the child (a change, which materially affects the child & was *unforeseen* or *not reasonably contemplated* at time of previous order)
5. BIotC: Applicant must establish that the proposed move is in the **BIotC** given all relevant circumstances, the child’s needs, & the ability of the respective parents to satisfy those needs
* **ROUTE #2: If there’s an existing agreement/order** [**Division 6 – Relocation**]
	+ **Goal:** To introduce some certainty to this area of law by mandating notice of a proposed move, defining what constitutes “relocation”, and directing courts about circumstances that should/shouldn’t be considered
	+ **65(1) Relocation** 🡪 change in location of a child/guardian’s residence that can reasonably be expected to have a *significant impact* on the child’s relation with the guardian or another person(s) w/significant role in child’s life
* A change of residence within a metropolitan centre (e.g. Lower Mainland) ≠ relocation (*Berry v Berry*, [2013] BCSC)
	+ **65(1)** **Application** 🡪This section only applies if: (also note: only guardians have right to challenge relocation [**69**])
1. guardian plans to relocate himself and/or the child
2. there’s a written agreement/order respecting parenting arrangements/contact that applies to the child
	* **66** **Notice of relocation** 🡪 **(1)** Guardian who plans to relocate must give 60days’ written notice to other guardians/ppl having contact w/child (date of relocation + name of proposed location)
* Ct can grant **exemption** if notice can’t be given w/o incurring risk of FV or if there’s no ongoing relationship w/child [**(2)**]
* Application for exemption can be brought *ex parte*
	+ **67** **Resolving relocation issues** 🡪 After notice is given, guardians & contact persons must use their *best efforts* to resolve any issues relating to the proposed relocation
* However, guardian can still bring application for an order respecting relocation [**69**], and person w/contact can still bring an application for an order respecting contact [**59**/**60**]
	+ **68 Objecting to relocation** 🡪 If the other guardian objects to the relocation of the child, that guardian must file an application for an order to prohibit the relocation within **30days** after receiving the notice of relocation
* If the other guardian doesn’t file an application within 30days, then the relocation may occur on date in the written notice
	+ **69** **Relocation orders** 🡪 The court can make an order permitting/prohibiting the relocation
* **GENERAL TEST:** BIoTC (**37**) + good faith + rsnble & workable arrangements to preserve relationship b/w child & other
* Basically, the onus depends on whether/not there is *substantially* equal parenting time:

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| **Substantially equal parenting time** [**69(5)**] (*Wong v Rooney*) | **Not substantially equal parenting time** [**69(4)**] |
| The relocating guardian must satisfy the court that:* The proposed relocation is made in **good faith** [**(a)**]
* **Reasonable & workable arrangements** have been proposed to preserve the relationship b/w the child & other guardian/persons entitled to contact/ persons w/significant role in child’s life [**(a)**]
* The relocation is in the **BIotC** [**(b)**]

*The relocating guardian has the additional burden of establishing that the relocation is in the BIoTC!* | The relocating guardian must satisfy the court that:* The proposed relocation is made in **good faith** [**(a)(i)**]
* **Reasonable & workable arrangements** have been proposed to preserve the relationship b/w the child & other guardian/persons entitled to contact/ persons w/significant role in child’s life [**(a)(ii)**]

*If these factors are satisfied, the relocation must be considered to be in the* ***BIotC*** *unless the other guardian satisfies the court otherwise!* |
| **~BONUS ONUS!!!~** Basically, **69(5)** imposes an additional onus on a parent who wishes to relocate if that parent shares substantially equally parenting time with the other.  |

* + **69(7)** **Factor not to be considered** 🡪 Whether guardian would still relocate if child’s relocation weren’t permitted (this is an improper double-bind question)

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| ***Wong v Rooney***, [2016] BCSC 🡪 **Application of the *VJF* and *Cabezas* decisions**Couple never married; 1 child. Met in ’09, moved in together in ’11, had kid in ’14, broke up in ’15. Husband wants to move to Sechelt, and proposes that mother gets child on weekends & every other Monday.***Is the proposed move a relocation?*** 🡪 Yes—one-way trip to/from Sechelt = >2hrs***Should the relocation be permitted?*** 🡪 Assess using **69(5)** factors***In good faith?*** 🡪 No—husband hasn’t considered important factors that could affect quality of child’s life (e.g. no social network established in Sechelt)***Reasonable & workable arrangements to preserve child’s relationships?*** 🡪 No—child would lose vital day-to-day contact w/mother important for young children. Would also lose regular contact with her extended family.***BIoTC?*** 🡪 No—need for stability [**37(2)(e)**]**RESULT:** Court denied relocation |

### PARENTAL ALIENATION

* The ***FLA*** doesn’t specifically address allegations of parental alienation, so this topic is governed by the common law

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| ***NRG v GRG*,** [2015] BCSC (Kent J) *Provides an overview of the signs of estrangement/alienation & possible remedies.***Estranged child vs. alienated child*** **Estranged child** 🡪 As a result of a parent’s abusive/immature behaviour, shitty parenting, or dysfunctional contact, child no longer wants to spent time w/the parent (**parent’s fault**)
* **Alienated child** 🡪 One parent undermines the relationship b/w the child & other parent (in)directly through antipathy & hostility until child no longer wants to spend time w/other parent (**other parent’s fault**)

**Remedies adopted by courts** (Bala et al., “Alienated Children & Parental Separation: Legal Responses in Canada’s Family Courts” (‘07))* Case MGMT
* Parental conduct orders (w/costs for non-compliance)
* Judicial exhortation urging compliance & emphasizing emo harm to children (effective in less severe cases)
* Ct-ordered therapeutic intervention (although “force-marching” child to reunification can be unrealistic/harmful)
* Ct-ordered supervised access/parenting time to allay child anxiety & possibly pave way to achieve (+)ve relationship in future
* Suspension of child/spousal support as a sanction to enforce more engagement w/other parent
* Transfer custody from alienating to rejected parent if expert testimony establishes long-term benefits > short-term emo trauma
* Terminating alienated parent’s access/parenting time when alienation is so entrenched that the *cure is worse than the illness*—recognize that children sometimes resume relationships w/rejected parent after long period w/o contact (perhaps in later years)
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| CHILD SUPPORT |

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| ***Divorce Act*** (**15.1**) | ***Family Law Act*** (**Part 7**: **146**-**152**) |
| **WHO is ENTITLED to CHILD SUPPORT?** 🡪 Under both regimes, a child is entitled to child support if either:* Under the age of majority & hasn’t withdrawn from the parents’ charge
* Age of majority or over & under the parents’ charge but is unable, by reason of **illness, disability, or “other cause”**, to withdraw from their charge or obtain the necessaries of life

***Farden v Farden***, [1993] 🡪 Post-secondary education can be an “other cause”; court may consider these factors:* whether child is studying full- or part-time
* whether child has applied for or is eligible for student loans & other financial assistance
* whether child’s career plans are reasonable & appropriate
* child’s ability to contribute to his own support via part-time employment
* child’s age
* child’s past academic performance & whether the child is demonstrating success in chosen course of studies
* parents’ plan for their children’s education, particular where plans were made during cohabitation
* if *mature child*, whether he has unilaterally terminated the relationship w/the parent from whom support is sought
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**Development of the law**

* Before the Guidelines: random application of rules for calculation of child support (recall: *Metzner*)
* With the introduction of the Guidelines in ’97 came a standardized national system for calculating child support

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| FEDERAL CHILD SUPPORT GUIDELINES |

**Objectives** [**1**]

1. to **establish a fair standard** of support for children that ensures that they continue to benefit from both spouses’ financial means after separation
2. to **reduce conflict & tension** b/w spouses by making the calculation of child support orders more objective
3. to **improve the efficiency of the legal process** by giving courts & spouses guidance in setting the levels of child support orders & encouraging settlement
4. to **ensure consistent treatment** of spouses & children who are in similar circumstances

**Presumptive rule** [**3(1)**] 🡪 Unless otherwise provided under these Guidelines, the amount of child support for children < age of majority is: **(a)** the amount set out in the applicable table, and **(b)** the amount, if any, determined under **7**

**For incomes >$150K** [**4**] (*Francis*) 🡪 Where the income of the spouse against whom a child support order is sought >$150K, the amount of child support is:

1. the amount determined under **3**, or
2. if the court considers that amount to be inappropriate (*Francis*),

**(i)** in respect of the **1st $150K** of the spouse’s income, the amount set out in the applicable table

**(ii)** in respect of the remaining balance of the spouse’s income, the **amount that the court considers appropriate** having regard to the condition/means/needs/other circumstances (*Metzner*)

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| ***Francis v Baker***, [1999] SCC (Bastarache J) 🡪 **4(b): “inappropriate” = “unsuitable”, not merely “inadequate”**Married in ’79 w/2 kids. Husband = Bay St. lawyer; wife = teacher. Divorced in ’87. Separation agreement provided that husband would pay $30K/year in child support. Wife applied for an increase in child support in ’88—once the matter reached trial 9yrs later, she amended her pleadings to claim support under the Guidelines. At time of trial: husband earned $900K/yr; wife eanred $63K/yr.**TJ:** Ordered $10K/mo in child support. **CA:** Dismissed husband’s appeal.* Proper construction of **4** reqs that the objectives of predictability, consistence, & efficiency be **balanced** w/those of fairness, flexibility, & recognition of the actual conditions/means/needs/other circumstances of the children
* Parliament intends there to be a **presumption in favour of the Table amounts**
* Thus, there must be an articulable reason for displacing the Guideline figures (relevant factors differ case-to-case)
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| ***Metzner v Metzner***, [2000] BCCA 🡪 **4: Presumption of the Table amounts; can only increase/decrease if rebutted*** Need clear & compelling evidence to depart from Guidelines
* Focus on the *centrality* of the actual situation of the children
* **Objective:** The maintenance of children, not household equalization or spousal support
* Onus is on paying parent to show an expense is not reasonable (too high)
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**Special/extraordinary expenses** [**7(1)**] 🡪 The court can order a spouse to provide an amount to cover all/a portion of the following expenses *taking into account the necessity of the expense in relation to the BIoTC & the reasonableness of the expense in relation to the means of the spouses, the child, & the family’s spending pattern prior to separation*:

1. **childcare expenses** incurred as a result of custodial parent’s employment/illness/disability/education/training
2. mental & dental **insurance premiums**
3. **health-related expenses** that exceed insurance reimbursement by ≥$100 annually (*Bell v Stagg*)
4. extraordinary expenses for primary/2ndary school **education** or program that meets child’s particular needs
5. expenses for post-secondary education
6. extraordinary expenses for extracurricular activities

**Def’n of “extraordinary expenses”** [**7(1.1)**]

1. Expenses that exceed those that the requesting parent can reasonably cover, or
2. Expenses that the court considers to be extraordinary, taking into account:
3. the amount in relation to the requesting spouse’s income
4. the nature & # of the educational programs & extracurricular activities
5. any special needs/talents of the child
6. the overall cost of the programs & activities
7. any other similar factor the court considers relevant

**Sharing special/extraordinary expenses** 🡪 The court may order or parties may agree that:

* Parents share payment of **s7** expenses proportionately, based on their respective incomes \*most common approach\*
* Each parent pays for a set of expenses
* One parent pays < what’s req’d, based on party’s income (e.g. each pays 50/50, even though one ought to pay more)

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| ***Bell v Stagg***, [2016] BCSC 🡪 **Must provide evidence as to why 7 expenses are necessary/reasonable** Parent claimed child was diagnosed w/Lyme disease, but provided no medical/other proof (also, credibility concerns) |

**Split vs. shared custody**

* **Split** [**8**] 🡪 Where each spouse has custody of ≥1 child, the amount of child support = the difference b/w the amount each spouse would otherwise pay if a child support order were sought against each spouse
* **Shared** [**9**] 🡪 Where a spouse exercises a right of access to, or has physical custody of, a child for **≥40% of the time**, the amount of child support must be determined by taking into account:
1. the amounts set out in the applicable tables for each spouse,
2. the increased costs of shared custody arrangements, and
3. the conditions/means/needs/other circumstances of each spouse & child (e.g. take into account household incomes, which include the income of any new spouse)
* Note: the “shared custody” provision (**9**) has generated a significant amount of litigation (see: *Contino*; *Maulstaid*)
* **40% threshold** 🡪 To trigger **9**, access or parenting time of ≥40% over the course of a year must be met
	+ Onus on parent seeking a change in child support to invoke **9** to establish care of ≥40%
	+ **9** has been criticized as being arbitrary (*Maulstaid*) & the cause of parental conflict—one might limit the other’s parenting time to avoid reduction in child support, while other may seek more parenting time to reduce payments
* **Methods of calculating time include** (but remember: *Maulstaid* says there’s no single method)**:**
	+ Counting the hours each parent has w/child over a 2wk period
	+ Counting the hours over a year (incl. school & holidays)
	+ Counting the hours in a typical week
	+ Counting the # of days
* **Shared custody – quantum** 🡪 **9** requires the court to determine the amount of child support in accordance w/the 3 factors listed, and consider the following:
	+ The specific language of **s9** warrants emphasis on flexibility & fairness to ensure that the economic reality & particular circumstances of each family are properly accounted for
	+ The weight given to each factor depends on the particular facts of each case (*Maulstaid*)
	+ There’s no presumption of reducing/increasing the amount of child support payable—there’s no conclusive formula

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| ***Contino v Leonelli-Contino***, [2005] SCC 🡪 **2-step test based on 9****(1)** *Does the parent cross the 40% threshold?* **(2)** *What amount of child support should be paid, given the factors listed under* ***9****?* |

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| ***Maulstaid v Blair***, [2009] BCCA (Saunders J) 🡪 **No single method of determining the amount of time (go case-by-case)*** Although courts have bemoaned the imprecision of **9** & expressed concern over its consequences for children in certain circumstances, the court isn’t free to disregard the language enacted by Parliament
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**Undue hardship** [**10(1)**] 🡪 On either spouse’s application, court may award an amount of child support that differs from an amount determined under **3**, **4**, **5**, **8**,or **9** if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship

* **Circumstances that may cause undue hardship** [**10(2)**]
1. spouse has an unusually high level of debt reasonably incurred to support spouse/children or earn a living
2. spouse has unusually high expenses in relation to exercising access to a child
3. spouse has a legal duty under judgment, order, or written separation agreement to support someone
4. spouse has legal duty to support a different child who’s **(i)** < age of majority, or **(i)** illness/disability/etc.
5. spouse has legal duty to support any person unable to obtain the necessaries of life due to illness/disability

**Circumstances for variation** [**14**] 🡪 Any of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

1. if child support amount is from table, any change in circumstance that would result in a different child support order
2. if child support amount isn’t from table, any change in the condition, means, needs, or other circumstances of either spouse or any child who is entitled to support

**Determining a spouse’s annual income** [**15(1)**] 🡪 Determined by the court in accordance w/**16**–**20**

* **AGREEMENT** [**15(2)**] If both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse’s income for the purposes of these Guidelines if the court thinks the amount is reasonable having regard to the income information provided under **21**
	+ Guideline income is determine under **16**–**20** based on present year’s predicted income/historical pattern of income
	+ All sources of income are included in the calculation
	+ Income may also be **imputed** where there has been a failure to comply w/disclosure obligations [**21**]
* **CALCULATION of ANNUAL INCOME** [**16**] Subject to **16**–**20**, a spouse’s annual income is determined using the sources of income set out in the CRA’s T1 General Form (“Total Income”), and is adjusted in accordance w/Schedule III
* **PATTERN of INCOME** [**17(1)**] If the court thinks that determining a spouse’s annual income under **16** would not be the fairest determination of that income, it may have regard to the spouse’s income over the last **3yrs** & determine an amount that’s fair & reasonable in light of any pattern/fluctuation of income during those years
* **SH, DIR, or OFR of a Cx** [**18**] Where a spouse is one of these + court thinks the spouse’s annual income under **16** doesn’t fairly reflect all the money available to the spouse for child support payments, the court may consider the situations described in **17** and determine the spouse’s annual income to include:
1. all/part of the pre-tax income of the Cx for the most recent taxation year, or
2. an amount commensurate w/the services the spouse provides to the Cx

**Determining income – SUMMARY**

**16** 🡪 based on “Total Income” in T1 Income Tax General

**17** 🡪 pattern of income = use last 3yrs & determine what’s fair & reasonable in light of fluctuations & non-recurring amounts

**18** 🡪 for SHs/DIRs/OFRs, court can consider all/part of pre-tax income & amount commensurate w/the payor’s services to the Cx

**20** 🡪 for non-resident payor, as if person were resident of Canada

**Imputing Income** [**19**] 🡪 The court may impute income as it considers appropriate in the circumstances, including:

1. payor is intentionally unemployed/under-employed (*Koch*)
2. payor is exempt from paying federal/provincial income tax
3. payor lives in country w/significantly lower tax rate
4. it appears income has been diverted
5. spouse’s property isn’t reasonably used to generate income
6. payor failed to provide income info
7. payor unreasonably deducts expenses from income
8. payor derives significant portion of income from dividends, capital gains, or other sources taxed @ low/no rate
9. payor is a beneficiary of a trust and is or will be in receipt of income from the trust

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| ***Koch v Koch***, [2012] BCCA 🡪 **Sets out general principles re: unemployment/under-employment*** Parents who are healthy & can work have a duty to seek employment
* Reasonable income-earning capacity is based on parent’s age, education, skills, health, & on-the-job experience
* Limited experience & skills don’t justify a failure to pursue employment—*can’t just wait for the best job*
* Persistence in unremunerative employment may entitle the court to impute income
* Parent can’t be excused from child support obligations in furtherance of unrealistic/unproductive career aspirations
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| ***SAB v CDB***, [2004] BCSC 🡪 **Court decided to impute drug dealer’s income**∆ = drug trafficker w/crim record. Earned virtually all of his income during the marriage from trafficking (his “work”), but says he hasn’t trafficked since the action started. Now, ∆ faces an enormous assessment of income tax arrears ($200–$300K) which he’s contesting. π (exotic dancer) now has cleaning job, but supplements her income w/some dancing.* Court decided to **impute income** to ∆ for the purpose of child support [**19**]
* “I am concerned that the court would appear to be encouraging him or req’ing him to continue his criminal activity”
* At trial, ∆ & his friends insisted that he was quite capable of earning a good income legally
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| SPOUSAL SUPPORT |

* Payment made by one spouse (payor) to the other (recipient) to help w/day-to-day living expenses or to compensate the recipient for the financial choices the spouses made during the relationship
* Not an automatic right 🡪 don’t get to receive support just because of the relationship
* Whether spousal will be paid and, if so, the amount depends on the particular circumstances of each couple
* *M v H*, [1999] SCC declared it unconstitutional to exclude **same-sex spouses** from spousal support rights & obligations

**Objectives of spousal support** [***FLA* s161**; ***DA* s15.2(6)**] 🡪 Court/parties must consider these in determining entitlement:

1. to recognize economic (dis)advantages to the spouses arising from their relationship or its breakdown
2. to apportion b/w the spouses any financial consequences arising from childcare (beyond child support)
3. to relieve economic hardship arising from the breakdown of the relationship
4. to promote economic self-sufficiency of each spouse within a reasonable period of time (as far as practicable)

*Moge v Moge* 🡪 All 4 must be taken into account in determining entitlement to spousal support—*no single objective is paramount*

**Duty of spouse** [***FLA* s160**] 🡪 If a spouse is entitled to spousal support (based on objectives in **161**), the other spouse has a duty to provide for the spouse in accordance w/**162**

**Amount of spousal support** [***FLA* s162**] 🡪 The amount/duration of spousal support is based on the conditions, means, needs, and other circumstances of each spouse, including: **(a)** length of time spouses lived together, **(b)** functions performed by ea. spouse when they lived together, and **(c)** any agreement b/w them or order relating to spousal support

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| GROUNDS for SPOUSAL SUPPORT |

**Choosing grounds for spousal support** (contractual, compensatory, non-compensatory)**:**

* Where the extent of the economic loss is quantifiable, **compensatory** factors may be paramount (*Bracklow*)
* Where it’s difficult to quantify the extent of the disadvantaged spouse’s economic loss = **non-compensatory** (*Bracklow*)
1. CONTRACTUAL🡪 Applies where parties entered into a marriage/separation agreement or Kual obligation is implied
* The*Miglin* Testis a judge-made, CL test—it has been codified & expanded in the ***FLA***
* Basically, you’ll want to use the ***FLA*** *unless* the couple is **married** & elects to use the ***DA*** (and therefore *Miglin*)

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| ***Divorce Act*** | ***Family Law Act*** |
| **Old:** *Pelech* Trilogy(*Pelech*; *Caron*; *Richardson*)* These cases held that, subject to limited exceptions, parties should be bound by their agreement
* To depart from agreement, must show a radical change in circumstances flowing from a pattern of economic development caused by the marriage

**Now:** *Miglin*, [2003] SCC* The threshold established by *Pelech* Trilogy is no longer appropriate under the ***DA***’s broader support objectives
* Agreements are still subject to deference, but broader grounds for ordering support in different amount
* **2-stage test** for approaching an originating application for support when there’s an existing agreement:

**STAGE #1** requires the court to look at:1. circumstances in which agreement was made (ask: *was the agreement obtained fairly?*)
2. whether the agreement substantially complied w/***DA***’s objectives (set out in **15.2(6)**)

*\*\*\*If agreement wasn’t obtained fairly or departs from* ***DA****’s objectives, it will be given little weight\*\*\****STAGE #2** requires the court to consider:* If agreement still reflects the parties’ original intention & remains in substantial compliance w/***DA***’s objectives
* If there has been a material change in circumstances not reasonably anticipated by the parties that has led to a situation which cannot be condoned = court may give little weight to the agreement
* **High threshold:** Ct will defer to the agreement *unless* the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds w/***DA***’s objectives
 | **Where court can make order to replace agreement** [**164**]* The court can’t make a spousal support order in the face of an agreement *unless* all/part of the agreement is set aside (i.e. can’t just supplement agreement) [**165(3)**]
* **164** provides two tests that, if met, allow the court to set aside or replace an agreement with an order:

**TEST #1** [**164(3)**]**: *Procedural fairness**** If *any* of the following circumstances existed when parties entered into agreement, court may set it aside:
1. spouse failed to disclose income, significant property/debt, or other info relevant to the negotiation of the agreement
2. spouse took improper advantage of other spouse’s vulnerability (e.g. ignorance/need/distress)
3. spouse didn’t understand the nature/consequences of the agreement
4. other circumstances that would, under the CL, cause all or part of a K to be *voidable*

**TEST #2** [**164(5)**]**: *Significant unfairness**** Court may set aside agreement if it’s satisfied that the agreement is *significantly unfair*
* In determining significant unfairness, it may consider:
1. the length of time passed since agreement was made
2. any changes in a spouse’s condition/means/needs or other circumstances since the agreement was made
3. the degree two which the spouses relied on its terms
4. the degree to which the agreement meets **161** objectives
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1. COMPENSATORY 🡪 Applies where spouse has *forgone opportunities* or *endured hardships* as result of the marriage
* Often invoked when spouse left workforce to care for child (but even w/o child, may decide that 1 spouse stays home)
* Any economic disadvantage to the spouse who remained home flows from the ***shared decision*** = ***compensable***
* **Scenarios:** Spouse declined a promotion, refused a transfer, left a position to allow other spouse to take advantage of an opportunity for advancement, or otherwise curtails employment opportunities & incurs economic loss
* **Financial consequences:** Loss of future earning power, loss of seniority, missed promotions, lack of access to fringe benefits (pension plan, life/disability/dental/health insurance), missed opportunity for job retraining/skills upgrading
* **Standard of living:** Spouse entitled to support isn’t guaranteed the same standard of living, but argue:

*the longer the relationship = closer the economic union = greater presumptive claim to equal standards of living*

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| ***Moge v Moge*,** [1992] SCC (**L’Heureux-Dubé J**) Married for 20yrs w/3 kids. Wife had grade 7 education + no special skills/ training (stay-at-home mom). Did some intermittent work cleaning offices, but was laid off = increase in spousal & child support. Later able to secure part-time & intermittent cleaning work. Husband sought to terminate spousal support.**Q:** *Is the wife entitled to ongoing support for an indefinite period of time?* **YES**—husband’s appeal dismissed* Self-sufficiency is only ¼ objectives—it shouldn’t necessarily be given priority in determining spousal support
* Divorce & its economic effects play a role in the *feminization* of poverty in Canada—in most marriages, **wife remains the economically disadvantaged partner** = Parliament’s intent wasn’t to financially penalize women
* Must ascertain the extent to which spouse’s withdrawal from labour force has adversely affected her ability to maintain herself
* If finances, household MGMT, & childcare are divided b/w spouses, a spouse who does any of these should be seen as freeing the other spouse to perform the remaining functions
* Once the marriage dissolves, the kinds of non-monetary contributions made by wife may result in **significant market disabilities**
* Effectively, the wife is left w/**diminished earning capacity** & may have conferred upon her husband an embellished one
* **DOCTRINE of EQUITABLE SHARING of the ECONOMIC CONSEQUENCES of MARRIAGE or MARRIAGE BREAKDOWN:**
* Seeks to recognize & account for economic disadvantages incurred by spouse + advantages conferred upon other
* Recognizes that work within the home has undeniable value
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* **Divorce – Impact on women & children**
	+ Reduction in income causes residential moves, inferior housing, drastically diminished funds for rec/leisure, intense pressue due to inadequate time/$, social dislocation, loss of familiar networks for emotional support & social services
	+ Divorce increases female & child poverty; creates an ever-widening gap b/w the economic well-being of divorced men vs. their children & former wives
* **Judicial discretion** (solution to aforementioned problems associated w/divorce)
	+ Broad approach; requires an examination of *all objectives* (although not all will be equally important)
1. NON-COMPENSATORY (SOCIAL OBLIGATION MODEL) 🡪 Applies where recipient spouse’s needs **>** entitlement to compnst’n
* Here, the obligation to provide support derives from the basic social obligationof the marital relationship

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| ***Bracklow v Bracklow*,** [1999] SCC (**L’Heureux-Dubé J**) **Q:** *May a spouse have an obligation to support a former spouse over & above what’s req’d to compensate spouse for loss incurred as a reuslt of the marriage & its breakdown (or to fulfill contractual support agreements?* **YES*** In cases where the extent of spouse’s economic loss is hard to quantify, the court will consider the need & standard of living as the primary criteria (along w/other party’s ability to pay) 🡪 from Bastarache J in *Ross v Ross*, [1995] NBCA
* When compensation isn’t indicated & self-sufficiency ≠ possible, support obligat’n may still arise from marriage relationship itself
* Even if spouse hasn’t foregone career opportunities, court must consider spouse’s actual ability to fend for him/herself & the effort that has been made to do so
* “Economic hardship arising from the breakdown of the marriage” [***FLA* s161**; ***DA* s15.2(6)**] encompasses the mere fact that a person who formerly enjoyed intra-spousal entitlement to support now finds him/herself without it
* Spouse’s lack of self-sufficiency may arise from things unrelated to foregone career/education opportunities such as disappearance of the kind of work the spouse was trained to do (e.g. can only work at Blockbuster, lol) or **ill health**

**Quantum of non-compensatory spousal support** 🡪 varies w/the circumstances and the practical & policy considerations of ea. case* The same factors that go to entitlement have an impact on quantum
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* **Indefinite support?** *Messier v Delage*, [1983] SCC
	+ Doesn’t mean that the support obligation should continue indefinitely—consider the current economic situation, the difficult in finding work, & the resulting high rate of unemployment
	+ Divorced spouse who’s working should bear the consequences of these factors—not something for the gov’t to alleviate

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| VARIATION of a SPOUSAL SUPPORT ORDER |

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| ***Divorce Act*** | ***Family Law Act*** |
| **s17(4.1)** To vary a spousal support order, the court must be satisfied that a **change in the condition/means/needs/ other circumstances** of either former spouse has occurred since the making of a prior order/variation | **167(1)** On application, the court may change, suspend, or terminate a spousal support order, and may do so either *prospectively* or *retroactively* (but tries to avoid retroactive repayments)**167(2)** To vary a spousal support order, the court must be satisfied that *at least one* of the following exists:1. change in the condition/means/needs/other circumstances of either spouse has occurred since order was made
2. substantial evidence that wasn’t available at previous hearing is now available
3. evidence of a lack of financial disclosure was discovered after order was made
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| SPOUSAL SUPPORT ADVISORY GUIDELINES (“SSAG”) |

**Background**

* W/funding from the DoJ, family law professors Rollie Thompson & Carol Rogerson developed the SSAGs to make spousal support more **predictable & consistent**
* The SSAGs suggest appropriate ranges of support in a variety of situations for spouses entitled to support—they don’t provide advice as to whether a spouse is entitled to support
* Originally introduced in draft form in 2005, released in 2008, & revised in 2016
* Not legally binding (*Yemchuk*)—rather, they’re are intended as *informal* *guidelines* operating on an advisory basis only (*W v W*)
* Contain with & without child formulas; income ceiling ($350,00) & floors ($20,000)

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| ***Yemchuk v Yemchuk*** (**Prowse J**) 🡪 Comments on the use/legitimacy of the SSAG* The SSAGs are intended to reflect the current law (not change it) and build upon the law as it exists
* They aren’t official law, but neither do they constitute evidence (or even expert evidence) that needs to be proven in court
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| ***W v W***, [2005] BCSC 🡪 **SSAGS = consistent with the law in British Columbia*** The SSAGs are just *advisory* *guidelines*—they’re an example of one useful tool to lawyers
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| ***Redpath v Redpath***, [2006] BCCA 🡪 **Court maintains discretion to increase/decrease spousal support*** Ct increased an award of $3500/mo. to $5000/mo. even though TJ considered all factors & didn’t misapprehend the evidence
* If particular award deviates substantially from SSAGs w/no exceptional circumstances to explain it = **potential grounds of appeal**
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### WITHOUT CHILD FORMULA

* **Two crucial factors**: **(A)** the gross income difference between the spouses **(B)** the length of the relationship
*  amount & duration of spousal support
* Note: there’s softward used to determine quantum & duration of support (e.g. DivorceMate)

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| **WITHOUT CHILD FORMULA****Step #1:** [payor’s gross annual income] – [recipient’s gross annual income] = [gross income difference]**Step #2:** 1.5 x [length of relationship (yrs)] = [lower % limit]; 2 x [length of relationship (yrs)] = [upper % limit]**Step #3:** [lower % limit] x [gross income difference] = [lower annual spousal support estimate]  [upper % limit] x [gross income difference] = [upper annual spousal support estimate]  |

### WITH CHILD FORMULA

* Raises different considerations: priority must be given to child support
* **Factors:** What drives support isn’t the length of the marriage, marital interdependency, or merger over time, but the presence of dependent children and the need to provide care & support for those children
* **Differences from the “without child formula”:**
	+ This formula uses spouses’ net incomes (not their gross incomes)
	+ Divides the pool of combined net incomes between the spouses (not the gross income difference)
	+ The upper & lower % limits don’t change with the length of the relationship

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| **WITH CHILD FORMULA:** **Step #1:** Determine the individual net disposable income (INDI) of each spouse by:1. [SSAG income] – [child support] – [taxes & deductions] = [payor’s INDI]
2. [SSAG income] – [notional child support] – [taxes & deductions] + [gov’t benefits & credits] = [recipient’s INDI]

**Step #2:** Add together [payor’s INDI] + [recipient’s INDI] & determine the range of spousal support amounts that would be required to leave the lower-income recipient spouse with **40­–46% of the combined INDI** |

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| SPOUSAL MISCONDUCT |

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| ***Divorce Act*** | ***Family Law Act*** |
| **15.2(5)** **Spousal misconduct** 🡪 In making a spousal support order, the court shall not take into consideration any misconduct of a spouse in relation to the marriage* Basically, you can’t get compensated for being cheated on, unless the cheating led to other grievances (misuse of family funds, mental health issues, health issues, etc.) 🡪 *Leskun*
 | **166** **Misconduct of spouse** 🡪 In making a spousal support order, the court must not consider any misconduct of a spouse **except conduct that arbitrarily/unreasonably**:1. causes, prolongs, or aggravates the need for spousal support, or
2. affects the ability to provide spousal support

**167(1)(c)** Allows a court to vary a support order in certain circumstances (incl. *lack of financial disclosure*)* Here, the court might **impute income** on a payor
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| ***Leskun v Leskun***, [2006] SCC 🡪 **Spousal misconduct ≠ relevant to spousal support but its consequences might be**20yr marriage. Wife suffered severe back injury & was laid off. Soon after, husband told her he was divorcing her to marry another woman. 4yrs later, husband sought to discontinue support payments. **Held:** Wife wasn’t self-sufficient & remained in need of spousal support (husband’s appeal dismissed)* The ***DA*** doesn’t prevent consideration of a failure to achieve self-sufficiency as being a result of the **emotional devastation** caused by the other spouse’s misconduct
* While spousal misconduct itself isn’t relevant to spousal support, the consequences of spousal misconduct may be relevant insofar as they affect **self-sufficiency**
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| ***Peterson v Lebovitz***, [2013] BCSC 🡪 A payor’s **failure to take meaningful steps toward employment** and **repeated actions to terminate support** are arbitrary actions affecting the ability to pay |

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| ***Bateman v Bateman***, [2013] BCSC 🡪 The **cause of the relationship’s failure** isn’t a factor to be considered |

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| SECURITY for SUPPORT |

**ESTATE** 🡪 Support payments can be secured by making the payments binding on the payor’s estate (by agreement or court order)

**LIFE INSURANCE** 🡪 Support payments can be secured through life insurance on the life of the payor whereby the recipient is the irrevocable beneficiary for the duration of the support obligation (by agreement or court order)

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| ***FLA* s95** Permits the court to order an unequal division of family property and/or debt if it would be significantly unfair to equally divide them* **Factors:** Court can consider **(3)** the extent to which a spouse’s financial means & earning capacity has been affected by the responsibilities & circumstances of the relationship if, on making a determination on spousal support, the objectives (**161**) have not been met (recognize economic (dis)advantages, apportion financial consequences from childcare, relieve economic hardship, promote economic self-sufficiency)
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| DIVISON of PROPERTY |

* Historically, men would retain property acquired during marriage because it was registered in their name alone—women (ex-wives) had to apply for division of property (DoP) through a complicated trust-like procedure
* ***FRA*** allowed ct to divide marital property, then was replaced by the ***FLA*** in 2013
* One of the ***FLA***’s principal objectives was to reduce litigation & encourage out-of-ct settlement
* **Changes to the *FLA*:** Applies to both CL spouses & married spouses; redefined “family property” & “property divison”; includes division of family debt; difficulties re: judicial interpretation

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| DATE of SEPARATION |

**Importance**

* **Acts as a triggering event** 🡪 point in time when the spouses’ joint financial unit is divided into 2 individual units
* **Exception** 🡪 Assets bought w/family property; debts incurred for family purpose
* **Advice to clients** 🡪 Deliver written notice of intention to separate

**Reconciliation** 🡪 Impact on date of separation

***FLA* s83(1)** Spouses aren’t considered to have separated if, within 1yr after separation:

1. they begin to live together again for the primary purpose of **reconciliation**
2. they continue to live together for ≥1 periods totaling **≥90days**

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| *FLA* PART 5 – PROPERTY DIVISON |

**Who can make a claim?** 🡪 Only a “spouse” (married or CL) as defined by **3**

* Married individuals or people who have lived together in marriage-like relationship for continuous period of ≥2yrs [**3**]
* Spouses aren’t separated if they continue to live together w/goal of reconciliation or for total of 90 days [**83**]

**Property division** [**97(2)(a)**] 🡪 Court can make declarations concerning the possession & ownership of property + any orders that are necessary to give effect to such declarations

**Jx** [**106**] 🡪 When orders are made in ≥1 Jx, the BCSC has authority if there’s a real & substantial connection to the prov

* *Real & substantial connection* = presumed to exist if property is located in BC or the spouses’ most recent common habitual residence was in BC

**PRESUMPTION of equal entitlement & responsibility** [**81**] 🡪 Upon separation, each spouse takes ½ interest in family property as a tenant in common, and each becomes responsible for ½ of the family debt

**EXCEPTION: “significant unfairness”** [**95(1)**] 🡪 The court may order for an unequal division of family property/debt if it would be significantly unfair to divide it equally between the spouses

* **FACTORS** [**95(2)**] In determining whether equal division would be significantly unfair, court may consider:
1. duration of relationship
2. terms of any agreement b/w the spouses
3. spouse’s contribution to the other spouse’s career or career potential
4. whether family debt was incurred in the normal course of the relationship b/w the spouses
5. if the amount of family debt > value of family property, the ability of each spouse to pay a share of the debt
6. whether a spouse cause a significant increase/decrease in value of family property after the date of separation
7. if a spouse not acting in good faith substantially reduced value of family property or transferred/disposed of it
8. tax liability that may be incurred as a result of an order
9. any other factor that may lead to significant unfairness
* **SPOUSAL SUPPORT** [**95(3)**] The court may also consider the extent to which a spouse’s financial means & earning capacity has been affected by the responsibilities & other circumstances of the relationship if, on making a determination of spousal support, the objectives under **161** haven’t been met
* **Discussion – *FLA* s95**
	+ The ***FLA*** has made it more difficult to divide excluded property by raising the bar to *significant* unfairness
	+ Courts have interpreted **95** as a “caution against departure from the default equal division in an attempt to achieve perfect fairness”
	+ ***LG v RG***, [2013] BCSC 🡪 only when equal division brings consequences that are sufficiently weighty to render it unjust/unreasonable should a judge depart from the default equal division
* **CLIENT ADVICE:** Advise clients that the issue of significant unfairness needs to be approach on a case-by-case basis, & courts are unpredictable (solution: do a cohabitation or marriage agreement to avoid future problems)

**Family property** [**84**] 🡪 Includes all real & personal property as follows:

* **On date of separation:** property that’s owned by ≥1 spouse (or in which ≥1 spouse has a beneficial interest) [**(1)(a)**]
* **After separation:** property that was acquired by ≥1 spouse (or in which ≥1 spouse has a beneficial interest) that is derived from family property [**(1)(b)**]
* **Includes:** share/interest in Cx, money of a spouse in a bank account, spouse’s entitlement under pension plan, etc.
* Income ≠ property unless determining support payments or in bank account where it accumulates

**Excluded property** [**85**] 🡪 Following is excluded from family property (onus on spouse claiming excluded property: **(2)**):

1. property acquired by spouse before relationship began
2. inheritances to a spouse (or gifts to a spouse from 3rdP: **(b.1)**)
3. settlement/damages as compensation for injury/loss (unless it’s for lost income)
4. money payable under insurance policy (unless it’s for lost income)
5. property held in trust for the benefit of a spouse
6. beneficiary interest in property held in trust to which spouse didn’t contribute & is settled by another person
7. property derived from excluded property

**EXCEPTION** [**84(2)(g)**]**:** The amount by which the value of excluded property has increased since the later of the date: **(i)** the relationship began, or **(ii)** the excluded property was acquired

**Family debt** [**86**] 🡪 Includes all financial obligations incurred by a spouse:

1. **during the period** b/w when the relationship began & when the spouses separated, and
2. after the date of separation, if incurred for the **purpose of maintaining family property**

**Valuation** [**87**] 🡪 Unless an agreement/order provides otherwise:

1. the value of family property is based on its fair market value
2. the value of family property & debt must be determined as of the date

**(i)** an agreement dividing the property & debt is made, or **(i)** of the court hearing respecting its division

**Orders for interim distribution of property** [**89**] 🡪 If satisfied that it wouldn’t be harmful to an interest of a spouse & it’s necessary for a purpose listed below, the court may make an order for an interim distribution of family property to provide money to fund: **(a)** FDR, **(b)** all/part of a proceeding under the ***FLA***, or **(c)** obtaining info/evidence in support of FDR or a court application

**Temporary order protecting family residence** [**90)**] 🡪 Ct may make order granting a spouse (for specific period of time)

**(a)** exclusive occupation of fam residence, or **(b)** possession/use of specified personal property stored at fam residence

* An order under this section doesn’t:
1. authorize a spouse to materially alter the substance of the fam residence/personal property
2. grant a spouse a proprietary interest in the fam residence/personal property
3. grant a spouse any right that continues after the rights of the other spouse as owner/lessee are terminated

**Temporary order protecting property** [**91(1)**] 🡪 On application by a spouse, the court must make an order restraining the other spouse from disposing of any property at issue under this Part until/unless the other spouse establishes that a claim that won’t be defeated or adversely affected by the disposal

* **(2)** The court may make an order for the following purposes:
1. for the possession, delivery, safekeeping, & preservation of property
2. for the purpose of protecting the applicant’s interest in property from being defeated or adversely affected
3. prohibiting the other spouse from disposing of, transferring, converting, or exchanging the property
4. vesting all or a portion of the property in, or in trust for, the applicant

**Pensions** = family property (division of which is dealt w/by ***FLA* Part 6**)

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| CASE LAW on EXCLUDED PROPERTY |

* *Asselin v Roy*, [2013] BCSC 🡪 If you can trace your excluded property (w/docs & other evidence), then you can keep it separate from family property (it remains excluded)
* *Remmem v Remmem*, [2014] BCSC 🡪 If you use your excluded property to purchase property jointly w/your spouse, you won’t automatically lose your exclusion
* Husband was allowed to keep value of his excluded property, even though he sold it & used the funds towards the purchase of the parties’ new house
* *PG v DG*, [2015] BCSC 🡪 Once property is excluded, it’s always excluded
* *Wells v Campbell*, [2015] BCSC 🡪 **Contradicted** *Remmem* & *PG*: Husband lost the ability to claim his exclusion by putting property into joint names w/wife (similar result in *VJF v SKW*, [2015] **BCSC**)
* Then, BCCA issued 2 cases to clarify division of excluded property: *Cabezas v Maxim* and *VJF v SKW*, **BCCA**…

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| ***Cabezas v Maxim***, [2016] BCCA 🡪 ***FLA* isn’t a complete code—interpret using common law principles**Met in ‘05, moved in together in ’06, bought property together in ’07. ∆ paid down-payment, leaving $256K mrtge. Couple struggled financially, so ∆’s parents paid $187K to discharge the mrtge w/o any written agreement or loan doc. Separated in ’13 & sold property. ∆ argued that net sale proceeds ($196) were his excluded property. ∆’s mother testified that she intended the money to be given only to her son as an advance on his inheritance—not to the couple together.**Held:** Mrtge payments were given as a *gift* to benefit both parties = **not excluded property** (appeal dismissed)* Common law indicates that the relevant time for assessing intention is the time of transfer
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| ***VJF v SKW***, [2016] **BCCA** 🡪 **Clarifies that CL & equitable prinicples haven’t been eliminated by the *FLA***Husband put his $2M inheritance into a house in the sole name of his wife. Since he *gifted* the property to his wife, he couldn’t later claim that the property was excluded property. He argued that the purpose of his “gift” was to protect the property from creditors.**Held:** Can’t have it both ways—can’t give property to spouse for one reason, then get it back for another = **family property** (not excluded) = subject to equal division between the parties* This case followed the line of reasoning in *Wells v Campbell*
* **If property is given/registered as a gift, it remains a gift (**can’t have it both ways**)**
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| ***Sardinha v Sardinha***, [2016] BCSC 🡪 **Look @ parties’ intention to determine whether property is excluded** (gift or not)Parents assisted w/down-payment & became liable on mrtge. Court considered whether the parents’ funds qualify as an advance on an inheritance or as a gift. **Held:** Allowed in part (deemed **excluded property**)* There was no suggestion funds advanced by claimant's parents had been a loan
* *Presumption of advancement* doesn’t apply between parents & independent adult children
* However, it was apparent that the retirement of mrtge should be seen as **advance on claimant's inheritance** which he was entitled to retain as **excluded property** pursuant to **85(1)(g)**
* Alternatively, could’ve argued that equal division here would be **significantly unfair** [**95(1)**]
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| ***Jaszczewska v Kostanski***, [2016] BCCA 🡪 **Increase in property value after separation; equal div = significantly unfair** Husband built new residence on parties’ property = increase in property value after separation. **TJ:** Allowed wife to keep proceeds from the sale of some strata units & gave compensation order for $1M. **Held:** Equal division of strata profits would be significantly unfair [**95(1)**] (so units were apportioned 70/30), but the majority of the TJ’s order was left intact. |

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| ***Wong v Rooney***, [2016] BCSC & ***Bell v Stagg***, [2016] BCSC 🡪 **Application of the *VJF* and *Cabezas* decisions** |

**State of the law**

* **Plain reading of *FLA*** – Person who received an inheritance & could prove it = entitled to claim it as excluded property
* **Case law** – Informs us that the ***FLA*** can’t be considered in isolation—it’s not in itself a complete code (*Cabezas*)
	+ Must look to the **intentions of the parties at the time the inheritance was received or the property was transferred** (*Cabezas*; *VJF*, **BCCA**; *Sardinha*)
* These cases tell us that the excluded provisions of the ***FLA*** aren’t a complete code
	+ In advising our clients we need to look at the intention of the parties and/or their parents/relatives at the time the gifts or inheritances were given or property was received/transferred
	+ Needs to me evidence of intention at the time decisions were made
* Prior to 2015 (& certainly before the recent BCCA decisions) lawyers may have been telling their clients that the excluded property of the ***FLA*** would protect their gifts & inheritances in any circumstance, but those assurances can no longer be given

**Client advice**

* Draft a marriage agreement or a cohabitation agreement and clarify your intentions.
* Make sure you have documentation at the time your property/gift/inheritance is received/transferred
* Sign a *Declaration of Trust* if you intend that your spouse will hold property in trust for you
* Be aware of the inference of joint right of survivorship that arises with joint bank accounts & property held in joint tenancy
* Talk to a family law lawyer about your options.

**Arguments**

* In favour of property being **excluded property**
	+ First, argue that it plainly qualifies as “excluded property” under **85(2)**
	+ Rely on plain reading of the ***FLA*** 🡪 if you can prove excluded property, you can claim excluded property (*Asselin*)
	+ Even using excluded property to purchase something jointly w/spouse doesn’t revoke its status (*Remmem*)
	+ Once property is deemed “excluded property”, it should remain “excluded property” (*PG*)
	+ Apply CL principles and argue on the facts that the parties’ intention at the time of transfer was for the property to only benefit one spouse (*Cabezas*)
	+ Finally, rely on **95(1)** and argue that equal division would be significantly unfair (*Sardinha*; *Jaszczewska*)
* In favour of property being **family property**
	+ First, argue that it’s “family property” under **84** & doesn’t fall within **85(2)** exceptions
	+ Concede that it’s not family property, but go after its increased value via **84(2)(g)**
	+ Argue that equal division would not result in significant unfairness: it’s a high threshold, as per *LG v RG* (address **95(2)** factors)
	+ Emphasize how the code isn’t complete—common law principles should guide interpretation (*Asselin*)
	+ Based on CL principles, argue on the facts that the intention of the gift = to benefit both spouses (*Cabezas*)
	+ Argue that property was *given as a gift*, and should therefore *remain a gift* (*VJF*, **BCCA**)
	+ Argue that, unlike in *Asselin*, the spouse is unable to trace the property back so as to establish that it’s excluded property

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| DRAFTING AGREEMENTS |

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| TYPES of AGREEMENTS |

**Agreements** [**6**] 🡪 ≥2 ppl may make an agreement to resolve a family law dispute or respecting a matter that may be a future family law dispute (e.g. cohabitation/marriage agreement)

**Parenting arrangements agreements (limits)** [**44(2)**] 🡪 Only binding if the agreement is made after separation or when parties are about to separate

**Property division agreements** [**92**] 🡪 To divide family property/debt (equally/unequally), include/exclude property as family property, value family property differently than would be done under **87**

**Child support agreements (limits)** [**148**] 🡪 Only binding if agreement is made after separation or when parties are about to separate

**Spousal support agreements** [**163**] 🡪 May provide for when spousal support will change/end

* You can include a condition changing/ending support if spouse is in new relationship, but a condition that a spouse abstain from sexual relations ≠ binding

**Agreements silent as to impact support on death of payor** [**171(2)**] 🡪 If agreement exists & payor dies, court may make an order to **(a)** set aside/replace the agreement, or **(b)** change/suspend/terminate the order

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| SETTING ASIDE AGREEMENTS |

* Start w/the **basic principles of K law** to see whether an agreement exists to begin with (mistake, unconscionability, non-disclosure, etc.)
* Written agreements will be set aside for lack of procedural fairness, common law pitfalls, or if they’re “significantly unfair” (but this is a high threshold)
	+ Agreement must be in writing 🡪 but this isn’t always fatal (see **164(5)**)
	+ Each spouse must have signed
	+ Signatures of spouses must be witnessed (can be by the same person)
* If the agreement isn’t in writing, it can still be considered as a factor under “significant unfairness” considerations for unequal division of property/debt

### PROPERTY DIVISION AGREEMENTS

**Setting aside property division agreements** [**93(3)**] 🡪 Court may set aside part/all of the agreement if satisfied that ≥1 of the following circumstances existed when it was entered into:

1. non-disclosure
2. improper advantage of ignorance, need, or distress
3. didn’t understand nature/consequences of the agreement
4. other circumstances that would, under CL, cause all/part of a K to be voidable (unconscionability, fraud, etc.)

**EXCEPTION** [**93(5)**]**:** Even if none of these circumstances exist, the court can set aside/replace the agreement if it’s significantly unfair having regard to:

1. the length of time that has passed since agreement was made
2. the intention of the spouses, in making the agreement, to achieve certainty
3. the degree to which the spouses relied on the terms of the agreement

**Court can decline to act** [**93(4)**] 🡪 If the agreement wouldn’t be replaced with a substantially different order

### CHILD/SPOUSAL SUPPORT AGREEMENTS

**Setting aside child support agreements** [**148(3)**] 🡪 Ct can set aside/replace it if the court would make a different order

**Setting aside spousal support agreements** [**164(3)**] 🡪Court may set aside/replace an agreement if satisfied that ≥1 of the following circumstances existed when it was entered into:

1. spouse failed to disclose income or significant property/debt (or other relevant info)
2. spouse took improper advantage of other spouse’s vulnerability (ignorance/need/distress)
3. spouse didn’t understand nature/consequences of the agreement
4. other circumstances that would, under CL, cause all/part of a K to be voidable (unconscionability, fraud, etc.)

**EXCEPTION** [**164(5)**]**:** Even if none of these circumstances exist, the court can set aside/replace the agreement if it’s significantly unfair having regard to:

1. the length of time that has passed since agreement was made
2. any changes in a spouse’s condition/means/needs/other circumstances since the agreement was made
3. the intention of the spouses, in making the agreement, to achieve certainty
4. the degree to which the spouses relied on the terms of the agreement
5. the degree to which the agreement meets **161** objectives

**NOTE** [**164(6)**]**:** Court may apply this section to an unwitnessed agreement if satisfied that it’s appropriate to do so

**Remedies**

* **BLAME the CONTRACT** 🡪 Mistake, fundamental breach (high threshold), capacity issues
* **BLAME the PRACTITIONER/PROCESS** 🡪 Procedural fairness, duress, undue influence, fraud, non-disclosure, lack of independent legal advice, reconciliation

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| DRAFTING SEPARATION AGREEMENTS |

**Strategies for practitioner**

* Issues of unconscionability/vulnerability/emotions
	+ Recognize emotional difficulties/limitations
	+ Ask: *How conflict is resolved in the relationship? How are arguments settled?*
	+ Evaluate financial pressure: *How are you meeting your expenses? How are you going to afford [recent purchase]?*
	+ Consider how the client will feel down the road: *6 weeks? 6 months? 6 years?*

**Terms of agreements**

* **RECITALS** 🡪 Important IDs/def’ns (big assets, significant dates, relationship breakdown, separate property)
* **SEPARATE PROPERTY** 🡪 *Compensation in lieu?* (sliding scale) *Tracing for contributions into joint assets?*
* **JOINT PROPERTY** 🡪 *Presumption of ownership: contribution-based, or equal? Presumption of advancement?*
* **PERSONAL DEBTS vs. JOINT DEBTS**
* **SPOUSAL SUPPORT** 🡪 Waiver, sliding scale, put cap on income, leave it open
* **HOUSING ALLOWANCE** 🡪 In lieu of actual property interest, meet needs for shelter
* **ESTATE RIGHTS** 🡪 *Does agreement survive death, absent a breakup?*

**Non-disclosure** 🡪 People are entitled to all the info req’d to make an informed decision

**Waiver/limited spousal support** 🡪 Consider including work history, income earning capacity (range of incomes or statement that income will be similar/greater

* Also, consider leaving spousal support off the table, especially in less-than-generous property divisions

**Independent legal advice (ILA)** 🡪 Consider what a self-represented client can agree to, short of receiving ILA (entering without undue influence, fraud, coercion, etc.)

**“Opt-in” agreement** 🡪 The ***FLA*** has led to an increase in the preparation of cohabitation agreements—consider where it may be appropriate to draft an agreement even when spouses are opting in to the ***FLA*** scheme

* Agreements can:
	+ Crystallize values of assets/debts
	+ Set out pertinent dates (start of cohabitation, property purchase dates, etc.)
	+ Establish dispute resolution mechanisms consistent w/***FLA*** (w/object of avoiding litigation)

### SEPARATION AGREEMENTS

* A separation agreement is a roadmap, troubleshooting guide, tiebreaker, and support doc (border crossings, banks, estate planners)

**Process**

* Draft from scratch vs. build upon previous work (mediation, DIY templates, parenting plan, prior cohab/pre-nup agreement)
* Consider what has already been discussed/agreed upon
* Consider which transactions have already taken place since the separation
* Ask: *Are there any missing gaps?*

**Topics in separation agreements**

* **RECITALS** 🡪 Set backdrop; give context; ID excluded property; ID how property has been valued (date of appraisal, acknowledgment of passage of time since appraisal)
* **PARENTING ARRANGEMENTS** 🡪 Parenting responsibilities; parenting schedule (beware of vaguaries/assumptions of goodwill like holiday times “to be agreed upon” and “shared” vs. “equally”, set expectations, set review periods (especially w/young children); unenforceable clauses (significant others, sexual relations)
* **CHILD SUPPORT** 🡪 “Special provisions”; **7** expenses (be specific: *what are they?* *how/when reconciled? post-secondary education?*); expectations re: imputation of income; reviews of support
* **DISPOSITION of FAMILY RESIDENCE** 🡪 Terms of conduct of sale; ongoing payments/maintenance while pending sale; terms if sale takes place in small window after buyout—future appraisal/adjustment; allocation of sale proceeds
* **DIVISION of ASSETS** 🡪 Real property; bank accounts/investments; RRSPs; pensions (valuations, consider role of experts); insurance policies (*is security for support needed/wanted?*); household contents; vehicles; business assets (tax implications, steps to remove SH interest; division of corporate retired earnings)
* **DIVISION of DEBTS** 🡪 Allocate responsibility; eliminate joint debts if possible (creditors don’t care); set repayment deadlines
* **SPOUSAL SUPPORT** 🡪 Review triggers
* **SECURITY for SUPPORT**
* **EXTENDED MEDICAL COVERAGE**
* **DISPUTE RESOLUTION CLAUSES**
* **TIE UP LOOSE ENDS**

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| VARIOUS APPROACHES to FAMILY LAW DISPUTES |

***FLA* Part 2 – Resolution of Family Law Disputes** [**4**–**19**]

**Purposes** [**4**]

1. to ensure that parties to a family law dispute are informed of various methods available to resolve the dispute
2. to encourage parties to resolve the dispute through agreements & appropriate FDR before litigation
3. to encourage parents/guardians to resolve conflict outside of court and create parenting arrangements that are in the BIoTC

**Duty to disclose** [**5(1)**] 🡪 Party to a family law dispute must provide full & true info for the purposes of resolving dispute

* Can’t use information obtained except as necessary to resolve the dispute [**5(2)**]

**Agreements respecting family law disputes generally** [**6**] 🡪 2 or more persons may make an agreement:

1. to resolve a family law dispute
2. respecting a matter than may be the subject of a future family law dispute
3. A single agreement may be made addressing multiple matters
4. An agreement is binding on the parties (subject to this Act)… [**4**] regardless of whether there’s consideration, involvement of an FDR professional, or agreement is filed w/court
5. A child who’s a parent/spouse may enter into & be bound by an agreement

**Replacing agreements** [**7**] 🡪 If an agreement changes a previous one, **(a)** parts that are changed are deemed to have been revoked, and **(b)** parts that aren’t changed remain effective

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| DUTIES |

**Duties of FDR professionals** [**8(1)**] 🡪 Must assess whether **FV** may be present and, if so, the extent to which the FV may adversely affect: **(a)** the safety of the party (or family member), and **(b)** the party’s ability to negotiate a fair agreement

* **(2)** Based on this assessment, the FDR professional must:
1. discuss the advisability of using various types of FDR to resolve the matter, and
2. inform the party of facilities & other resources, known to the FDR professional, that may be available to assist in resolving the dispute
* **(3)** Must advise the party that agreements & orders respecting the following matters must be made in the **BIotC** only:

**(a)** guardianship **(b)** parenting arrangements **(b)** contact w/child

**Duties of parties to FDR** [**9**] 🡪 Must comply with any requirements set out in the regulations respecting mandatory family dispute resolution or prescribed procedures

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| LITIGATION |

* **Form 3** (Notice of Family Claim) kicks off the process
* **Form 4** (Response to Family Claim) filed in response
* ***FLA* s106** 🡪 Sets out Jx for property disputes where the property could fall into different Jxs: *real & substantial cxn*

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| **✓** | **✗** |
| * Clear outcomes (win/lose)
 | * $$$
* Lack of confidentiality
* Judge may not have (strong) background in family law
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| MEDIATION |

* Conflict resolution process in which parties voluntarily attempt to negotiate & formulate their own consensual resolution to matters in assistance of an impartial & neutral person
* Useful in cases where the parties have outlined & agreed upon what is in dispute

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| **✓** | **✗** |
| * Empowers parties to make their own decisions & formulate their own consensual resolution
* Impartial/neutral assistance from a mediator
* Quicker process = less $$$
* Less formal
* Confidential
* More about *persuading* the other side (rather than winning/losing)
* Less adversarial
* Financial advantages (e.g. tax benefits to dividing assets a certain way or at a certain time—something a court wouldn’t consider)
 | * It’s difficult to reach consensus in family disputes
	+ Bell opts to use **evaluative** rather than interest-based mediation for this reason
* Can’t be used where there’s FV—there would be a systemic power imbalance
* Need to make sure your mediator has a background in family law
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| ARBITRATION |

* Dispute resolution process whereby the parties hire a neutral 3rd party to make a decision resolving their dispute
* Parties agree to be bound by the decision—unlike mediation, a resolution is imposed on them
* ***FLA* s5 Regulations** set out the minimum training & practice standards:
	+ Must be a lawyer, psychologist, or social worker
	+ Min. 10yrs of experience in a family-related field
	+ Must take specified training in arbitration, family law, decision-making, skills development, & FV
* **Jx/scope** 🡪 Only an arbitrator who is a lawyer may conduct arbitrations on all family issues, including child-related issues, property, & spousal support
	+ An arbitrator who’s a psychologist/social worker may only arbitrate child-related issues & “straightforward” matters of child support
* **Challenging decisions** 🡪 *reasonableness* standard for judicial review

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| **✓** | **✗** |
| * Quicker (fewer delays); more flow
* Flexible scheduling
* More cost-effective
* Less formal/more streamlined
* Simplified rules of procedure: the usual rules of evidence don’t apply (cost saver)
* Specialist “judge” = decision-maker
* Confidential
* Control of the process (evidence, rules, timing, decision-maker ID)
 | * More costly
* Imposed resolution (mediation might be preferable)
* Is not (procedurally) as “easy” to appeal (*but realistically, it’s pretty much the same protocol*)
* Creates a lack of case law (but FLAG: bank of decisions created to encourage consistency among judges & arbitrators)
* Deprives participants of the ability to craft their own solutions
* Doesn’t promote any ongoing relationships b/w the parties
* Finding an arbitrator
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| COLLABORATIVE MODEL |

* Effective alternative to traditional adversarial divorce—gives the parties the legal, financial, & emotional support to make sound decisions & move on w/their lives
* Proven process for moving past conflict to resolution
* Parties agree from the start that they will
	+ **Not go to court**, or even threaten to go to court
	+ **Communicate** w/honesty & respect
	+ Make **sincere efforts** to understand each other’s needs & concerns
	+ Promptly **disclose** all relevant info
	+ **Work together** towards an agreement that’s in everyone’s best interests

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| **✓** | **✗** |
| * Efficiently get passed conflict and move towards resolution
* Parties get the legal financial & emotional support to make decisions and move on with life
* Save $$$
* Not adversarial = protects children from the damages of divorce
* Promotes openness & full disclosure
* Models good behaviour for children
* Parties get team of specialists helping THEM make the decisions, rather than putting the control in the (unpredictable) courts
 | * Doesn’t work for parties not willing to operate in good faith – with vindictive/ulterior motives/power imbalances
* Doesn’t work in the context of FV—sometimes it’s just not a good idea to have the parties in the same room
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| PARENTING COORDINATION |

* Intended for high-conflict parents—it’s a child-focused dispute resolution process for separated families
* Assists families w/the implementation of parenting arrangements once they’ve been finalized by an agreement or court order—it is not used to *create* a parenting plan
* **Req’d qualifications** 🡪 Experienced fam lawyers or mental health professionals who have specialized training in child development & high-conflict family dynamics + additional training in mediating & arbitrating parenting disputes
* **Jx/scope** 🡪 After an order/agreement has been made, the parents sign an agreement outlining the roles/objectives/ scope of the parenting coordinator, as well as each parent’s rights & obligations
* ***FLA* s224(1)** 🡪 Ct can make an order for a parenting coordinator; **(2)** court can allocate fees relating to the PC service
* **Role of parenting coordinator:** Educating, coaching, consensus-building, determination-making
	+ Must clearly advise parents in writing when transitioning from consensus-building to determination-making
	+ Role & authority of a parenting coordinator examined in *NRF v MAF*; *Shih v Shih*

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| **PC has Jx over:** | **PC doesn’t have Jx over** |
| * Parenting arrangements
* Contact with a child
* Child’s daily routine
* Education, incl. in relation to the child’s special needs
* Participation in extracurricular activities & special events
* Temporary care by a person other than a guardian
* Provision of routine medical/dental/other health care
* Child discipline
* Transportation & exchange of a child
* Parenting time/contact with a child during vacations & special occasions
* Any other matters by agreement provided it is within Jx
 | * Change in guardianship
* Change to the allocation of parental responsibilities
* Giving parenting time/contact with a child to a person who doesn’t have parenting time/contact with the child
* *Substantial* change to the parenting time/contact with a child
* Relocation of a child
* **The overall parenting schedule can’t be changed**—PC can only makesmall changes *within* the set out agreement & its boundaries
* Usually, the PC doesn’t decide on whether child will attend private school or not because of the large amount of money involved if a private school is chosen—however, parents can decide to let the PC decide this
* If parties want a “**substantive change**” made to the parenting schedule, they must return to arbitration/mediation—PCs lack the Jx to make substantive changes
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* **Challenging decisions/terminating a PC**
	+ **If appointed by agreement** 🡪 PC can be terminated by agreement or upon application to court
	+ **If appointed by order** 🡪 PC may be terminated by court order upon application by either party
	+ **Withdrawal** 🡪 PC may witihdraw by giving notice to parties & court if appointed by court order
	+ **Standard of review:** *McMillan v McMillan*; *MH v CS*