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This course surveys *the legal framework surrounding familial relationships and family breakdown in Cdn society*

* Themes: State regulation of families through law

Relationship of law to social change (such as shifts in familial forms)

Use of social context in legal argument

Socio-economic and cultural implications of family law

Relevance of factors such as gender, sexual orientation, culture, First Nations status, race, etc

* Identify key socio-legal issues related to families
* Identify basic principles that structure legal regulation of families
* Understand interrelationship of federal and provincial family law
* Discuss the relationship between statues and case law in family law
* Reflect on the role of the legal profession in family matters
* Discuss the law and policy debates that shape and inform family law in Canada

\*\* Law doesn’t exist in a vacuum ... it generally responds to changes in the way society views things

* Law can *influence* how we think about family
* Does society dictate the law? Or, does the law dictate society? … more of a reciprocal relationship

\*\* The family as a core institution in society that must, at all costs, be protected? (by the legal system?)

* Consider how benefits were only granted to people who did certain things, ie) got married

\*\* Consider: Family exists independently of the Market, should be treated differently

* Markets: laissez-faire principles, ruthless, based on economic compensation
* Families: should be based on love, trust, sacrifice, no economic compensation
  + A parent may leave labour force to raise child, loses some job skill, to what extent is the other parent legally responsible to financially compensate for this?

\*\* Consider: Family exists only in the *private* sphere, should be “protected” from *public* interference

* Legal system should not interfere in family structures? State has no business telling ppl what to do?
* Challenges to this notion ...
  + Proliferations of family laws; how property, contracts, relate to family members
  + Problems with leaving families “unregulated” (criminal laws d/not apply? Re: spousal rape)
* BUT: **legal interventions** have been problematic for some families
  + Issues with how laws interfered in notions of family (see: *Dorothy Chunn*’s article)
  + See: “Responding to Child Abuse in Canadian Institutions” (problems w/residential schools)
* Clearly, legal systems interfere in families ... when? How? Why? What effects?

# Introduction: The Family and Family Law

## Social and Historical Framework

### Histories, Cultures and Legal Change

*Katherine Arnup, “Close Personal Relationships between Adults: 100 Years of Marriage in Canada” (2001)*

* Marriage and family have become especially contested terrain in Canada; enormous changes to families
  + Transformation from patriarchal institution 🡪 relationship resembling a partnership of equals
  + Should not overestimate coercive power of law and its capacity to control or prohibit social behaviour
* 19th -20th century: forming a nation of families
  + State created numerous rewards and benefits for marriage, family life; numerous penalties otherwise
  + Clearly defined roles for men, women – legal existence of woman was suspended, gendered division of labour (policies and laws enacted to encourage conjugal units)
* 1968-2000: attitudes towards marriage have changed profoundly
  + Changes to women’s status: reproductive freedom, liberalization of divorce 🡪 greater choice
  + Marriage and divorce …
    - Demographics: increased rate of divorce, remarriage, dual income families
    - Legal changes: c/law relationships socially acceptable (esp in QB), s/sex marriage
    - Treatment of single mothers and illegitimate children
* 2001 and beyond: increasing choice as to how people organize their intimate lives
  + Despite state efforts to control, regulate marriage and family, many ppl choose (for many reasons) to live outside boundaries of heterosexual nuclear family
    - Legislative change has slowly adapted, has assisted in formation of thousands of families
  + Marriage continues to hold symbolic significance; symbol of cultural acceptance and recognition
    - Re: benefits, responsibilities of marriage 🡪 s/sex, c/law couples

“Family” is often (purposefully) NOT defined in statute

* StatsCan: definition premised on “couple-dom”
  + 2001 – C/Law couple now includes two ppl of opposite sex or of the same sex ...
* Flaws with the “couple-based” StatsCan definition? NOTE: census def d/not always = legal def
  + Adult children living with parents
  + Parents now supporting grandparents (do adults have a responsibility to support their parents?)
  + Siblings supporting other siblings
  + “Chosen” families, esp re: LGBT community
  + Foster children vs. adopted children, even though many foster relationships can be very lengthy
* Definitions re: family law have evolved over time
  + But, still tend to reflect the “nuclear” family …
  + **Census stats are indicating a mov’t AWAY from nuclear-style families**
  + We’ve moved away from a focus on the *form*, to a focus on *function*
    - How the relationship works, as opposed to what it looks like

*Susan Boyd, “Can Law Challenge the Public/Private Divide? Women, Work, and Family” (1996)*

* Ideological division of life into apparently opposing spheres of public/private activities
  + Men: dominate public sphere of pd work
  + Women: private sphere of family responsibilities, but tend NOT to exercise authority
* Consider: organization of public sphere *depends* on a particular way of organizing private sphere
  + Stress of negotiating demands of work and family are highly gendered
* Laws have encouraged women to enter labour force (private sphere) and men to share domestic labour (public)
  + Can law, on its own, persuade individuals to change their behaviour in this fundamental kind of way?
    - Public sphere has opened to women, not much corresponding change to private sphere
    - Consider single mothers: encouraged to work, but how are they to manage private resp?
  + Either to model of full-time work must change, or public sphere must assume more responsibilities for social responsibilities such as childcare, or BOTH

*Dorothy Chunn, “From Punishment to Doing Good: Family Courts and Socialized Justice in ONT” (1992)*

* 1880-1940: welfare leaders focused more explicitly on family as chief incubator of social problems
  + Important to provide firm, loving, protective family environment to ensure harmonious child dev’t
  + Discrepancies btwn childrearing in middle-class vs. non-middle-class became apparent
  + Reformers attributed “soaring rates” of juvenile crime, illegitimacy, divorce, etc to “deviant families” …

*Law Commission of Canada, “Beyond Conjugality” (2001)*

* Demographic changes in Cdn adult personal relationships … how should the legal system respond?
* In seeking to recognize, support full range of personal adult relationships, state should be attentive:
  + Relational equality for c/law couples (*Miron v. Trudel*), s/sex couples (*M v. H*)
    - Gov’ts should focus on relevant functional attributes of relationships (NOT marital status)
  + Equality within relationships: gov’t should facilitate EQ, avoid policies creating econ dependence
  + Autonomy: freedom to chose whether and with whom to form close personal relationships

*Law Commission of Canada, “Restoring Dignity: Responding to Child Abuse in Cdn Institutions” (2000)*

* Racial attitudes re: inferiority of Ab’l ppl fuelled maltreatment, abuse experienced at residential schools
  + Assimilation, segregation, intended to undermine Ab’l culture (deliberately aimed at children)
* Affronts to collective dignity, self-respect, identity of Ab’l ppl occurred, these individuals now seek redress
  + Consider larger social context: families and communities have been profoundly harmed
  + Family is focal pt for transmission of Ab’l spiritual/cultural values, education btwn generations
* There remains today a significant need for public education
* Truth and Reconciliation Commission, 2008 – est by federal gov’t
* Harper’s apology to former students of Indian residential schools

### Religion, Culture, and Family Law

*John Syrtash, “Alternative ‘Cultural’ Dispute Resolution in Religion and Culture in Cdn Family Law”*

* ADR, to permit specific groups to appt own arbitrators to resolve family law disputes according to customes, traditions of own communities
  + Many d/not like to embarrass their culture/religion by airing personal family conflicts in public
  + “Secular” judges have little sensitivity or interest in specific religious/cultural issues?
  + Religious/aboriginal cts can be far less expensive, expedious?
* Disadvantages? (some claims are more or less limited, compared to provincial law)
  + ie) risk that Sharia law (Islam) may risk that arbitrations follow patriarchal values

SUMMARY – BC’s *Commercial Arbitration Act* d/not explicitly exclude arbitration in family law matters

* s.2(2) – provides important safeguard to vulnerable individuals
  + Family arbitrations CAN’T remove ct jurisdiction under *DA* or *FRA,* still subject to review

## The Legal Framework: Family Law in the Federation

* *Divorce Act* covers: child custody, spousal support
  + Matrimonial property = s.92(13), covered by BC *Family Relations Act*

(applies differently to married vs. c/law spouses)

* Matrimonial property is NOT covered by the federal Divorce Act (matrimonial property = s.92(13))

Family law 🡪 an area of shared jurisdiction (leads to questions of jurisdiction)

* Federal: powers to legislate for marriage and divorce
* Provincial: powers to legislate re: property and civil rights (also, “solemnization of marriage” (s. 92(12))
* Which court has jurisdiction to make an order? (which order has priority if two orders are in conflict?)
* How do private dispute resolution mechanisms relate to freedom of religion/religious laws

|  |  |
| --- | --- |
| **FEDERAL: s. 91 *Constitution Act*** | **PROVINCIAL: s. 92 *Constitution Act*** |
| (26) **Marriage & Divorce**  -essential elements of marriage    *Marriage (Prohibited Degrees) Act*  *Civil Marriage Act*  *Divorce Act*    + corollary issues  - custody, support | (12) **Solemnization of Marr.**  - formalities of marriage    *Marriage Act* BC |
| (27) **Criminal Law**    *Criminal Code*  - assault  - homicide  - necessities of life  - corporal punishment | (13) **Property & Civil Rights**    *FRA*: property, support, children  *Adoption Act*  *CFCSA*: child welfare  *Law & Equity Act*: legitimacy  *Vital Stats. Act*: parenthood, naming  *Estate Admin. Act*: succession |
| (29) **Anything else in prov. hands**  Fed power = overriding but must  take the field;  - e.g. until feds legislated on  Divorce, provinces could | (16) **Generally all matters of purely**  **local/private nature** |

NOTE: Convention on the Rights of the Child

* Article 9: Right of a child not to be separated from parents unless it’s in the child’s “best interest”
* Article 3: Best interests of the child must be the primary consideration of the cts when making decisions
* Article 7: Children MUST be given opportunity to make their views known if their parents are separating
  + Interestingly, most Cdn child custody legislation make this mandatory

... also, increasing trend for lawyers to invoke international law norms in domestic disputes

*Peter Hogg, “Constitutional Law of Canada” (2007)*

* Federal authority: s. 91(26) – marriage vs. Prov authority: s. 92(12) – solemnization of marriage
* Definition of marriage is *federal* responsibility (feds have control over “essential elements”)
  + Initially, C/Law definition (*Hyde, 1866*)
  + Then, challenges: opposite sex req was invalid for breach of s.15 equality guarantee
    - Now, marriage = “lawful union of two persons to the exclusion of all others”
    - Valid law, per s. 91(26) – federal jurisdiction over capacity to marry
    - SCC view that words of Const must receive a progressive interpretation to address the realities of modern life 🡪 thus, same-sex marriage legalized in 2004 (SCC *Ref*)
  + SCC held that Fed power over marriage d/NOT extend to “relationships short of marriage”
* Also, SCC affirmed religious freedom (s. 2(a) of *Charter*), protecting religious officials from being compelled by the state to perform marriages contrary to religious beliefs
* Legally recognized non-marital relationships are exclusive jurisdiction of Provs (s. 92(13))
* Laws re: consequences of marriage (supporting spouse, child custody, property rights of married ppl) have largely been enacted by provinces (s. 92(13)) ... see CHART
  + ie) risk that Sharia law (Islam) may risk that arbitrations follow patriarchal values

**Divorce**: Federal authority, s. 91(26) see: *Divorce Act,* 1968

* Federal *Divorce Act* is exercise of divorce power, w/laws re: alimony, maintenance, custody

**Adoption, legitimacy, custody, guardianship, child welfare, maintenance of children**: Prov, s. 92 (13)

* But, what is the extent of federal power by virtue of power over marriage, divorce?
* *Papp* (1969), child custody provisions of Divorce Act are validly federal (as are corollary relief provisions)
  + Provisions re: child support pmts are validly federal, bc of “close connection with the divorce”

**Support pmts by one spouse to another**: Prov power

* Prov statutes giving spouse right to bring proceedings for support, and for support to be awarded as relief

**Alimony and maintenance for support of spouse, re: divorce proceedings**: Fed power

* Alimony, maintenance, custody of children are Fed jurisdiction re: dissolution of marriage

**Division of Property**

* Laws re: property (incl matrimonial property) fall under s. 92(13), along with support and custody
  + All provs have matrimonial property laws that provide for division on dissolution of marriage
  + SCC: prov laws, imposing division of property, are *restricted* to legally married couples
* *Divorce Act* d/NOT grant fed power to order transfer of real estate, only “lump sums” etc

**CONFLICT** between Fed and Prov orders (prov: support, custody vs. fed: corollary relief in divorce)

* Hogg feels paramountcy doctrine should resolve any conflict, but ct decisions have been “inconsistent”
  + Re: orders of support, if inconsistent, prov order is inoperative (even if no “contradiction”)
* Can a prov ct make custody/maintenance order which is inconsistent w/pre-existing Divorce Act order?

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**CONSIDERATIONS:**

* Can’t apply for a divorce unless she’s been *legally married*
* If marriage not “valid,” *Divorce Act* doesn’t apply
  + So, she’s common-law ... remedies under provincial power, s. 92(13) 🡪 *Family Relations Act*
  + *Family Relations Act* also covers couples whose marriages are null and void
* *DA* covers child, spousal support ( “corollaries of divorce”) but NO provisions about division of marital property
  + In BC, for matrimonial property applications, C/Law unmarried couples aren’t regarded as “spouses”
    - So, what’s the remedy for an unmarried couple? Is there an unjust enrichment claim?
  + If land is situated on a First Nations reserve; Ab’l land is treated differently, subject to *Indian Act*
    - Ct may make a “compensation order,” to provide some sort of monetary equivalent/remedy
* Only BCSC can hear matters unde*r Divorce Act:* s. 2(1) “court” (DEFINITION)
* Only BCSC can hear property matters (even if in a provincial statute e.g. *FRA* s. 6)
* But maintenance or custody issues can be heard by either BCSC or prov ct (see *Family Relations Act*, s. 5 & 6)
* Only BCSC can hear adoption (*Adoption Act*, s. 1 definition of “court” & s. 29)
* Usually have to put an application under *Divorce Act* to get an interim order
  + Or, if she needs to sort things out at present, make an application for provincial remedies
* Where federal and provincial orders for custody or support are inconsistent (express contradiction test), the order under the federal statute prevails (federal paramountcy).
  + HOWEVER, if the order had been under a provincial statute, an order could be made now in a divorce proceeding (federal statute).
* Where a divorce has been granted but no order for corollary relief was made under the *Divorce Act*, a provincial order dealing with relief will probably be valid (applying the “express contradiction” test).
* The Charter only applies to situations where “an element of governmental action [is] implicated in the litigation.” Thus questions can arise about the application of the Charter to family law disputes (private law).
* Relevant sections include s. 2, 7, 15. ie) concerns re: equality (married vs. unmarried couples)
  + s.2 – Fundamental Freedoms (religion, expression)
  + s.6 – Mobility rights
  + s.7 – Legal rights (life, liberty, security of the person)
  + s.15 – Equality rights
* The *Charter* has had an impact in three areas:

1. Governments have amended legislation to ensure compliance with the *Charter*

e.g. both men and women can claim spousal support

1. Direct constitutional challenges to statutory provisions for violation of guarantees such right to equality (s. 15) or “life, liberty and security of the person” (s. 7)

e.g. *J.G* on legal aid in child protection context (*Fiona Kelly’s Article)*

1. Arguments that, even in the absence of the required element of government or state action, judges must nonetheless take into account fundamental *Charter* values

e.g. *Moge* case on spousal support (equality rights s. 15 Charter)

# Creating the Family

* There’s been a trend toward bringing unmarried couples into the fold; QB lags behind
* How is marriage contracted? What relevance does this contract have to the state?
* While legal in Canada, s/sex couples may not be able to marry in the religious ceremony of their choice

Relevant statutes: *Marriage Act (BC)*

*Law and Equity Act (BC)*, s. 60

*Civil Marriage Act (Canada)*

*Marriage (Prohibited Degrees) Act (Canada)*

## Cohabitation, Contracts, and Marriage

* + Cohabitation – when does the fact that two people cohabitate become legally relevant
  + Contracts – what role do contracts play?
  + Marriage – it’s still the most widely-used way to “contract” a relationship, have it legally recognized

*Law Comm. of Canada, “Beyond Conjugality: Recognizing & Supporting Close Personal Adult Relationships” (2001)*

* Report suggested that maybe we should recognize “non-conjugal” relationships as legal
* Legal organization of personal relationships
  + - The state DOES have a role in creating legal mechanisms for ppl to express commitments
* Role of the state *: what should the role of the state be re: committed personal relationships?*
* Legal frameworks for personal relationships (all mechanisms are used to some degree in Canada)
  + Private law (contract, property, etc)
  + Ascription (ascribed spousal status)
  + Registration
  + Marriage ... registration could “replace” marriage? ... or, s/sex couples s/be included in
* Registration instead of marriage
* Adequacy of current marriage laws
* Illegitimacy

Consider: what kind of relationship would be best served by each model? Why

Think about: Equality (btwn spouses, btwn relationships)

Choice (family laws as encouraging certain behaviour, but not imposing/restricting it)

Autonomy

**Private law** and relationships

* Rosemary Auchmuty has argued that marriage s/be abolished, move away from ascription, merely make it so that any two people wishing to legally recognize a relationship should rely on private law
  + Would require extensive public legal education, so that ppl could understand what they’re doing
* Before a relevant family law statute was drafted, ppl DID rely on private law principles
* Problems?
  + Issues re: access to legal services – people would need more lawyers, courts to create/abolish ties
  + Its tended to be only wealthier people who establish contracts re: relationships
    - Contracts are premised on equality of bargaining power ... this may not always be the case
  + Too complex? Each couple could craft an individualized relationship (but, respects diversity?)
* Who would benefit most from this type of relationship?
  + Rich people; very “equal” relationships

**Ascription** and relationships

* See: *FRA*, s. 1 – “spouse” means a) a person married to another, or b) a person who’s lived with another in a marriage-like (conjugal) relationship for at least 2 years (can include persons of the same gender)
  + Extends many of the family law rights and obligations of married people to non-married people
  + It ascribes spousal status to people who haven’t actually contracted a marriage
* Definition of “spouse” varies from prov to prov AND among statues within a province (*ITA* spouse = 1 year)
* To some degree, you can contract OUT of this
  + Can’t opt out of child support obligations
  + Can’t opt out of being ascribed spousal status re: student loans (“spouse” = 1 year)
* Criticisms?
  + Removes element of choice – ppl are ascribed a status they didn’t necessarily choose
  + Being ascribed spousal status can have serious financial implications (ppl may not be happy about it)
* Benefits?
  + Protects disadvantaged ppl, don’t have to sign up for it, but may be subj to its protections, etc
* Law Comm advises that gov’t should continue to use ascription model, but also provide Cdns w/appropriate tools to define for themselves the terms of their relationships

**Registration** and (unmarried) relationships

* Two ppl live together and want some recognition, legal responsibilities but can’t/don’t want to get married
  + An alternative form of relationship recognition in Canada
* Examples: Civil unions (QB) (same or opposite sex)

Registered domestic partnerships (NS)

Adult interdependent relationships (AB)

C/Law partner registration (MB) … used alongside ascription

* Criticisms? … requires some awareness of the relevant legal issues by lay people

## The Significance of Marriage: Using Marriage Law to Regulate Relationships

*Hyde v. Hyde (1866*) – “Marriage, as understood in Christendom, is defined as the voluntary union for life of one man and one woman, to the exclusion of all others”

Now 🡪 *Civil Marriage Act*, s.2 – “union of two persons to the exclusion of all others”

... marriage not necessarily defined in terms of Christianity ... not necessarily for life

*Katherine Arnup, “Close Personal Relationships between Adults: 100 Years of Marriage in Canada” (2001)*

* Marriage originally a private customary contract (Roman law) ... state wasn’t really involved
* Rise of Christian church: marriage as a religious institution
* Marriage is now (arguably) returning to its secular roots (secular institution, secular contract)
  + Realistically, it’s still quite infused with religion
  + Ppl can choose to be married by a religious official OR a secular official (both have authority)
  + Combination of private contract and public institution
* What exclusionary effects has marriage had, historically? (racism, health issues, preventing immigration)
  + *Indian Act*, any First Nations woman who married a non-First Nations man lost her “Indian status”
    - Racist and sexist, re: granting/revoking status

*Law and Equity Act*, s. 60 🡪 a remedial statute that changed some of the archaic views of marriage

**60**  (1) A married man has legal personality that is independent, separate and distinct from that of his wife and a married woman has a legal personality that is independent, separate and distinct from that of her husband

**Legal Marriage vs. Cohabitation**

* Initially, marriage was the only legal way to create legally bound rights, protections, obligations
  + Co-habitants argued that this was discrimination (challenges, incl *Charter* challenges)

Federal: *Modernization of Benefits and Obligations Act (2000)*

* Extended almost all benefits and responsibilities of married spouses in *federal* statutes to C/Law partners
  + ie) Income Tax Act 🡪 cohabitating with someone for over a year = spouse for tax purposes
* This statute was very important, but very little family law was affected *per se (*Most family law is prov)

Provincial:

* NS v. Walsh, 2002 SCC – it’s NOT contrary to the *Charter* to exclude non-married partners from the matrimonial property provisions under provincial statute
  + Provinces can treat C/Law couples differently re: post-separation property distribution
  + Some provinces have recognized unmarried cohabitants under their matrimonial property statutes

## Requirements for a Valid Marriage and Jurisdiction

**Four requirements** of a **valid marriage**

1. Both parties must have legal capacity to enter the marriage
2. Both parties must consent to the marriage
3. There must be compliance with the formalities of marriage
4. Both parties must have capacity to perform sexual aspects of the marriage
   * + (A), (B), (D) 🡪 federal jurisdiction, go to the essential validity of the marriage
     + (C) 🡪 provincial jurisdiction, goes to formal validity of the marriage
     + (A), (B), (C) 🡪 non-compliance can render a marriage null and void
     + (D) 🡪 non-compliance can render marriage voidable (valid until annulment)
     + LEGAL PRESUMPTION in FAVOUR of the validity of marriage (see: *Marriage Act*)
       - s. 11 – requirements may be waived if …; marriage may still be deemed lawful and valid
       - s.18 – protection against irregularities in issuance of licence

**Legal Marriage/Divorce vs. Annulment** 🡪 a marriage that is a nullity ≠ a divorce

* Void ab initio 🡪 non-existent even if it hasn’t been annulled formally by a ct
* Voidable marriage 🡪 stands until its annulled
* Why would a couple choose annulment over divorce?
  + Maybe they want to get around property obligations BUT, see *FRA,* s. 1(1)(c)(iii)

*FRA*, s. 1(1) **– “spouse"** means a person who

1. is married to another person,
2. lived withanother person in a marriage-like relationship for a period of at least 2 years if the application . . . is made within one year after they ceased to live together (… includes s/sex couples)
3. applies for an order under this Act within 2 years of the making of an order

(i)  for dissolution of the person's marriage,

(ii)  for judicial separation, or

(iii)  declaring the person's marriage to be null and void, or

1. is a former spouse for the purpose of proceedings to enforce or vary an order

*FRA*, s.56 (1) – each spouse is entitled to an interest in each family asset when

1. a separation agreement,
2. a declaratory judgment under section 57,
3. an order for dissolution of marriage or judicial separation, or
4. an order declaring the marriage **null and void** respecting the marriage … is first made

**Capacity** (lack of capacity 🡪 marriage is generally void, except in some age cases)

* Age – parental consent and age of consent
* Consanguinity & Affinity (*Marriage (Prohibited Degrees) Act*, 1990
  + Can legally marry your cousin, but not your parents, brother/sister, adopted or half
  + This statute really narrowed the prohibited people (you can now marry more people)
* Single (*quaere* polygamy)
  + see *Civil Marriage Act* 🡪 “to the exclusion of all others”
  + Provisions allowing a spouse to get a “declaration in presumption of death”
* Where you get married dictates your capacity to marry (if polygamy is legal elsewhere ...)
* Sanity ... not a terribly high standard
  + How “sane” must you be to divorce? (ie, spouse has Alzheimer’s)
  + Test for forming intention to divorce is similar to test for intention to marry ...
* Person must have basic understanding of “what marriage is”

**Consent** (void) (possibly voidable)

* Duress; Mistake or Fraud

**Formalities** (provincial domain)

* *Marriage Act* (B.C.):
  + s. 20 – Civil marriage (marriage may be contracted beforehand, solemnized by marriage commissioner)
  + s. 28 – Consent required to marriage of person under 19 years of age
  + s. 29 – Marriage of person under 16 years (must not be solemnized, unless …)
  + s. 30 – Nothing in s.28 or 29 invalidates a marriage (?)

**Consummation**  (voidable)

* Harkens back to the heterosexual notions of marriage
  + Historically, if you failed to consummate your marriage it was “voidable” (declared nullity)
* Test: “practical impossibility of consummation” (how to apply to same sex marriage?)

### General vs. Customary Marriage

|  |  |  |
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| Casimel v. Ins Corp of BC (1993) BCCA | **F:** Recognition of traditional aboriginal adoption and marriage?  **C:** *Adoption Act,* s. 46 states that the ct **may** recognize that an adoption order effected by the custom of an Indian band or Aboriginal community has the effect of an adoption order made under the Act. Also applies to marriage. | **Ct \*may\* recognize customary adoption/marriage** |

* If the indigenous customs were properly adhered to, it’s likely a valid marriage
* Must present-day customary marriages (Ab’l) be registered to be valid? (uncertain)

### Marriage, Equality, and Religious Freedom

*Civil Marriage Act*

* s. 2 – Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others
* s. 3 – Religious officials are free to refuse to perform marriages not in accordance w/their religious beliefs
* Federal gov’t attempt to balance freedom of religion (per *Charter*) with equality rights (to SS couples)
* SCC: federal gov’t had no jurisdiction to dictate *who* can perform marriages (***Ref re: S/Sex Marriage****)*
  + That power belongs to provinces, as solemnization of marriage
  + Feds put s. 3 in *Civil Marriage Act* anyway, likely for political reasons (declaratory stmt)

**Balancing s/sex marriage and religious freedom …**

SEE: ***Smith & Chymyshyn v. KofC***

* KofC refused to rent their hall (church property) to a lesbian couple to celebrate marriage
  + BC Human Rights Trib: Knights could have religious freedom, but had to pay damages (return deposit)
* Religious officials are “protected” under s. 3, but secular officials (marriage commissioners) aren’t

### The Validity of Canadian Same-Sex Marriages in Other Jurisdictions

*Consider: S/sex couple legally marry in Canada, return to their home country. Must it recognize their marriage?*

* Difference btwn law that determines capacity to marry vs. law that determines particulars of ceremony
  + Capacity to marry s/be determined by the law of your domicile
  + Ceremony itself s/be determined by the place where it takes place
* Cdn s/sex couple marry in Canada, then move somewhere where SS marriage isn’t recognized, what happens?
  + They should be recognized, but practically speaking they’re often “converted” to civil union couple

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**MARRIAGE – Final Thoughts**

Many have suggested that we should abolish legal (civil) marriage, and move to a system of registration. Marriage would be relegated to the religious sphere for those who wanted it. What is the key reason in Canada why legal marriage should NOT be abolished?

* Recall: marriage has a racist, patriarchal history ... a bad institution
* BUT, it would be difficult to move to a system of registered civil partnership
  + ‘Marriage’ is a federal power per the Constitution
    - Probably, federal gov’t would have to abolish the status of ‘married’
  + SCC is clear that jurisdiction over civil partnerships belongs to the provinces
    - There could be entirely different rules re: civil partnerships
    - Is this reason enough to keep marriage?

## Children

* In BC, technically speaking (birth registration), a newborn child can only have 2 legal parents
  + There may be other ways to grant “another parent” legal rights

*Vital Statistics Act*

s.3 – Reporting of birth

* 1. Within 30 days after the birth of a child in British Columbia,

1. the mother and the father of the child
2. the child's mother, if the father is incapable or is unacknowledged by or unknown to the mother,
3. the child's father, if the mother is incapable

must complete and deliver to the chief executive officer a statement in the form required by the chief executive officer respecting the birth

s.4 – Name of child … if parents don’t agree there could be a hyphenated name ordered

s. 4.1 – Court order respecting child’s name (must consider \*\*best interests of the child\*\*)

* + Consider views of the child if child is 7+, written consent if 12+ (s.4.1(3)(b))

*Adoption Act*

s. 37 – Effect of adoption order

(1) When an adoption order is made,

1. the child becomes the child of the adoptive parent,
2. the adoptive parent becomes the parent of the child, and
3. the birth parents cease to have any parental rights or obligations with respect to the child, except a birth parent who remains under subsection (2) a parent jointly with the adoptive parent.

s. 84 **-** Paying or accepting payment for an adoption

s. 85 **–** Advertising

*Family Relations Act*

s. 94 – Parentage

* If parentage of a child is denied in a proceeding for an order under this Part, the court may determine the parentage issue under section 95, on the balance of probabilities, as part of the proceeding for that order.

s. 95 – Presumptions of paternity

1. If a male person denies paternity, the ct must, unless the contrary is proved on BoP, presume that the male person is the father of the child in any one of the following circumstances:
2. the person is married to the mother of the child at the time of the birth of the child;
3. the person was married to the mother of the child and the marriage was terminated
4. the person marries the mother after the birth and acknowledges that he is the natural father;
5. the person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child, or the child is born within 300 days after the person and the mother ceased to cohabit;
6. If circumstances give rise to a presumption or presumptions of paternity by more than one male person under this section, a presumption must not be made as to paternity.

s. 95.1 – Paternity Tests

*Law and Equity Act*

s. 61 – Child status

1. Subject to the *Adoption Act* and the *Family Relations Act*, for all purposes of the law of British Columbia,
2. a person is the child of his or her natural parents,
3. no distinction between children born within a marriage and without (no more “illegitimacy”)

### What is a Legal Parent?

* Should presumptions based on birth/marriage/cohabitation give rise to assumptions about paternity?
  + Legal system developed legal presumptions due to lack of technological advances
  + Are these presumptions still effective??

Consider: Sperm donors?

Does intention matter?

Is being a parent a biological or social relationship?

Rely on statutes? Or let judges decide case-by-case?

Traditionally, birth and marriage (now cohabitation) prompted legal parenthood

* The act of giving birth \*usually\* gives rise to legal motherhood (*Vital Statistics Act*, s. 1 – “birth”)

**Fathers** – husbands have been presumed to be legal (and biological) fathers by virtue of their marriage relationship

* Recall: issues around legitimacy
* Men who cohabit with the birth mother within certain period of birth are now presumed to have responsibilities, at least for child support
  + SEE: s. 94, 95 of the *Family Relations Act* – presumptions of paternity for child support
  + Note that these presumptions do not necessarily correlate w/genetic tie!
  + s. 95 (and 95.1) are generally used re: a man’s financial obligations
* Presumptions of paternity are very closely tied to the man’s relationship with the child’s mother

Abolishing **illegitimacy** … for most legal purposes, the legal status of “illegitimacy” has been abolished

* See: *Law and Equity Act*
  + s. 61(1)(a) – “a person is the child of his or her *natural* parents”
    - What does natural parentage mean? What about surrogacy?
    - How does assisted conception come into play?
  + s. 61(1)(b) – “any distinction … is abolished”
* What were the consequences?
  + More emphasis on natural parenthood, rather than the relationship between mother and father

There’s an uneasy stance in family law re: how birth fathers are treated (see: *Trociuk)*

**How can one establish legal parenthood?**

1. Birth registration = presumptive proof (*Vital Statistics Act*, *Gill v. Murray*)
2. Court order permitting BR/declaring legal parentage
   * If father excluded by birth mother: *Trociuk*
   * To exclude birth mother in favour of others: *Rypkema* surrogacy case
   * If more than two parents wanted: *AA v. BB* (*parens patriae*)
3. Adoption as single parent or co-parents
   * 2nd parent adoption adds a co-parent and excludes a birth parent such as sperm donor/father (*Re SM*)

**How can one acquire parenthood rights and responsibilities?**

* Distinction between legal parenthood vs. parenthood rights and responsibilities
* Custody or access order (*KGT; DWH*)
  + Need not be a ‘parent’: s. 35(1) *FRA¸*”one or more persons may exercise custody”
  + Being a legal parent d/not necessarily = custody
  + Being non-legal parent d/not preclude having access/custody (grandparents, aunts, etc)
* Child support order
  + s. 94-95 *FRA,* Presumptions of paternity
  + Definitions of ‘parent’ and ‘stepparent’/’spouse’ in s. 1 *FRA*

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| Pratten v. BC (AG) (2011) BCSC | **F:** Woman born from assisted conception, searching for genetic father. No record of sperm donor (records not kept).  **C:** Just as it’s now somewhat easier for adult adoptees to get info about birth parent, this woman wants processes improved for assisted conception children to get genetic info | **Ct declared sperm donor anonymity unconstitutional** |

* Compelling need to find out who genetic ancestors are
  + Even if we can find out who the genetic parents are, does that mean they should be legal parents?

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| Gill v. Murray (2001) BC HR Trib | **F:** *VS* refused to record lesbian partner of mother as a parent  **C:** *Vital Statistics Act* d/not require opposite sex couples to verify biological parentage. Purpose of the *Act* is not to provide biolog info; no reason to exclude s/sex parent! | ***VS Act* discriminated against s/sex couples by refusing to register s/sex partner** |

… birth certificate d/not purport to identify biological parentage (only presumptive proof of parentage)

* Some have thought that birth registration may not be sufficient; should legally adopt as well
  + In principle, it shouldn’t be necessary, but legal adoption still seems the most secure way to go …

Reinstates biological and heterosexual notion of parental status … \*\* CONTROVERSIAL\*\*

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| Trociuk v. BC (AG) (2003) SCC | **F:** Father applied to have *VS* to put his name on BC, change sons’ surnames. Who is a parent?  **C**: Father being arbitrarily excluded from naming process violates s.15 *Charter* right to equality. | **Father should be able to apply to be included on BC** |

… Legislation was amended to add a procedure to apply to have a parent’s particulars on birth registration

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| Rypkema v. BC (2003) | **F:** Surrogacy; is *VS Act* antiquated for defining “mother” as person who gives birth?  **C:** Genetic mother should be listed as “mother” on child’s birth certificate. | **Genetic mother (not surrogate) should be listed on child’s**  **birth certificate** |

… we don’t really have any contested, messy cases (ct just has to reflect the desires of intentional parents)

**Lesbian and Gay Parenting – Case Studies**

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| AA v. BB (2007) Ont | **F:** Lesbian (non-bio) parent wanted to be declared “parent,” application made w/consent of both bio parents. **3 parents?**  **C:** Ct held it was within *parens patriae* power to declare A child’s mother. Ct has to fill in gaps; legislative gap not deliberate. BC recognized legal status of both mothers. | **3 parents recognized**  **(lesbian couple & bio father)**  **(all consented)** |

* + NOTE: being on birth registry d/not necessarily grant custody rights

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| KGT v. PD (2005) QB | **F:** Lesbian couple, one has baby. Together 7 ½ years, bio-mom leaves, starts new relationship. New spouse wants to adopt child.  **C:** Ct refused to say new spouse was parent; d/not allow original spouse to adopt without other mom’s consent. Original spouse allowed joint guardianship, access rights. | **Non-bio lesbian mother vs.**  **new lesbian partner** |

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| DWH v. DJR (2007) AB | **F:** Two s/sex couples, two children. Male couple separates, bio-father and lesbian couple prevent non-bio father from having access.  **C:** Ct granted non-bio father access, he was *in loco parentis*, they had close relationship. His direct involvement meant it was in child’s best interest to have relationship maintained. | **Gay non-bio father granted access rights bc he was *in loco parentis*** |

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| Re SM (2007) ON | **F:** Lesbian couple, male friend (sperm donor), drew up donor K: he was father, could develop relationship w/child, right to receive info about child. Non-bio mother wanted to adopt, ct refused?  **C:** Father gave evid that he understood agreement, d/not intend to maintain any legal rights re: child. Ct then accepted father’s consent to adoption. | **Lesbian couple; bio father must understand what legal rights are being given up, re: consenting to adoption** |

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| C(MA) v. K(M) (2009) ON | **F:** Lesbian couple, male father who would take active role. Entered into agreement, then mothers restricted access to father. Father refused to consent to adoption.  **C:** To dispense w/consent in adoption, applic must show it’s in child’s best interests. Ct refused to dispense w/consent re: adoption, concerned it would deprive child of loving relationship. Found intention to create three parent family. | **Lesbian couple;**  **ct held that child’s relationship w/bio father was in “best interests”** |

… blood ties had enhanced significance where loving relationship between biological kin existed

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| K(L) v. L(C) (2008) ON | **F:** Lesbian couple, relationship broke down, non-bio mother d/not want access, then brought applic for joint custody.  **C:** Summary motion; ct declined to rule on declaration of parentage w/out further evidence. | **Evidence required to show “best interests of child”** |

**BC WHITE PAPER PROPOSALS**

* Birth mother is legal mother at birth
  + Keeps basic position seen in birth registration cases (initially, birth mother regarded as legal mother)
  + She can relinquish status by adoption or surrogacy
* If no assisted conception, presumptions of paternity will apply + DNA testing if contested
  + Presumptions of paternity, similar to s.95 of *FRA* (cohabitation around conception = presumed ...)
* If assisted conception, birth mother’s spouse is presumed to be a legal parent
  + Birth mother’s spouse (could be SS or OS) is presumed to be legal parent
  + Extends presumptions of parenthood to SS (female) couples (used to apply to paternity only)
* Partner can contest if s/he proves d/not consent
* 3rd party donors of eggs/sperm/embryos are NOT parents; UNLESS everyone agrees in writing prior to assisted conception that donor = legal parent
* Surrogacy Ks unenforceable but process after birth can give parentage to intended parent (no ct order needed)

1. Adoption 🡪 a legal action (*in rem*) that changes a child’s status against all other legal parties

* Birth mother must give consent to a child’s adoption (and the child, if >12yrs)
  + Adoption typically severs the legal connection between a child and its birth parent(s)
  + Birth fathers generally aren’t required to give consent to a child’s adoption
    - Very controversial bc birth mothers have more control/rights re: adoption
* If a child is a treaty 1st nation child, the nation may have to be consulted about placement of child for adoption
  + May depend on a treaty agreement (does the *Adoption Act* apply to that first nation, in entirety?)

**Legal History and Politics**

* Adoption legislation was enacted in a context in which pregnant unmarried women placed their babies for adoption to avoid stigma of “illegitimacy”, and childless couples adopted them to “complete” their own families
* Why did Canada stick to the rules in relation to children being adopted from Haiti after the earthquake?
  + Maybe Canada did not want to encourage child trafficking
  + Perhaps concern over culture and stripping a child of their background
  + Children being taken away from poorer countries to wealthier ones
  + Middle class white couples typically adopt interracially
* Why is adoption so strictly regulated? (see: s.84 and s.85)

#### Blood Ties and the Rise of the “Best Interests of the Child” Test

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| King v. Low (1985) SCC | **F:** Single pregnant mother, panicked, decided to give child up for adoption. Signed consent, 3 mos later tried to revoke consent.  **C:** Ct looked at facts of case, 3 mos was enough time for child to bond w/adoptive parents. | **Emphasized “best interests” over birth parent rights, culture** |

* + In BC, a birth mother cannot give consent to an adoption until the child is 10 days old
  + “Parent claims must not lightly be st aside, are entitled to serious consideration; where it is clear that the welfare of the child requires it, however, they must be set aside.”

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| Racine v. Woods (1983) SCC | **F:** Child abandoned by mother, adopted by white/Métis parents. Mom came back when child was 5, wanted child.  **C:** Importance of cultural background/heritage lessens over time. Best interests test emphasizes bonding over culture, especially after time has passed. | **Significance of cultural background/ heritage abates over time** |

#### BC Adoption Scheme

* s.2 – Purpose of the Act
  + “to provide for new and permanent family ties, giving paramount consideration to child’s best interests”
* s.3 – Relevant factors re: best interests of child
* s.37 – Effect of adoption order
  + Usually permanently severs legal relationship btwn birth parents & child (unless 1 birth parent stays)
  + Substitutes a legal relationship with adoptive parents
  + D/not affect any aboriginal rights the child has [s.37(7)]
* s.84 – Paying/accepting payment for an adoption; s.85 – advertising
* s.4- 12 – Private placements
* Aboriginal matters:
  + s.46 – ct may recognize adoption effected by custom of Aboriginal community (***Casimel v. ICBC****)*
  + s.7 – reasonable efforts must be made to discuss Ab’l child’s placement w/members of community

*Adoption Act*, s. 3 – Relevant factors to be considered in determining child’s best interests:

1. the child's safety;
2. the child's physical and emotional needs and level of development;
3. the importance of continuity in the child's care;
4. the importance to the child's development of having a positive relationship with a parent and a secure place as a member of a family;
5. the quality of the relationship the child has with a birth parent or other individual and the effect of maintaining that relationship;
6. the child's cultural, racial, linguistic and religious heritage;
7. the child's views;
8. the effect on the child if there is delay in making a decision.

(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered

#### Who Can Apply to Adopt?

* s.5 – child may be placed w/1 adult or 2 adults jointly; each prospective parent must be BC resident
* s.29 – 1 adult or 2 adults may apply; 1 adult may apply w/birth parent; each applicant must be BC resident

|  |  |  |
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| Re K (1995) ON | **C:** “Step-parent” adoption by s/sex co-parent. Judge reviewed studies re: effects of being raised by s/sex parents 🡪 virtually no differences! | **Expert evidence re: s/sex parenting** |

#### Whose Consent is Required?

*Adoption Act*

* s. 13(1) – the consent of each of the following is required for a child's adoption:

1. the child, if 12 years of age or over
2. the birth mother;
3. the father;
4. any person appointed as the child's guardian.

(2) For the purpose of giving consent to adoption, the child's father is anyone who …

* s.14 – Birth mother’s consent only valid if child is at least 10 days old
* s. 15 – Person under 19 yrs may give legally valid consent
* When do fathers need notice? (see: s.6(1)(g); 10, 11)
* s.7 – reasonable efforts must be made to discuss Ab’l child’s placement w/members of community
  + Exceptions: requirement d/not apply if child is 12+ years and objects (s.7(2))
* Dispensing with consent; ct can dispense if it’s show that it’s in child’s best interests
  + s.17(1)(a) – Parent is not capable of giving informed consent
  + s.17(1)(b) – Reasonable but unsuccessful efforts have been made to locate person
  + s.17(1)(c), (i)-(iii) – person has abandoned, not made reas effort to parent, etc
  + Gives quite a lot of power to judges to determine whether a birth parent’s parenting has been adequate
* Revoking consent (recall: *King v. Lowe*)
  + s.18 – revocation as long as child has NOT been placed, and revocation is in writing
  + s.19 – singles out birth mothers for special protections (that fathers d/not necessarily get)
    - Birth mother can revoke consent within 30 days of child’s birth
  + s.20 – child may revoke consent to adoption any time before adoption order made (re: \*interests\*)
  + s.22 – court revocation of consent (see: “best interests” principle)
    - Only until adoption order is granted; recall: adoption is “in rem,” changes legal status
    - s.22(5) – failure to comply with open adoption agreement not grounds for ct to revoke consent

|  |  |  |
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| In the Matter of Female Infant (2000) BCCA | **F:** Couple, early20s, she gets pregnant but wants to place child for (open) adoption. Child placed w/adoptive parents, father learns of situation and asks for custody  **C:** To what extent should we weigh biological ties? Or, focus on child’s welfare, best interests? Ct/A considered socio-economic position of adoptive parents. | **All else equal, biological ties may tip the scale (“intangible benefits of blood ties”)**  **(here, no)** |

#### Access Issues Related to Adoption

* Grandparents
  + *FRA*, s.35(1)(1.1) – allows cts to award custody/access to 3rd parties (such as grandparents)
  + C(DH) v. S(R) – custody/access NOT granted to grandmother, who lived in California
    - Bio parents consented to adoption, child had been placed, then grandmother claimed ...

Race, Culture, and Adoption (“Best Interests of the Child” – a case study)

* *Practice Standards and Guidelines for Adoption* – advocate extensive consideration of aboriginal culture

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| Racine v. Woods (1983) SCC | **F:** Child abandoned by mother, adopted by white/Métis parents. Mom came back when child was 5, wanted child.  **C:** Importance of cultural background/heritage lessens over time. Best interests test emphasizes bonding over culture, especially after time has passed. | **Significance of cultural background/ heritage abates over time** |

... CRITIQUE: Does increased attachment necessarily reduce the significance of culture and race?

***Sawan v. Tearoe (1993) BCCA***

* To return child (remove from “loving, competent” proposed adoptive parents) is to place him in uncertain future, less continuity and stability
  + As in *Racine*, cultural background must give way to bonding; child’s best interests come first

|  |  |  |
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| DH v. HM (1999) SCC | **F:** Aboriginal mother had been adopted out to white family early on. Gave birth, dispute between her bio parents (Ab’l) and her adoptive parents.  **C:** Custody awarded to her adoptive parents. Ab’l factor not disregarded, but other factors pointed to the adoptive (white) parents. Ct downplayed Ab’l issue? | **Ab’l considerations not disregarded, but ct placed child with other (white) family** |

Compare and Contrast:

|  |  |  |
| --- | --- | --- |
| *Racine v. Woods* | *Sawan v. Tearoe* | *DH v. HM* |
| * Birth mother vs. adoptive parents * Adoptive parents had child for 7 yrs (re: status quo issue) * Adoptive parents got custody * Bonding > biology | * Birth mother vs. adoptive parents * Ab’l mother tried to revoke consent (orally) within 6 days * Adoptive parents had child for 2 months (re: status quo issue) * Adoptive parents got custody * Bonding > biology | * Biological grandfather (Ab’l) of child (HM) vs. adoptive grandparents * Adoptive grandparents had adopted birth mother (Ab’l), her child was at issue (was mixed race) * Birth mother went back to BC, intended for child to be raised w/her birth family (not legal family) * Biolog grandfather had child for 2 yrs * Adoptive grandparents got custody * Passage of time > bonding, biology, and culture |

# Legal Regulation of Family Life

## Child Protection

* The process through which the state can supervise your parenting, or remove a child (temporarily or permanently) from the family and put child up for adoption
  + Fairly radical intervention in family autonomy
  + Judges appear concerned about the *risks*
    - Concerns about returning a child to unstable parents who face challenges, difficulties?
    - Children at risk of abuse, neglect (due to systemic disadvantages?)
  + What about the other risks? Psychological? Cultural identity?
    - Concerns about removing a child from birth family, potentially an Ab’l community?

### State Intervention and Family Autonomy

State intervention vs. Family autonomy (public/private divide)

* The balance:
  + Protect vulnerable family members vs. support intact family as a whole
  + Protect vulnerable (recall: the risks) vs. principles of autonomy, privacy and respect

Consider: child care practices

* What sorts of different child care practices are there?
* Cts make assessments about what is adequate child care or not
  + Can you ever say whether someone is parenting “well” or not? Consider: expected norms?

## Violence in Relationships

* BC’s custody legislation requires that \*nothing\* be taken into account when determining whether a parent should have custody of a child (under the current *Family Relations Act*)
  + Courts have been better at saying certain forms of abuse are relevant in custody assessments

We know that domestic abuse goes on in relationships, but not much research has explored post-separation abuse ...

* “Separation abuse” – attacks on the woman’s body and volition, in which partner seeks to prevent her from leaving, retaliate for separation, or force her to return … Separation, or suggestion of it, can lead to abuse
  + Consider gender dynamics, and SS vs. OS couples

*Statistical Overview (Canada)*

* 2007: nearly 40,200 incidents of spousal violence
  + ie) violence against legally married, C/Law, separated, divorced partners
  + Consider: what definition of “violence” is used? How much injury? How much fear? A pattern?
  + Note that this is only the reported incidents!
    - **Why?** Fear of stigma, shame, police arresting both partners, no economic security, could lose children (once protective services visit), fear of retaliation, lack of confidence, self-blaming
  + This represents about 12% of all police-reported violent crime
* The majority (83%) of victims of spousal abuse are females, but men also experience abuse
* Common assault was the most frequent type of spousal violence (2/3 of offences)
  + Followed by: major assault, uttering threats, criminal harassment, stalking ...
* Spousal homicides account for 15% of all homicide deaths
  + See: Peter Lee’s murder of Sunny Park (pg 225), and the panel recommendations
  + 3 times as many women as men are killed by their intimate partners
* Aboriginal women experience higher rates of spousal violence and homicide
* Separation d/not always end abuse, abused women are most at risk of injury/death during separation
* Three phases of domestic abuse:
  + Building tensions (gradual escalation manifested by verbal abuse, less extreme physical)
  + Acute battering incident
  + Loving contrition phase (remorse, promises to change, affection)
    - This phase provides reinforcement for victim to remain in relationship
    - CRITIQUE: this seems to make women passive actors, often many pragmatic/material reasons why victim remains in the relationship (economic, structural constraints)

*Impact of Domestic Violence on Children* (see: Kerr and Jaffe article)

* Parents tend to underestimate what their children know about violence that goes on, how they witness it
  + Can leave children w/same psychological problems as the direct experience of violence
  + Almost 60% of children who witness violence show symptoms of PTSD
  + Children who witness violence can internalize it, to resolve conflict
    - Boys may in turn abuse their own future partners; Girls may see violence as “acceptable”
* In families w/spousal abuse, there’s likely child abuse going on as well

*Custody and Access Decision-Making and Abuse*

* Decision makers often assume that violence re: parent d/not raise same concerns as violence towards a child
  + Violence towards a parent fails to adequately impact custody decisions?
  + Spousal abuse has little relevance to custody and access determinations?
  + Does this make sense, given what *Kerr and Jaffe* report?
* Neither the *Family Relations Act* nor *Divorce Act* explicitly direct judges to consider abuse ...
  + *DA*, s.16(10): “maximum contact and friendly parent rules emphasize contact between child and both parents as a goal, reward parent who appears most cooperative in facilitating contact”
    - Is this a good principle?
    - In the context of abuse situations, it might be problematic that maximum contact is desired
* For women who’ve been abused, access to the justice system can be difficult...
  + Issues re: access to legal system, lawyers’ ignorance, judges’ ignorance

(ignorance re: significance of pattern of abuse, custody issues, etc)

* Advice from practitioners – don’t stereotype re: who might be abused; may need to probe carefully

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| HH v. HC (2002) ABQB | **F:** Husband applied for access to 2 sons, wife vigorously opposed. Allegations of physical abuse as well as threats (incl threats to cease sponsorship of wife’s family). Husband completed anger mgmt course, the next day assaulted wife with hammer. Wife alleges children were present during attack (husband says they were too young to comprehend?)  **C:** Child welfare worker advised wife to leave Kamloops, funded transport to Edmonton. Father argued it’s in children’s best interests that he have access. Ct granted limited supervised access. | **Despite spousal abuse, father granted access because it’s in “best interests of child”** |

Critique:

* Extent of abuse seems to have been diminished? Diminished impact on family?
* Judge emphasized that access to both parents is generally seen as in best interest of child
  + No violence against children, witnessed by children, judge feels H is no risk to them
  + H obviously misses sons, some contact w/children is in their best interest (governing criteria)
* “Continued denial of access is not necessarily in best interests of children, and is punitive to husband”
  + Is denying access justified in this case by the violent and abusive behaviour of husband?

**Criminal and Civil Response**

* Peace bond (s 810 of Criminal Code)
* Order restraining harassment (s. 37 of *FRA*)
* Order prohibiting interference with child (as part of a custody order) (s. 38 of *FRA*)
* Order restraining disposition of assets (s. 67 of *FRA*)
* Order for temporary exclusive occupancy of family residence (s. 124)
* Restriction from entering premises (s. 126 of *FRA*)

**BC WHITE PAPER PROPOSALS**

* Changes may increase a judge’s ability to deal with family violence by:
  + identifying children’s safety as an overarching objective in the best interests of the child test;
  + including impact of family violence & consideration of civil or criminal proceedings relevant to the safety or well-being of the child as best interests factors;
    - Impact of violence on health, emotional well-being, safety, security of the child
    - Impact of violence on ability of perpetrator to care for and meet needs of the child
    - Appropriateness of arrangements requiring parental cooperation (increased risk?)
  + defining family violence & legislating risk factors to be considered in cases that involve violence; and
  + clarifying the grounds for protection orders and providing for criminal law sanctions for breaches.
* Also: Place duty on all family justice professionals, including lawyers, family justice counselors, and mediators to screen for violence
* Definition of family violence – actions by a person towards a family member:
  + Causing or attempting to cause physical/sexual abuse
  + Psychological or emotional abuse constituting a pattern of coercive/controlling behavior
  + D/not include acts of self protection (or protection of another), if force is reasonable

# FAMILY BREAKDOWN

# Separation and Divorce

## Divorce

* The grounds for divorce in Canada are:
  + Adultery
  + Mental cruelty
  + Physical cruelty
  + Living separate and apart for one year
* Since the 1980s, Canada is often considered a “no fault” country for divorce, but we still do allow spouses to bring evidence of the preceding fault-based grounds for divorce (a hybrid system)

### The Legal Framework

* 1968: first federal statute introduced
* 1987: first genuine no fault divorce regime (but note fault is still included)
* Before granting divorce, a judge must determine that “marriage breakdown” exists
  + Like adoption, the divorce isn’t legally effective until judicial order
  + Even when divorce is “on consent”
  + Why is this required? (85% of divorces are uncontested)
    - Recall: marriage changes legal status (‘in rem’ action), so similar action must change it back
* s.2(1) – “spouse” is “either of two persons who are married to each other” (includes s/sex couples)

**Grounds for Divorce** – Marriage Breakdown

* s.8(1) – ct may grant divorce on ground that there’s been breakdown of the marriage
  + s.8(2)(a) – spouses have lived separate and apart for at least 1 year immediately preceding *determination* of proceedings, and were living separate and apart at commencement of proceeding
    - “Separate and apart” period is NOT interrupted if they move back in together for less than 90 days w/reconciliation as primary purpose [s.8(3)(b)(ii)]
  + s.8(2)(b) – spouse NOT bringing application has committed adultery, or treated other spouse w/cruelty
    - Adultery includes adulterous acts w/individuals of same sex (***P(SE) v. P(DD), 2005 BCSC***)
    - Physical/mental cruelty – rather high threshold; must assess subjective impact of spouse’s conduct; conduct must be “grave and weighty,” beyond incompatibility (***Knoll***)

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| Oswell v. Oswell (1990) ON | **F:** When did “living separate and apart” begin?  **C:** No true intention to live separate and apart, couldn’t say there was NO chance of resuming cohabitation. TEST ... 1) Physical separation   1. Withdrawal by one or both from marital obligations 2. Absence of sex not conclusive but considered 3. Discussion of family problems, communication, joint social activities, meals, etc 4. Household tasks | **TEST for “living separate and apart”** |

... Objectively, it looked like he was treating her as his wife; he took her to parties, listed as “married” on taxes

### Procedural Issues

**Duties of Legal Advisors and Judges** (*Divorce Act*)

* It’s the duty of lawyers [s.9], judges [s.10] to discuss possibility of reconciliation, inform spouse of marriage counselling, unless circumstances of the case are of such a nature that it would clearly be inappropriate
  + ie) in cases of spousal abuse, this provision likely isn’t triggered
* Duty of lawyer to discuss advisability of negotiation and to inform spouse of mediation facilities [s.9(2)]
* Judge must be satisfied that there’s no possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so [s.10]
* How do these provisions work, given that 85% of divorces are “paper order divorces”?

... practically, they’re likely of not much force or effect

**Jurisdiction**

* Like adoption, you can only apply for divorce in a superior court (ie, BCSC) see: definition of “court”
* s.3 – Can apply in a province in which one spouse is ordinarily resident for at least one year immediately preceding *commencement* of proceeding (note the time period)
  + Doesn’t matter which spouse has been ordinarily resident for 1 year, either can apply in a prov
  + “Ordinary residence” – question of fact
    - “the place where a person regularly, or customarily lives in a settled routine” (*Thomson*)
* What happens if each spouse applies in a different province? See: s.3(2)
  + Whoever got application in first, that province has jurisdiction (other application will lapse)
  + If applications are made on the same day, the *federal* court gets jurisdiction ... interesting!
* Note: proceedings can be transferred by a court if there is a custody dispute and the child is more substantially connected to another province (s. 6)

**Collaborative Lawyering**

* Cooperation, working jointly w/opposing counsel to ensure both clients achieve acceptable results
  + Establish goals and interests, tailor solution to meet the goals (progressive , sophisticated approach)

**BC WHITE PAPER PROPOSALS –** Divorce Mediation

* New statute should encourage use of ADR where appropriate
* Duty on all family justice professionals to screen for violence, provide people w/info about ADR options
  + Must make inquiries to assess whether family violence present
* Lawyers must file certificate confirmation discussion about non-court based processes has occurred
  + Similar to *Divorce Act*
* Parenting coordinators can mediate or determine a dispute
  + New breed of family law professional, recommendation that they be given add’l power
* Encourage agreements unless unfair (or not in child’s best interests)
  + Will continue to allow cts to set aside unfair aspects of agreements
  + Cts more willing to uphold economic-based agreements, compared to family-based agreements

### Enforceability of Marriage Contracts

* To what extend can couples pre-determine what should happen in event of divorce? (pre-nup)
  + Contracts can normally be enforced by judges, but is there something special about marriage? Some argue family law is a special field, there shouldn’t be strict enforcement of such contracts
  + Prenuptial agreements can be enforced, but there may be grounds not to enforce them (protection of the weaker spouse, etc)

*Family Relations Act*

* s.61(2)(b) – parties to a marriage can enter into a marriage agreement before or during their marriage regarding division of their family assets or other property during marriage or upon marriage breakdown
  + s.61(3) – must be: in writing; signed by both; witnessed by one or more other persons
* s.120.1 – unmarried spouses; if they make agreement that would otherwise be a marriage or separation agreement, *FRA* applies to the agreement *… brings some unmarried spouses into the legislative regime!!*

**Property Rights and Marriage Agreements** (*FRA)*

* s.56 – at the end of marriage each spouse is entitled to an undivided half interest in each family asset
  + Subj to a marriage or separation agreement (can contract OUT of sharing presumption)
* s.65 – if division of property in s.56 or under a marriage agreement is unfair w/regards to various factors, a party can apply for judicial reapportionment

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| Hartshorne v. Hartshorne (2004) SCC | **F:** Marriage K severely restricted assets available to wife. Can marriage K (w/independent legal advice, no duress (?), etc) be set aside bc it doesn’t adequately provide for spouse’s sacrifices in marriage?  **C:** Ct will inquire whether circumstances of parties at time of separation were within reasonable contemplation of parties at time of K – did parties make adequate arrangements re: anticipated circumstances?   * + 1. Ensure agreement was entered without duress, coercion, fraud, undue influence     2. Apply “fairness test” under s.65: * Apply agreement, add other entitlements (spousal support, child support) * Consider factors listed in s.65(1) ... Is K unfair? Have lives unfolded as contemplated? | **SCC upheld agreement (see: TEST)** |

* Here, K upheld (freedom of K?) ... lesson? Maybe vulnerable party shouldn’t sign agreement like this?
  + How much difference did it make that she had legal education, legal counsel? (less vulnerable?)
* CRITIQUE – consider notions of choice, both ways; Robert consciously chose to marry, take on matrimonial property division commitments?

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| Johnstone v. Wright (2005) BCCA | **F:** Unmarried spouses, applic of s.65 when there’s a s.120.1 agreement between unmarried cohabitants? 48 yr old woman, living with 74 yr old millionaire. Note: disparity between divisions in will and divisions in cohabitation agreement.  **C:** Ct held no economic disadvantage due to relationship, nothing unanticipated by agreement, no children, will has no bearing. | **Hartshorne also applies to cohabitation agreements (s.120.1)** |

# Custody and Access

**Custody**  (based on case law)

* Almost all of the rights incidental to guardianship of the person (ie, right to determine a child’s education, health care, religion), and physical care of/control over a child
* *Divorce Act*, s.1 – “includes care, upbringing, and any other incident of custody”
* *FRA*, s.34 – persons who may exercise custody …
  + Power of court to override custody agreements: s.34(2)(a)

**Joint Custody** *Divorce Act,* s.16(4); *FRA* s. 35(1)

* Orders can be made for sole or joint legal custody (refers to decision making re: the child)
* Or, order for sole or joint physicalcustody (more rare)
* May be fragmented order (joint legal custody, primary physical custody)

**Guardianship**

* The right to direct the course of the child’s life and upbringing; can be sole or joint guardianship
* What is guardianship and how does it relate to custody ...
  + More about decision making part? Order for sole (legal) custody, but joint guardianship?
  + Custody = *all* of the rights associated w/guardianship plus right to the physical care and control
* *FRA,* s.27, s.28; see 27(4) for relationship with *Divorce Act*
  + Mother and father = joint guardians for so long as live together
    - Contingent on parents co-residing
    - Here, notions of genetics (mother/father), but guardianship contingent on living together
  + If separated, whoever has care and control = (sole) guardian
  + Or, can agree on arrangements
* Power of court to override guardianship agreements: *FRA* s.28
  + More power of courts to override agreements (more likely to override than, say, financial K)

**Joint Guardianship**

* Each parent has full, active role in providing a sound moral, social, economic and educational environment for children, and they should consult w/one another in planning religious upbringing, education, athletic and recreational activities, health care (excluding emergency), and significant changes in the social environment
  + ***Lennox v. Frender (1990) BCCA***

**Access**

* Parent granted access has right to spend time w/child, usually in accordance w/terms of access order or agrmt
  + *Divorce Act*, French definition of access includes ‘right to visit’
  + *DA*, s.16(5) – includes right to make inquiries, be given info re: health, education, welfare of child
  + *DA*, s.16(7) – ct can order custodial parent to give notice re: change of residence
  + *FRA*, s.21 – ‘access’ includes visitation
* Definitions are in flux, as orders for sole custody become less popular
  + Trend is to create orders/agreements that specify details re: what time child spends with parents, who makes what decisions (custody fragments)

Jurisdiction re: custody/access 🡪 shared between federal and provincial gov’ts

* s.16, 17, *DA* – when corollary to divorce
* Pts 2, 3, 4, *FRA* – other than at divorce (married ppl not seeking divorce, unmarried ppl)

Who can apply for custody or access?

* s.16(1), *DA* – either or both spouses or any other person may seek custody or access
  + If person applying isn’t party to marriage, must seek leave of the court, s.16(3)
* s.35(1), *FRA* – one or more “persons” may exercise custody, have access
  + “Persons” includes parents, grandparents, other relatives, non-relatives, s.35(1.1)

Variation of orders – s.17, *DA*

## “Best Interest of the Child”

GUIDING PRINCIPLE re: custody/access 🡪 **“Best interests of the child”**

(see: L’HD in ***Young v. Young, (1993) SCC****)*

**History of Child Custody Law**

* 20th century – 'tender years doctrine' emerges (all else equal, mothers get custody)

1968 🡪 First Canadian *Divorce Act*:

* Courts can look at conduct, condition, means & other circumstances

1975 🡪 SCC says tender years doctrine a rule of common sense only, no longer a legal doctrine (*Talsky* case*)*;

* But also still ok to consider a mother’s conduct (ie, adultery, etc)

1985 🡪 Reform of *Divorce Act*;

* Best interests of the childis the ONLY consideration, having regard to means, needs, etc of the child (s. 16(8));
* No joint custody presumption, but s. 16(10) maximum contact provision (friendly parent rule)

Late 80s 🡪 Trend to eliminate language of custody & access; emphasize shared parenting; orders for contact

 Early 90s 🡪 Canada begins review of child support & custody law

 1997 🡪 Bill C-41 introduces child support guidelines, enhanced enforcement, etc.;

* Guidelines do not apply if both parents have at least 40% of time with child
* Makes shared custody desirable for payors

1997-98 🡪 Special Joint Parliamentary Committee is appointed to examine custody and access.

* Fathers’ rights groups emerge as powerful force
* Women’s groups concerned that spousal violence not taken into account when shared parenting suggested.

2011 🡪 Joint custody *in practice* the starting point (but no joint custody provisions in the law)

* Various federal Private Member’s Bills propose *equal parenting* in the Divorce Act

## The Relevance of Conduct, Race, and Sexuality

*Divorce Act*

* s.16(8) – in making a custody/access order, ct shall consider ONLY the best interests of the child as determined by reference to the condition, means, needs and other circumstances of the child.
* s.16(10) – Maximum contact, as is consistent w/best interests principle, shall consider willingness of parents
  + Generally interpreted to mean the more contact the better (re: presumption of joint custody)
  + “Friendly Parent Rule” – which parent is most willing to facilitate maximum contact w/the other?
    - If one parent is viewed by ct as uncooperative, custody granted to other parent?
    - See: ***TS v. AVT, (2008) AB*** – allegations made by mother viewed negatively, father = custody
* s.16(9) – Conduct of a parent is irrelevant unless conduct is relevant to ability of that person to act as a parent
  + - ie) adultery d/not necessarily mean that parent is a bad parent
  + Note: judges sometimes unwilling to find that abusive conduct btwn parents is relevant to best interests

*Family Relations Act*

* s.24(1) – when making, varying or rescinding a custody, access or guardianship order a court must give paramount consideration to best interests of the child;, MUST consider the following factors

1. health and emotional well being of the child including any special needs for care and treatment;
2. if appropriate, the views of the child;
3. the love, affection and similar ties that exist between the child and other persons;
4. education and training for the child;
5. the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

**What factors must a court NOT take into account?**

* s.24(3) – If conduct of a person d/not substantially affect BI factors, the ct must NOT consider that conduct
* s.24(4) – If ct is going to consider conduct, must only consider to extent that it affect best interests of child

### Race, Sexual Misconduct, and Family Status

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| Van de Perre v. Edwards (2001) SCC | **F:** Child of single white female, African-Amer pro bball player. Father and his wife wanted custody, wife would be primary caregiver (father away a lot). What role does race, culture play in “best interests” test in *FRA*?  **C:** Race is relevant but not determinative factor. Conduct is considered only insofar as it impacts a factor under s.24(1). Std of review? Finality is valued, minimal disruption to child. | **Race is only one factor re: custody** |

* Race test: which parent will facilitate contact, dev’t of racial identity in a manner that avoids conflict, discord?
  + Relevance of race factor depends on context; only one factor, primary needs must be considered first

### Violence

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| Carlson v. Carlson (1991) BCCA | **F:**  Impact of family violence on custody and access orders? Role of expert evidence?  **C:** Cts should avoid interfering w/status quo if possible. Violence towards spouse may affect emotional well-being of children as well as suggest danger to them. | **Violence towards spouse may be relevant to custody (not access)**  **(but not necessarily)** |

(recall perils of unproven allegations of abuse: ***TS v. AVT, (2008) AB***) see: s.16(10), *DA* – friendly parent

### Working Mothers

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| Tyabji v. Sandana (1994) BCSC | **F:**  Mother was provincial MLA who left father for another politician  **C:** While responsibility for breaking up the marriage (“conduct”) not necessarily a test for awarding custody, it’s relevant if it shows one parent pursued and may continue to pursue self-interest to detriment of the children | **Will one parent pursue self-interest to detriment of children?** |

### Sexual Preferences – Lesbian Custody

|  |  |  |
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| N v. N (1992) BCSC | **C:** Is lesbianism a factor in custody disputes? Ct granted custody to mother, her new lesbian relationship was not “notorious,” no evidence children were affected. | **Ex-spouse’s discreet homosexuality d/not interfere w/”best interests of child”** |

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| JT v. SC-T (2008) ON | **F:**  Lesbian parents, two children conceived by artificial insemination; divorce.  **C:** Joint legal/physical custody ordered. “Best interests” test focuses on maximum contact, expert raised sexist stereotypes which ct d/not challenge. | **Joint legal/physical custody to divorced lesbian mothers** |

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| MMG v. GWS (2006) SK | **C:**  Wife leaves father for lesbian relationship, gets joint legal custody w/frequent access (children to stay with father). Father appeared to be “friendlier parent” | **Father appeared “friendlier” parent, mother (w/new lesbian relationship) granted frequent access** |

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| JSB v. DLS (2004) ON | **F:**  Mohawk parents, mother leaves for lesbian relationship.  **C:** Original order for joint physical custody was disruptive for kids, changed to maternal custody/paternal access. Race and sexuality relevant factors (per *Van de Perre*). Mother less connected to community, but still got custody based on “best interests” | **Race (Ab’l culture) and sexuality may be relevant factors re: “best interests”** |

Do the more recent cases in the casebook indicate a more relaxed view towards sexuality? If so, why?

* Seems that now, if you’re gay/lesbian parent, you don’t necessarily need to be “discrete” (as in *N v. N)*
* Society has evolved, has different understanding of gay/lesbian relationships
  + However, still some problematic judicial attitudes in recent judgements …
* Also consider transgender parents and custody/access claims ... should it matter?
  + Judges should ultimately put children first
  + Perhaps openness with children should be viewed as helpful, constructive, positive evidence
  + Comments made by one parent disparaging other parent’s “lifestyle” possibly viewed negatively?

## Trends: Joint Custody and Primary Caregiver Presumption

**Statistics**

* Maternal custody diminishing somewhat (69% 🡪 45%), paternal custody diminishing as well, but joint custody increasing substantially
  + Joint custody does not always mean custody is proportionally shared (may be 70/30)
* Note also that there are no same-sex stats; prior to 2004 there was no same-sex marriage/divorce

**Social Science Research**

* Children d/not necessarily benefit from greater contact w/non-custodial parent
  + The TYPE of parenting (rather than amt of time) is most significant
  + Some children, esp in high conflict families, fare worse w/joint custody arrangements
* Studies are mixed, but majority conclude that key factors that correlate to a child doing well after divorce are
  + a close, sensitive relationship with a well-adjusted custodial parent;
  + diminution of CONFLICT and reasonable cooperation between parents;
  + and whether or not child comes to divorce with pre-existing psychological difficulties
* One Size Does Not Fit All!
* No joint custody presumption in *DA* or *FRA* ... But, consider “maximum contact” in *DA*
* Can be very difficult to make shared parenting, joint custody work (can be difficult for child)

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| Stewart v. Stewart (1994) BCCA | **C:** Parents unable to communicate meaningfully, so ct overturned JC order. JC orders should be made rarely, only under circumstances where parties are in agreement, can communicate | **JC should be ordered rarely,**  **only in certain circumstances** |

* + If parties aren’t in agreement re: viability of shared parenting, don’t order joint custody
    - But, this makes it easy for one parent to “veto” joint custody, merely by not agreeing to it??
* Recall that parents may agree to whatever arrangement they want; this is for “orders” …

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| Robinson v. Filyk (1996) BCCA | **C:** No presumptions should be used to decide custody – no presumptions in favour of JC, but no presumptions that JC would be improper. | **No presumptions should be used to decide custody** |

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| Javid v. Kurytnik (2006) BCCA | **C:** No JC – father had anger mgmt issues, took no responsibility for problems, conflict real and continuing | **No JC where conflict btwn parents is real and continuing** |

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| Narayan v. Narayan (2006) BCCA | **C:** No joint guardianship – father had assaulted mother in past, animosity and blames her. | **No JC or joint guardianship; father assaulted mother** |

... parties can agree to joint guardianship later?

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| Kaplanis v. Kaplanis (2005) ON | **F:** Joint custody in context of domestic violence.  **C:** JC order revoked; JC should only be granted where there’s evidence of historical cooperation and good communication; don’t grant JC in hopes it will improve communications | **JC only granted where evidence of good cooperation, communication btwn parents** |

Problems w/judicial discretion – indeterminacy, lack of predictability, bias?

* Response 🡪 primary caregiver presumption
  + No presumption in Canada, but some judges take primary caregiving into account
  + Is this “one size fits all” system appropriate?

**BC WHITE PAPER PROPOSALS**

* Replace ‘custody’ and ‘access’ with ‘guardianship’; very broad definition of rights and responsibilities.
  + Subject to agreement/ct order re: guardianship, the parents of a child are the guardians of a child

(except if they did not reside with the child after the birth)

* + *Is this a presumption of joint guardianship?*
* *“*Parenting Time”will also be used (not access): time during which guardian has the responsibility to make day-to-day decisions, including day-to-day care and control and supervising the child’s daily activities.

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| Windle v. Windle (2010) BCSC | **F:** Interim order, 2002: joint custody and guardianship, supervised access. In 2009: primary residence w/mother, access to father. Oldest son (14 yrs) refused to visit father, ct order supported his refusal.  **C:** Ct held sole custody, primary residence to mother; joint guardianship NOT appropriate. Both parties agreed continued access was important (visits per mother’s consent, oldest son can decide for himself) | **Ct held joint guardianship not appropriate. Primary residence to mother, access to father**  **(oldest son not req to visit)** |

## The Access Parent

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| Johnson-Steeves v. Lee (1997) QB | **F:** Mother wanted to deny access to father bc of agreement that he would not take on father role. Access, re: paternity agreement? Role of choice in creating family arrangements?  **C:** Access is the child’s right, when it’s in the child’s best interests he should have access. Mother cannot contract out of child’s rights. Generally, it’s in child’s best interests to know father. | **Access is the child’s right, when it’s in the child’s best interests he should have access** |

* Many different versions of “family,” but society and biology haven’t reached a pt where we have dispensed with fathers or mothers completely
  + Judge relied on expert evidence premised on father/mother involvement in child’s life
  + Inappropriate to create single-parent life for child, if possible to have father and mother?
    - Is there a preferred family form?

**Access and Allegations of Violence**

* What happens when allegations of child or spousal abuse are made against a parent seeking access?
* Struggle re: how to balance parental rights, children’s rights, efficacy of supervised access, etc
  + Judges reluctant to cut off all access; only clear evid of probability of harm to child will result in denial
* Cases continue to turn on their facts, with disparate results

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| Fullerton v. Fullerton (1994) NB | **F:** Children so terrified of witnessing severe abuse they had nightmares of mother being hurt.  **C:** Ct refused to deny access. Child’s right to access means access may be ordered even when children themselves d/not wish to exercise it. | **Ct refused to suspend access (contrary to child’s right to access)** |

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| Al-Maghazachi v. Dueck (1995) MB | **F:** Mother alleged child sexual abuse, children indicated no wish to see father  **C:** Ct attempted to balance rights and concerns against “interests of the child” | **Ct again refused to terminate access** |

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| EH v. TG (1995) NS | **C:** Ct couldn’t determine if child was sexually abused (was prone to screaming in presence of father, had disclosed abuse to mother). Parental preference/rights should NOT influence consideration of “best interests” of child. | **Ct DID terminate access**  **(child alleged abuse)** |

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| Baggs v. Jesso (2007) NL | **C:** Father charged w/sexual assault but acquitted. Still, violent pattern of behaviour not in child’s best interests. | **Father granted some access** |

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| H(K) v. T(J) (2006) AB | **C:** Allegations of significant violence (convicted of assault), was psychologically manipulative | **Father denied access/contact** |

An uneasy balance? ... recall: supervised access is generally seen as a temporary measure

* ALSO, if a woman fears for her/child’s safety and tries to limit access, may be seen as “unfriendly parent”

### What is the remedy when access is denied or frustrated?

* + Action in tort; breach of fiduciary duty
  + Contempt of court; termination of spousal support; change of custody ...

Options and penalties: Imprisonment (*B v. D*)

Fine (*Cooper* - $10,000)

Varying of custody order

Cancellation of spousal support

Contempt of court 🡪 jail? … is this really in the best interests of child?

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| Ungerer v. Ungerer (1998) BCCA | **F:** Can misconduct by former spouse be considered as basis for varying/cancelling an order for spousal support? (YES)  **C:** s.17(6), *DA* (variation order) is no bar to considering such misconduct, because this misconduct occurred after the marriage – it’s not misconduct in relation to marriage (see s.15.2(5), *DA*). | **Ct terminated spousal support when mother failed to allow ex-husband access to daughter** |

... here, mother’s conduct was sufficiently egregious to disentitle her to support (turned child against her father)

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| B(L) v. D(R) (1998) ON | **F:** Mother persistently, wilfully denied ct-ordered access, no evid for valid reason for doing so (allegations of sexual abuse were unsubstantiated, evid of staff at access program suggested child was comfortable around father)  **C:** Mother committed to jail for 60 days (contempt of court), judge wanted to send strong message. | **Mother jailed for contempt of court** |

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| Cooper v. Cooper (2004) ON | **F:** Mother denied access, children refused to see father.  **C:** Ct didn’t accept that it was children’s decision. $10,000 fine for mother, JC granted. | **Mother fined**  **(even though children**  **refused to see father?)** |

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| JKL v. NCS (2008) ON | **F:** Father originally had primary custody of son, turned him against mother.  **C:** Mother received primary custody. Judge also ordered son (13 yrs) sent to “deprogramming” in US, workshop to gain critical thinking skills, interpret family situations, etc. | **Father lost custody for turning son against mother; son sent for “deprogramming”** |

... Do these programs work? Is it in best interests of child to force them to do this?

* + Cts emphasize destructive effect of turning child against other parent; award custody to other parent

**Denial of Access, or Failure to Exercise Access Regularly?**

* CBA alleged that there are more access parents who voluntarily curtain contact w/children than there are custodial parents who deny access. ... however, difficult to determine which occurs more often!
* Would you want to enforce an access order? Force a parent to spend time with child? … probably not

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| Young v. Young (1993) SCC | **F:** Divorced couple, father wanted to discuss his Jehovah’s Witness religion w/children.  **C:** “Best interests” re: Charter rights. Express wording of s.16(8), *DA* requires ct to look only at “best interests” for custody/access orders. Custodial parent has no right to forbid certain types of contact. No reason to limit access. | **Importance of “friendly parent” provision, s.16(10) – maximum contact encouraged by statute** |

* Ct held that ultimate and only criterion for limiting access is best interests of the child
  + But, significant weight to s.16(10): child of the marriage have as much contact w/each spouse as is consistent w/his or her best interests (maximum contact view)
  + Custodial parents can’t impose restrictions on access parents
    - Access parents have fairly generous rights to expose children to lifestyle/religion?

To what extent can cts dictate “how” parents choose to raise children?

* Obviously sexual abuse is problematic, but what about religious beliefs, other beliefs/lifestyle choices?
  + Where is the line ...

### Grandparents’ and Non-Parental Access

* Do grandparents have a legal right to apply for access (contact) with their grandchildren? YES!
  + s.35, *FRA* and s.16(1), (4), *DA* permit order of access in favour of 3rd party

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| Bridgewater v. Lee (1998) AB | **C:** Parents restricted grandmother’s access, she sought access order. Ct found negativity would pervade family if access granted. If access order would disrupt nuclear family, ct must exercise caution in evaluating effects of access on “best interests of child” | **Conflict btwn parents not prereq for access order**  **(here, access not granted)** |

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| Chapman v. Chapman (2001) ON | **C:** It’s not in child’s “best interests” to see grandmother when there’s no positive relationship | **Children s/not be forced to visit grandmother** |

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| Parsons v. Parsons (2002) ON | **F:** Mother denied access to grandmother bc she didn’t accept mother’s new lesbian relationship. Ct didn’t like mother using access to children as “bait. | **Access ordered, in child’s best interest to maintain relationship** |

Non-parental access

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| GES v. DLC (2005) SK | **C:** Platonic friend of mother was strongly involved in children’s lives. Access granted bc man’s role was similar to that of step-parent. There were emotional benefits to children from maintaining significant relationship. CA overturned order bc conflict btwn mother and man. | **Conflict btwn adults could negatively impact child**  **(access not granted)** |

## Restrictions on Mobility of Custodial Parents

: one parent wants to move quite a far distance away , marries a person who lives elsewhere

... what happens to custody/access orders? (not a lot of statutory guidance)

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| Gordon v. Goertz (1996) SCC | **F:** Custodial mother wants to move to Aus to pursue educational opportunity. Applied to vary custody order to allow her to move w/child  **C:** Ct must weigh: importance of child remaining w/custodial parent vs. continuance of contact w/access parent, community. Maximum contact is desirable. | **Parent applying for change in custody/access must satisfy 2-pt test** |

SCC has refused leave to appeal in many relocation cases bc of two part test (per McLachlin)

1. Threshold test for variation: demonstrate a material change in circumstances affecting child

(this is almost always shown with a relocation)

1. Best interests analysis: after threshold met, judge must consider.....
   * + Existing custody relationship and relationship btwn child and custodial parent
     + Existing access arrangement and relationship btwn child and access parent
     + Desirability of maximizing contact between child and both parents

(But can’t restrict mobility rights in *Charter*)

* + - Views of the child
    - Custodial parent’s reasons for moving, ONLY in exceptional case where it’s relevant to that parent’s ability to meet child’s needs (however, this factor often considered)
    - Disruption to child of change in custody
    - Disruption to child consequent on removal from family, schools, community

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| Karpodonis v. Kantas (2006) BCCA | **F:** Mother wanted to move to Houston to keep her job, father was minimally involved in child’s life  **C:** Relationships take precedence over financial disadvantage and employment preferences of a parent. Ct found no “error” to justify interfering w/initial order. | **Relationships take precedence over financial disadv/employment preferences of a parent** |

* Always hard facts to deal with, what should judge do?
  + Don’t want to restrict parent’s mobility rights, BUT want to maintain access for both parents

Of course, parents can always agree to their own arrangements

* Ask access parent if they ‘d move too? Ct can’t order access parent to move, but custodial parent could ask?

# Economic Consequences: Matrimonial Property

* Unmarried couples who have cohabitated for 2+ years do NOT have same rights to matrimonial property as
  + Except in some occasions where c/law couple has entered into some form of agreement [s.120.1]
  + Married spouses have simpler, more certain mechanism to deal w/property disputes
    - “Family assets” are divisible under *FRA* – OUFP assets and business assets contributed to
* Property rights of c/law couples must be determined by c/law trust principles
  + Unmarried spouse must establish that other party was enriched, h/she was correspondingly deprived, in absence of juristic reason (*Pettkus v. Becker*)
  + No presumption of equal division in c/law applicable to unmarried couples

## Property Claims by Unmarried Cohabitants

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| NS v. Walsh (2002) SCC | **C:** Application of NS *Act* to only married spouses is NOT discriminatory, it respects fundamental autonomy of individual. Emphasis on marriage as choice, indication that parties are contracting to statutory scheme | **It’s NOT contrary to the *Charter* to exclude unmarried partners from matrimonial property provisions** |

* Where legislation has the effect of dramatically altering legal obligations, choice must be paramount
  + Decision to cohabitate is insufficient to indicate intention to share each other’s assets
* DISSENT – Purpose of prov statute is to address consequences of relationship breakdown
  + Legislation recognizes needs at end of relationship, not choices at beginning

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| Pettkus v. Becker (1980) SCC | **F:** C/law couple, bought farm in QB, title in pf’s (husband’s) name, as was custom. Shared labour, both worked hard, had bee-keeping operation. She left him (twice), sued for ½ interest in properties.  **C:** Ct established new formulation of CT as remedy for unjust enrichment (re: c/law relationships) | **New formulation of CT as remedy for unjust enrichment** |

* + Where ppl have lived together, amassed property, even though it’s in one partner’s name, you can infer common intention that property is to be held jointly, equally
  + Legislation has since worked to address modern forms of association, relationships, families

For CT based on unjust enrichment 🡪 TEST: does evidence support finding of:

1. An enrichment/tangible benefit to property owner
2. A corresponding deprivation to contributor (incl domestic contributions)
3. Absence of any juristic reason for the enrichment

* For UE to apply, must be some causal connection between acquis of property and corresponding deprivation
* Remedies: Monetary award

Constructive trust

* + - * Where monetary payment would be insufficient (*Kerr*)
      * Pf’s contribution was “sufficiently substantial and direct” (*Pettkus*)
      * Interest awarded must be proportionate to contribution, direct or indirect (*Pettkus*)

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| Sorochan v. Sorochan (1986) SCC | **F:** Man owned farm before he met woman; she worked on farm, did all domestic labour, for 42 yrs  **C:** Unjust enrichment easily found, but could ct find CT given that she didn’t help to acquire farm? CT could be imposed, ct found clear link btwn contribution and asset (contribution to acquisition not req) | **Re: unjust enrichment,**  **claimant’s contribution to preservation/maintenance may suffice** |

… did claimant reasonably expect to receive an actual interest in property?

… was other party aware of this expectation? (should have been aware?)

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| Peter v. Beblow (1993) SCC | **F:** Lived together 12 yrs, she looked after house, kids, etc. He pd off mortgage, purchased car and boat. She owned a vacation property  **C:** Based on her domestic services contribution, Ms was found to have satisfied all 3 req for unjust enrichment. No c/law duty to perform services for a partner. | **Domestic contributions may satisfy req for unjust enrichment** |

... contribution to care of household, childcare duties without compensation enhanced the value of the property

Kerr v. Baranow (2011) SCC – Refines remedy of **unjust enrichment** in context of jt family venture \*\* cite *Kerr* \*\*

Unjust enrichment – unjust retention of disproportionate share of assets accumulated during “joint family venture”

* Monetary remedy should be calculated proportionate to claimant’s contributions
* Must show:
  + Joint family venture (question of fact)
    - Mutual effort: pooling of effort, having children together, length of relationship
    - Economic integration
    - Actual intent: portrayed themselves as “married”
    - Priority of family: one party relocates, left workforce, forgoes opportunity for sake of family
  + Link between contributions and accumulation of wealth

**s. 120.1, FRA** – Allows unmarried partners to make agreements regarding property

* Definition of “spouse” in *FRA*,s 1: includes unmarried cohabitants, but excludes them re: matrimonial property
* s. 120.1 **–** if unmarried spouses make an agreement (incl separation or cohabitation agreement) Parts 5 and 6 apply to the agreement

**BC WHITE PAPER PROPOSALS**

* Establish presumption of equal sharing for c/law spouses

## Family Assets under the BC *Family Relations Act*

**History and Principles of the statutory marital property regime**

* What is property? 🡪Assets (income is dealt with under spousal support)
  + Property includes: house(s), cars, RRSPs (even though it’s “future” income), business, personal property (furniture, jewellery), assets in bank accounts, investments (properties, stocks)
* Matrimonial property is an exclusive provincial power: *Family Relations Act*, Parts 5 & 6
* Canadian provinces did not introduce matrimonial property legislation until the late 1970s
  + Before that common law remedies, e.g. resulting trust, had to be attempted
* Most provinces legislated deferred community of property regimes
* Aboriginal women living on reserve do not usually benefit from these regimes because the Indian Act precludes application of the provincial marital property laws to real property on reserve

**Deferred community property legislative regime (*FRA* Part 5 & 6)**

* In most provinces, applies only to married spouses & to certain property only
  + Tempered to some extent by judicial discretion
* As spouses, deemed to share property acquired during marriage
  + No proprietary interest vests upon marriage
  + Only on marriage breakup (per “triggering events”) does sharing “kick in”
* Homemaking, child care contributions are as worthy of recognition as financial contributions, (ie, s. 59(2) *FRA)*
* Can contract out of the regime (s. 56(3)(b) & s.65 *FRA*; *Hartshorne*)
* Can also contract *into* the regime ie) via contract (s. 120.1 *FRA*)

**Legislative Framework**

* s.56 – each spouse entitled to an interest in each family asset (consider: what is a “family asset”?)
  + s.56(2) – interest is undivided half interest as Tenant in Common
* s.56(1)(a)-(d) – 4 possible TRIGGERING EVENTS (whichever occurred first)

1. Separation agreement
2. Declaratory judgement after s.57 (declaration of “no reasonable prospect of reconciliation”)
   * + If one spouse is worried the other will declare bankruptcy, doing this will trigger the ½ interest and might protect the spouse’s interest
3. Divorce – an order for dissolution of marriage or judicial separation
4. Annulment – declaration from a judge that your marriage is null and void
   * + Consider: BC only gives matrimonial property rights to people who were married (also if your marriage is completely undone w/annulment? Yes)

* s.58 – definition of “family asset” 🡪 **ordinary use for family purpose** (OUFP test)
  + Property owned by one/both spouses, ordinarily used by a spouse/child of either for a family purpose
  + When do you “ordinarily use” something for a “family purpose”? (open to discretion)
* s.60 – onus on the person arguing that the property is NOT a family asset to prove its not
* s.56(3)(b) and 61 – ability to contract out of matrimonial property regime via marriage agreement
* s.65 – judges have discretion to make **reapportionment** on basis of unfairness and a list of factors:
  + Includes duration of marriage, date property acquired extent to which property was acquired via inheritance or gift, need to achieve some economic self-sufficiency (s.65(1)(e), debts)
    - This is the only part of statute which mentions sharing of debts

**“Family Asset”** (per s.58, s.59 *FRA*)

* s.58(2) – property owned by one/both spouses, ordinarily used by a spouse /minor child for a family purpose
* s.58(3)(c) – money of a spouse held in a savings account if ordinarily used for a family purpose
* s.58(3)(d) – pensions; a right of a spouse under an annuity or pension, home ownership, or RRSP
  + NO judicial discretion, this section deems such pensions family assets and thus sharable
  + ***Jiwa v. Jiwa*** – insurance policies were for future security of family unit, so they were “family assets” (policies were family assets, proceeds are thus family assets as well)
* s.58(3)(e) – a right, interest in a “venture” to which non-owning spouse has contributed (directly/indirectly)
  + Consider: what is a “venture”? Has the non-owning spouse made a contribution?
* s.59(1) – a business asset towards which the non-owning spouse has made a direct or indirect contribution

**“Business Assets”**

* s.59(1) – business asset owned by one spouse (to the exclusion of other), used primarily for business, non-owning spouse has made NO direct/indirect contribution, is NOT a family asset
* s.59(2) – “indirect contribution” in s.58(3)(e) and s.59(1) includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property
  + See: ***Robertshaw v. Robertshaw*** – wife was doing pd work for medical practice, this was held a “direct contribution” to the business

### Ordinary Use for a Family Purpose

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| Jiwa v. Jiwa (1991) BCSC | **C:** Ct considered intention of parties, intention that policies be used for benefit of family | **Assets intended to provide family security**  **(insurance policies, proceeds) are family assets** |

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| Martin v. Martin (1992) BCCA | **F:** Both spouses previously married, this marriage was rather short. Husband brought assets, wife brought mobile home which she sold and contributed proceeds to improvements to husband’s home. Husband used inheritance into mutual funds.  **C:** Home, pensions, RRSPs (see s.58) = family assets. Ct looked at husband’s intention re: mutual funds – he “intended” them for himself. | **Mutual funds NOT family assets** |

* Duration can be considered under s.65 (reapportionment), but is sometimes considered in OUFP assessment

Re: “modern” marriages

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| Lye v. McVeigh (1991) BCCA | **F:** Equal contributions made by each to living expenses, equal contributions to household chores. Husband earned more but they split expenses 50/50 (so husband was able to save more?). Shorter marriage, no children.  **C:** Husband’s savings, etc = NOT family assets, evidence there was no intention to share. Pattern of separate property during marriage. | **Husband’s savings NOT family assets, re: pattern/intention of separate property** |

* Pensions supposed to be family assets (s.53); husband had greater pension, normally it would be shared equally
  + Pensions weren’t split; judge said wife was younger, had capacity to contribute more to her pension

Consider: how income from OUFP asset, use of capital rather than income from asset, or use of both, impacts ct ...

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| Samuels v. Samuels (1981) BCSC | **C:** Husband had rental properties, received income. Is income a family asset? “Property” for purposes of division d/not include such income. | **Rental *income* used for family purpose d/not necessarily turn *asset* into divisible family asset** |

... so, it’s important to show that *capital* part of asset was used for family purpose? (not just the *income*)

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| Brainerd v. Brainerd (1989) BCCA | **F:** Investment portfolio, rental properties, jewellery. Short marriage (8 yrs), children.  **C:** Investmt portfolio = family asset, bc husband drew upon capital for family purposes. One rental property was for investment, used for lake access = had aspects of OUFP, but apportioned 80/20. Jewellery (his mother’s ring) = ct considered intention, had sentimental value to husband but he intended wife to have it? | **How do you show assets were OUFP?** |

NOTE: there’s presumption in statute of 50/50 split, but that’s not always the case ...

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| Evetts v. Evetts (1996) BCCA | **C:** Distinction btwn capital vs. income questioned. Brought it back to judicial discretion, case-by-case assessment. Specific use pattern must be examined. | **Distinction between capital and income questioned** |

**Assets – Hobbies, Inheritances, and Gifts** (OUFP + s.65)

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| O’Bryan v. O’Bryan (1996) BCSC | **F:** 10 yr marriage, sports memorabilia. Wife went to some card shows w/husband, some stuff displayed through home, mostly in husband’s den.  **C:** Collection WAS family asset, bc displayed prominently through house, wife participated | **Hobby is not necessarily carried on for “family purpose”** |

***Hauptman v Hauptman (1981) BCSC*** – expensive jewellery, intention to impress friends and colleagues = FA

***Hefti v Hefti, (1998) BCCA*** – intention is question of fact; must be proved (ie, plan for future security)

* NOTE: s. 65 can be used to reapportion a family asset, ie) if one person received property as inheritance

### Debts

* + *FRA* authorizes divisions of family assets, but does NOT refer specifically to allocation of debts

[debts only to be considered under s.65(1)(f)]

***Young v. Young, (1990) BCCA*** – Ct cannot make a spouse jointly liable for debt of another spouse

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| Mallen v. Mallen (1992) BCCA | **C:** Ct can consider debt when making s.65 reapportionment, if fairness requires. Do not just subtract debts from assets. Onus on person seeking reapportionment. | **Address debts at s.65 reapportionment stage** |

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| Stein v. Stein (2008) SCC | **C:** Wife equally responsible for contingent liability for tax shelters held in husband’s name, as well as half the “family” debts; both had benefited during marriage from tax shelters. | **Debts \*may\* be apportioned, but no presumption of equal division** |

### Pensions

* Re: pensions, NOT necessary to satisfy “OUFP” test because s.58(3)(d) explicitly deems pensions family assets

Distinction between **RRSPs** and **pensions** – both are family assets but note differences ...

* NOT for RRSPs, but for workplace pensions 🡪 division is confined to the portion of the pension that accrued during the marriage, but see s.65(3)
  + s.62: CPP – An agreement may provide that despite the CPP, there be no division of unadjusted pensionable earnings under that Act (can choose not to share CPP benefits, can K out)

### Ventures and Business Assets

NOTE: ***Samson v. Samson*** – professional qualifications NOT an asset (may factor into support)

**Direct contributions**

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| Robertshaw v. Robertshaw (1979) BCSC | **F:** 1 yr marriage, wife was doing pd work for medical practice.  **C:** “Venture” includes business. Contribution as paid employee counts towards contribution in s.58(3)(e) and s.59(1) | **Direct contributions can include paid work in business** |

**Indirect (and direct) contributions**

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| O’Keefe v. O’Keefe (2002) BCSC | **C:** Household management and childrearing, coupled w/minimal involvement in business = indirect contribution, sufficient to make the company a family asset | **Household contributions, w/minimal involvement in business; business = FA** |

* ***Piercy v Piercy (1991) BCSC –*** home care, entertaining, family care, companionship
  + He brought assets into marriage; did her unpaid labour constitute an indirect contribution
  + s. 65 reapportionment 85% to husband; 15% to wife (ct acknowledged her contribution)

**Dividing a Business**

* ***Balic v. Balic (2006) BCCA*** – shares normally divided rather than liquidate business

## s.65 Reapportionment and Dissipation of Assets

|  |  |  |
| --- | --- | --- |
| Narayan v. Narayan (2006) BCCA | **F:** Husband dissipated assets (RRSPs), used proceeds for self.  **C:** Ct must divide and reapportion property first, before deciding spousal support. No spousal support then needed in this case. | **Ct must divide and reapportion property first, before deciding spousal support** |

## Interim Use of Property, Valuation Date, and Compensation Orders

**Tracing – Conversion of a Family Asset into a Different Asset**

* If property is acquired w/proceeds from sale of a family asset, property can be “traced” back (*Tratch v. Tratch*)
  + Applies to property acquired before and after separation
  + Applies to property acquired in whole or in part by means of a family asset (*Milan v. Milan*)
* Ct can make compensation order where a spouse has disposed of property [s.66(2)(c)]

**Remedies** – s.66

* Ct has authority to make any order necessary to give effect to judicial reapportionment of property

(a) Declare ownership or rt of possession

(b) Order transfer of title, including for life or term of years

(c) Compensation order

(d) Partition or sale, then payment out of proceeds

(e) Transfer to, or in trust for, child

(f) Security for performance

(g) Sever joint tenancy

* Note also s. 66(3) and s. 67 allowing restraint of transfers

### Date of Valuation of Assets

|  |  |  |
| --- | --- | --- |
| Gilpin v. Gilpin (1990) BCCA | **C:** Unless there’s reason to the contrary, valuation is at date of trial. | **Valuation of asset based on date of trial** |

### Compensation Orders – First Nations and Provincial Property Law

* s. 124 – Ct can grant to one spouse exclusive temporary use of the family residence and the personal property in it, pending determination of the final division
  + BUT s. 124 cannot apply to property on reserve, just as Part 5 of the *FRA* cannot be used
    - No remedy under provincial legislation
  + *Derrickson v. Derrickson* , (1986 SCC); *Paul v. Paul*, (1986 SCC)
* BUT, could a reapportionment order (compensation order) effectively grant “1/2 interest” ??
  + Compensation Orders: s. 66(2)(c) (provided other spouse is “liquid” enough to provide $)
  + *George v George* (1996 BCCA)

Derrickson v. Derrickson; Paul v. Paul – division of assets, matrimonial home on reserve

* *FRA* inapplicable bc of *Indian Act*; *Indian Act* has no remedy
* Only remedy is lump sum payment? *(George*)

**BC WHITE PAPER PROPOSALS**

* Incl unmarried spouses in property division regime if cohabited in marriage-like relationship 2+ yrs
  + Less if have a child
* Reject the ‘user’ test (OUFP); instead define classes of property that are excluded from division
  + ie) pre/post relationship property, gifts/inheritances to one spouse
* Family property = all real & personal property owned by one or both spouses at separation (*triggering event*)
* Family property will be presumptively divided 50-50, as will *family debts* incurred during relationship
  + Unless excluded; if excluded, only divide *increase* in value during relationship
  + Can still contract out of equal division

For exams, re: matrimonial property divisions

* Discuss our basic deferred community of property scheme
* Go asset by asset
  + How was it used? OUFP?
  + Is it a family asset?
  + Would s.65 vary the presumptive 50/50 split?

# Economic Consequences: Spousal Support

* Until the late 20th century, spousal support was based on these factors: need, fault, gender
  + It used to be that only wives could claim from husbands, and not vice versa

## Who is Responsible for Support and Why?

* Acknowledging women’s economic disadvantages vs. Expecting women to re-establish themselves

Re: L’Heureux-Dube in ***Moge*** – broad context of achieving post-separation economic adjustment for former spouses

* Assets (marital property) vs. Income (spousal support)
* Priority must be given to child support, before considering any awards of spousal support [s.15.3, *DA*]
* Method/order of analysis: (often seen in judgements)
  + Determine child custody, access arrangements – how will child split time?
  + Determine marital property
  + Determine child support
  + Determine spousal support
* Ct won’t always grant an order for adjusting marital property AND order for spousal support; ct might find that apportionment of marital property is sufficient to adjust economic relationship btwn spouses

**Jurisdiction and Legislation** (*Divorce Act, Family Relations Act*)

* Parallel jurisdiction for spousal support
  + *Divorce Act*, s.15.2 🡪 claims re: divorce
  + *Family Relations Act*, s.89 🡪 outside divorce [s.92(1), (4), (5)]
    - If married couple is not yet divorcing; Or, if couple is unmarried
* Priority to child support in both statutes 🡪 *DA,* s. 15.3; *FRA*, s.93.2
* Entitlement (Who can ask for child support? Who can pay it?)
* Quantum and Duration – how much and for how long (Short-term? Indefinite?)
  + Spousal Support Advisory Guidelines (SSAGs – not laws but guidelines)
    - Don’t deal w/entitlement, but do deal w/content and duration
* You can contract into (or out of) spousal support obligations (just like property)
  + *DA*, s.15.2(4)(c); *FRA*, s.89(1)(b)
  + FRA*,* s.11: ct can incorporation provision of an agreement into a order

**Principles of Spousal Support for MARRIED couples**

* s.15.2 *–* “a ct may make an order requiring a spouse to secure or pays such lump sum or periodic sums, as the ct thinks reasonable for the support of the other spouse”
* s.15.2(4) – “ct shall take into account conditions, means, needs, other circumstances of each spouse, including

(a) the length of time the spouses cohabitated

(b) the functions performed by each spouse

(c) an order, agreement, or arrangement (pre-nup?) relating to support of each spouse

* + see somewhat similar provisions in s.89, *FRA*
* s.15.2(5) – “spousal misconduct shall not be taken into account” (*Leskun*)
  + Recall, custody and access – s.16(9), unless conduct affects parent’s ability to care for child
* s.15.2(6) – OBJECTIVES section; “a spousal support order should ...”

1. “recognize any economic advantages/disadvantages to spouses arising from the marriage or its breakdown” (COMPENSATORY)
2. “apportion between the spouses any financial consequences arising from care of any child of the marriage over and above any obligation for support of any child of the marriage”
   * + - Consider that one spouse might have responsibilities arising from care of child; what consequences attach to the adult
3. “relieve any economic hardship of spouses arising from the breakdown of the marriage (NEED)
4. “promote the economic self-sufficiency of each spouse within a reasonable time”
   * + - Strong directive, but it can be read two ways?

**Principles of Spousal Support for UNMARRIED couples**

* Set out in Part 7 of *FRA*: s.89(1) and s.93(4)
  + Judges deal w/statutory language in fairly similar way, when applying it to facts

|  |  |  |
| --- | --- | --- |
| M v. H (1999) SCC | **C:** Excluding s/sex couples from spousal support is discriminatory. Objective of *FRA* is to address economic consequences of marriage and/or its breakdown. Test for conjugality must be **flexible** | **S/sex spouses must be included in statutory rights, obligations of spousal support** |

**Goals** of Spousal Support: (per *M v. H*)

* Provide a means for “equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down”
* “Alleviate the burden on the public purse”

Tests for Proving **Conjugality** \*\* *Gostlin* appears to be the test in BC \*\*

* Unmarried person must meet definition of “spouse” in *FRA*, s.1(1) – “marriage-like relationship, 2+ yrs”

|  |  |  |
| --- | --- | --- |
| Gostlin v. Kergin (1986) BCCA | **C:** Unmarried cohabitants must show that they lived together in a marriage-like relationship for at least two years. What is marriage like? Intention plays important role. | **Did couple voluntarily embrace permanent support obligation under *Act*? (subj)** |

Note: if there ‘s a “marriage-like” relationship, claim for s/support must be brought within 1 yr of end of rltnshp

Considerations:

* Objective – referred to selves as “spouses,” shared property, bank accounts, vacations, did one surrender financial independence (become economically dependent on the other) in accordance w/mutual arrangement?
* **Subjective** – Would each partner have answered “yes” to support obligation during relationship

***Molodowich v. Penttinen (1980) ON*** – some **objective** factors to consider (but what about subjective intention?)

* Shelter – Live under same roof? What sleeping arrangements? Anyone else share the accommodations?
* Sexual/personal – Sexual relations? Attitude of fidelity? Eat meals together? Buy gifts on special occasions?
* Services – Preparation of meals? Household maintenance? Shopping?
* Social – Participate together or separately? Conduct towards respective families?
* Societal – Attitude and conduct of community towards each partner and as a couple
* Support – What financial arrangements? Acquisition, ownership of property?

Other considerations for “conjugality,” “marriage-like”

* Approach must be flexible (*M v. H*)
* No longer need to find financial dependence (*Takacs v. Gallo*)
* Relationship can exist where a partner lacks capacity to marry (ie, already married!) (*Austin v. Goerz*)

|  |  |  |
| --- | --- | --- |
| G(JJ) v. A(KM) (2009) BCSC | **F:** Couple was in marriage-like relationship, but several years before they terminated cohabitation they had been living together as “roommates only”??  **C:** Ct deemed the relationship “marriage-like,” they introduced each other as husband/wife, ate dinner together, watched TV in evenings, socialized w/families. | **Determine intention (subj) from objective view of facts** |

Note: man did NOT succeed in claim; he was entitled to apply, but not entitled to actual order for support.

## Conceptual Grounds for Spousal Support

**Contractual** (***Miglin***)

* + Cts tend to respect private agreements, encourage parties to settle own affairs

**Compensatory** (***Moge***)

* + Where a spouse has foregone opportunities, endured hardships as a result of the marriage

**Non-compensatory** (\*\* ***Bracklow*** \*\*)

* + Recipient spouse’s need exceeds entitlement to be compensated; “basic social obligation” of marriage

Recall – variation to earlier spousal support order, s.17(4.1): “circumstances have changed since order ...”

### The Contractual (Self-Sufficiency) Model - *Miglin*

Is the state or former spouse responsible for support? \* marked SHIFT in thinking about spousal support\*

|  |  |  |
| --- | --- | --- |
| Messier v. Delage (1983) | **F:** Stay at home wife, got custody of 3 children. Husband pd spousal and child support, 5yrs later he felt wife has become self-sufficient. Wife had retrained, but no jobs available. | **Husband should continue to pay s/support, until wife is self-sufficient** |

***Pelech* Trilogy** – applications by wives to vary separation agreements that limited spousal support

* ***Pelech (1987)*** – agreement incorporated into divorce decree (\*\*not good law anymore\*\*)
  + Lump sum arranged in agreement, husband was supposed to be “free” after the “clean break”
  + After lump sum, wife still encountered economic hardship (unemployed, unable to work, on welfare)
    - Husband had improved his financial situation significantly
  + Freedom of K? Wife had agreed to arrangement …
  + Causal test – wife’s “radical change” in economic hardship was not causally connected to marriage
  + Critique – wife was out of labour force for long time, due to marriage …
* ***Caron (1987)*** – agreement in divorce decree
* ***Richardson (1987)*** – separation agreement (*FRA* in Ont), then divorce claim for support
* All applications FAILED !

***Pelech***test changed by ***Miglin*** but philosophy laid out by Wilson J. still relevant:

* Finality in financial affairs of former spouses
  + Let people go on and live their lives, marriages are not required to go on forever
* Deference to the right and responsibility of individuals to make their own decisions
  + Encouraging spouses to come up with their own agreements and arrangements (re: *Hartshorne*)
  + Recall: ct language in *Hartshorne v. Hartshorne* re: contracts in matrimonial property
* *Pelech* still relevant, but only to show that *SCC takes strong stance in upholding separation agreements*

### The Compensatory Model - *Moge*

|  |  |  |
| --- | --- | --- |
| Moge v. Moge (1992) SCC | **F:** No contract, this case involved variation of a ct order. Immigrant, low income couple, wife generally was “homemaker.” Husband wanted “clean break”  **C:** Emphasizes that purpose of s/support is to deal w/economic consequences of marriage and its breakdown. Acknowledge disadvantages to one, advantages to other. Marriage should be viewed as economic partnership | **What effect did marriage have in improving or impairing each party’s economic consequences?**  **What compensation is necessary?** |

* Self sufficiency is only one of four objectives of spousal support (s 15.2(6)) and should not be prioritized
  + Consider ALL s 15.2(6) objectives & then apply the s.15.2(4) factors (length of marriage, functions, etc)
  + Marriage is a partnership that can create benefits for both parties, including financial
* Act requires fair & equitable distrib of resources to alleviate econ consequences of marriage, its breakdown
* Analysis of impact of the marriage and its breakdown applies equally to both parties, but in most marriages the wife is more likely to be economically disadvantaged (women tend to impair their econ prospects)
  + Traditional division of labour within a marriage can cause future economic harm
  + Consequences of a particular division of labour within a marriage may have ongoing impact
* This model seeks to compensate those who undertake this work (homemaking) at expense of their own careers/future earning capacity 🡪 COMPENSATORY support

Thoughts:

* Balance attempts to be gender-neutral, but also acknowledge gendered consequences of marriage breakdown?
* Variety of marriages, hard to say whether to focus on gender is still relevant
* Both HD, McLachlin note that judges shouldn’t try to fit a marriage into “traditional” or “modern”

... after ***Moge***, women were more successful in getting more generous spousal support awards

### Non-Compensatory Model (Basic Social Obligation) - *Bracklow*

|  |  |  |
| --- | --- | --- |
| Bracklow v. Bracklow (1999) SCC | **F:** Marriage relatively short, initially wife brought in larger salary (contributed more). Then wife stopped working, serious health problems, husband supported family.  **C:** SCC: early years involved relatively independent parties, but at time of separation relationship was interdependent (shared expenses, husband supported her). Wife did experience economic hardship as result of separation, she demonstrated need for support and husband had means to pay it. | **Marriage per se d/not cause the obligation, but obligation may flow from the marriage relationship** |

* Non-compensatory approach recognizes pattern of economic (inter)dependence arising during marriage
  + Based on need that > entitlement to be compensated, for forgone opportunities or disadvantages
* SCC found entitlement, but quantum and duration might be limited
  + \*\* Support may not be indefinite, quantum may not be exactly what spouse “needs” \*\*
  + Variables include: length of relationship; need, ability to pay, etc [s.15.2(5)]

**GENERAL NOTES on Spousal Support:** (per *Bracklow*)

* No single objective in support statutes is paramount; three conceptual bases for entitlement to spousal support:

1. Contractual
2. Compensatory
3. Non compensatory (means and needs, mutual obligation)

* (1) and (2) 🡪 reflect modern value of equality and independence of both spouses (clean break)
* (3) 🡪 reflects some notion of basic (marital?) obligation
  + Some idea that once you’re married you have obligations, “for better or for worse”
* Which claim a scenario engages may depend on the facts
  + Three models aren’t necessarily mutually exclusive ie) compensatory and non-compensatory claims?

**EXAM**: Analyse facts, explain which sections of statute generate basis for spousal support [s.15.2(6)]

* Which model/claim(s) arises, cite case(s)

## Spousal Misconduct and Economic Self-Sufficiency

* Clear statutory language [s.15.2(5)] – ct shall not consider any misconduct of a spouse in making support order
  + BUT, could misconduct be considered re: whether spouse had failed to achieve econ self-sufficiency?
  + Is there a difference between emotional consequences of misconduct, and misconduct itself?

|  |  |  |
| --- | --- | --- |
| Leskun v. Leskun (2006) SCC | **F:** Wife helped support husband in improving his credentials, also worked herself. Husband behaved “poorly” – left her at rough time in her life, was having an affair. But, adultery/desertion not supposed to be considered.  **C:** Ct’s cannot consider spousal misconduct in making support order [s.15.2(5)] BUT there may be emotional consequences of the misconduct itself. | **Consequences of spouse’s misconduct (along w/other factors) justified continuing support** |

Note: initial support order based on “non-compensatory” (means and needs) and “compensatory” (supported his MBA)

## Separation Agreements and Variation of Support

Recall: conceptual grounds for spousal support 🡪 **Contractual** (*Miglin*)

|  |  |  |
| --- | --- | --- |
| Miglin v. Miglin (2003) SCC | **F:** Couple co-owned hotel, managed by husband, wife was primary caregiver and assisted w/hotel (got salary). Entered into separation agreement, releasing each other from oblig to pay s/support. Had 5 yr “consulting agreement,” 15K/year for wife. Then, husband caused hotel to NOT extend consulting agreement, wife brought applic for s/support (“things have changed”).  **C:** Separation agreement s/be accorded significant and determinative weight. Per *Pelech*, to what extent should agreement be binding? SCC maintains high standard for ct intervention. No variation for wife – failed to show change in circumstances, etc! | **Separation agreement s/be accorded significant and determinative weight**  **TEST: 2 stage analysis** |

*Miglin* TEST

1. **First stage** (where agreement was created)
2. Look at circumstances at time of negotiation
   * + Condition of parties, oppression, pressure or other vulnerability, negotiations, legal advice?
     + D/not presume imbalance of power or exploitation by stronger party; presence of vulnerabilities alone won’t justify intervention (see also: *Rick v. Brandsema*)
3. Determine whether agreement is in “substantial compliance” w/factors and objectives listed in *DA*, including s.15.2(6) AND provisions that encourage parties to order own affairs
   * + s.15.2(6)(a) – economic advantages/disadvantages levelled out? Re: property distributions?
     + Financial consequences of childcare, over and above child support (s.15.2(6)(b)); relieve economic hardship (s.15.2(6)(c)); promote economic self-sufficiency (s.15.2(6)(d))
   * Only “significant departure from general objectives of Act” will warrant intervention
   * Note: if s/support was part of comprehensive settlement, consider s/supp in light of *entire* agreement

\*\* Ct may find egregious exploitation, etc, and agreement may fail at stage 1 \*\*

1. **Second stage** (at time of application; what is happening now)
   * If agreement survives stage 1, court must consider extent to which:
     + Agreement still reflects original intentions of parties? (or there’s been some change in circumstances that couldn’t have been reasonably anticipated)
     + Ct thinks a wide range of change in circumstances are reasonably foreseeable – pg 290)
     + If agreement is still in substantial compliance w/objectives of the Act

**NOTE**: Difference btwn seeking initial order under s.15.2 (*Miglin*) vs. seeking variation of existing order, s.17

* s. 17(10) **–**  where an order included time limited support :
  + If application to vary is after time period expires, court may not vary unless:

1. necessary to relieve economic hardship arising from change in condition, means, needs or other circumstances *related to the marriage* AND
2. changed circumst, had they existed when order made, would likely result in different order

ALSO consider: negotiation of marriage contracts (*Hartshorne*) vs. negotiation of separation agreements (*Miglin)*

**Disclosure and Exploitation of Vulnerability in Negotiating Agreements**

|  |  |  |
| --- | --- | --- |
| Rick v. Brandsema (2008) SCC | **F:** Couple separated after 27 yrs, 5 children, successful dairy farm. Separation agreement gave wife less than 50% share in business. After divorce, wife applied for variation, claiming 1) misrepresentation on value of assets, 2) agreement was unconscionable (re her mental health history).  **C:** Husband failed to make full, honest disclosure; knew negotiations were based on erroneous info; exploited his wife’s mental disability . | **Assets of former relationship must be distributed through process free from informational, psychological exploitation** |

* BCCA: mere fact that party enters into bad bargain (see *Hartshorne*), d/not mean agreement is unconscionable; mere presence of vulnerabilities d/not justify intervention (*Miglin*)
* SCC: allowed wife’s appeal (but, what about *Hartshorne* and *Miglin*?)
  + Where exploitation results in agreement deviating substantially from statutory objectives, agreement may be found to be unconscionable and thus unenforceable

## Spousal Support Advisory Guidelines

* Deal w/quantum and duration of spousal support (not entitlement)
* Not legally binding; designed to bring some uniformity and certainty and predictability
* Two different formula: with children (child support and spousal support) vs. no children to support

***W v. W (2005 BCSC)*** *–* “Guidelines” can provide useful crosscheck against the assessment made under existing law

* + Compare guidelines to pre-existing practices ... likely a similar determination

***Redpath (2006 BCCA*)**

* If award deviates substantially from the Guidelines range (from formula), w/no exceptional circumstances, appellate intervention may be appropriate

## Intersection of Matrimonial Property and Spousal Support

*Moge* – support awards should play role in compensating spouse for econ conseq of caring for children, etc

* + Cts have imported these principles into scheme for division of matrimonial property (s.65)
* ***Lodge v. Lodge (1993) BCCA*** – s.65(e) permits reapportionment where equal division would be unfair, regarding need of each spouse to become or remain econ self-sufficient
* ***Narayan*** – divide and reapportion property first, then decide support

***Boston v. Boston (2001) SCC*** – He kept his pension, she got the home, other property adjustmts; he pays s/support

* Then he retires, starts drawing income from his pension; he wants s/support obliga diminished, eliminated?
  + He’d be paying support out of his pension, while that was already addressed in property divisions
* If pension equalized, be cautious about ordering support to be paid out of same portion of pension
* Critiques? …why should he be relieved from spousal support obligation, just because he’s drawing on pension?
  + Econ disadvantages may continue well into pension years; wife still has financial need
* When dividing a pension, you’re meant to divide value of pension as it’s increased during marriage (Part 6)
  + What happens 15 years down the road? Pension has continued to increase in value
  + When payor’s pension continues to increase, why shouldn’t recipient spouse get some share of the income (as spousal support, even though it was considered in MP apportionment)

***Meiklejohn (2001, Ont CA)***: exceptions may exist (modifies impact of *Boston*, at least in ON)

* If bulk of MP distribution to a spouse is in form of property that d/not generate income (matrimonial home) then support pmts from same pension might be appropriate
  + Might be harsh to deny recipient spouse access to funds that payor spouse
* If payor spouse has ability to pay and receiving spouse continues to experience economic hardship

# Economic Consequences: Child Support

* Regime changed fairly radically during the late 90s
* A step-parent is not always liable to pay child support, but they can *sometimes* be liable
* Even if a child refuses to see a parent, that parent still must pay child support

**Responsibility for Child Support**

* Prior to 1997: broad judicial discretion (cts could determine a budget that would cover children’s costs)
  + Studies began to show that costs of raising a child were under-estimated
  + Enforcement issues; many obligations not paid, under-paid, or paid late
* 1997 reforms introduced:
  + New tax rules; system of guidelines and tables; enhanced enforcement measures

*Divorce Act* Amendments

* s.26.1(2) – guidelines shall be based on principle that spouses have joint financial obligation to maintain children of the marriage in accordance w/relative abilities to contribute
  + Even if both spouses don’t live with child, they both have financial responsibility
* Controversy? … often male spouses are the payors, attract more surveillance (not as much on recipient)

***Willick (1994, SCC)*** – L’H-D: “hidden vs. direct costs” of raising a child

* Direct costs: child’s share of rent, washing, food, pocket money, child care
* Hidden (add’l) costs: add’l nurturing costs, opportunity costs (but should be addressed re: spousal support)

NOTE: s.15.3(1), *DA*: give **priority** to child support over spousal support (also *FRA* s.93.2)

**Federal and Provincial Legislation: Shared Jurisdiction**

* s.15.1, *DA*: spouses are responsible for support of any “child of the marriage”
* s.88, *FRA*: each parent of a child is responsible, liable for reas and necessary support, maintenance of the child
* s.2, *DA*: “child of the marriage” means a child of two spouses (or former spouses) who, at material time
  + is under age of majority and who has not withdrawn from their charge, or
  + is the age of majority or over and under their charge but unable, by reason of illness, disability, or some other cause, to withdraw from their charge or to obtain necessaries of life
  + (see also *FRA* “child”, s.87), age of majority is 19 yrs
* s.2(2), *DA*: “child of the marriage” includes child for whom a spouse stood *in loco parentis*

## Defining the Parent-Child Relationship

|  |  |  |
| --- | --- | --- |
| JMS v. FJM (2005) ON | **F:** Parents split, son was severely disabled, province essentially had to take custody of son in order to provide necessary services. Mother still brought son home for significant periods, still pd expenses.  **C:** Ct found father NOT liable for child support bc son was Crown ward, no longer in his parents’ “charge” (s.1, *DA*). | **“Child of the marriage” = child who has NOT withdrawn from parents’ charge** |

* Dissent: mother continued to bear costs associated w/child, had him in care
  + Ct should address wider context and not financially penalize a child on basis of his disability
  + “Charge” should be understood to include financial context

What about a person who stands *in loco parentis*? ... when should step-parents be liable?

Note: they’re not always liable; no explicit “best interests of child” assessment, but it’s essentially considered)

|  |  |  |
| --- | --- | --- |
| Chartier v. Chartier (1998) SCC | **F:** Couple had child, then marriage breakdown (wife also had child from previous relationship). Husband cared for other daughter, then expressly stated he had no further intention to be parent. Can express intention to cease being a parent be determinative?  **C:** Can’t unilaterally end responsibilities to child when you’ve stood *in loco parentis* | **Whether an individual stands *in loco parentis* must consider all relevant factors (viewed obj)**  **Intention is only one factor** |

* Relevant factors include, but are not limited to:
  + Does person provide financially for the child? (how did spouses organize accounts?)
  + Do they discipline the child as a parent? (studies: step-parent often refrains from discipline)
  + Do they hold themselves out in the world as a parent to the child?
  + What is the role of the absent biological parent?
    - Just because another parent owes/pays child support, d/not mean step-parent shouldn’t also?

|  |  |  |
| --- | --- | --- |
| Doe v. AB (2007) ABCA | **F:** Couple lived together, she wants child (he doesn’t), she’s artificially inseminated. Drafted a K so only she would be responsible for care/support of child. Would K hold up?  **C:** Can’t K out of possibly standing *in loco parentis*  in the future. Chances are man would fall into parental role, can’t K out of unforeseeable future. | **Can’t contract out of “standing in place of a parent”** |

Note: Guidelines state that if a person is found to “stand in the place of a parent” and is therefore liable for CS, judge is NOT req to order the Table amounts.

***FRA* and Provincial Law** .... stricter test than *Divorce Act!*

s.1(1) – “parent” includes:

* A guardian or guardian of the person of the child
* A stepparent of a child if
  + Stepparent contributed to support of the child for at least one year, and
  + Proceeding is commenced within one year after the date the stepparent last contributed

s.1(2) *–*  ... a person is the stepparent of a child if the person and a parent of the child

* Are or were married, or
* Lived together in a marriage-like relationship for at least 2 years (may be between persons of the same gender)

## The Guidelines Approach to Child Support

: essentially, ct is supposed to follow guidelines, subj to certain exceptions

**Statutory Framework – *DA***

* s.15.1 – ct can make order for child support
* s.15.1(3) – court making a CS order *shall* apply the Guidelines, except:
* s.15.1(5) – court may award amount different from Table amount if :
  1. special provisions in order, judgment or written agreement; AND
  2. application of applicable guidelines would result in an amount of child support that is inequitable given those special provisions.
* s.15.1(7) – court may award an amount different from Table amount on consent of both spouses (ie, “desk order divorce”) if satisfied that reasonable arrangements have been made for support of the child (see ***Greene****)*
* s.15.1(8) – in determining whether reasonable arrangements (under s 15.2(7)) have been made for support of a child, court shall have regard to the Guidelines
  + However, court shall not consider the arrangements to be unreasonable solely because the amt of support agreed to is not the same as amt applicable under Guidelines (amt will usually be lower)

**Statutory Framework – *FRA***

* s. 88(1) – each parent of a child is responsible and liable for reasonable, necessary support and maint of child.
* s.93(1) & (2) – court may make an order using the guidelines but can take into account agreement or other arrangement as long as it is satisfied that provisions have been made for the benefit of the child.
* NOTE: New *Family Law Act* language will mirror more closely that in the Divorce Act 🡪 greater convergence

## Application of Child Support Principle

**Overview of Child Support Guidelines**

* s.1: objectives:

1. fair standard of support; benefit from means of both spouses
2. reduce conflict & tension by making calculation more objective
3. improve efficiency and encourage settlement
4. ensure consistent treatment in similar circumstances

* s. 3(1): Presumptive rule – [limits discretion]
  + Amount of child support owed is the table amount plus any s. 7 “special or extraordinary expenses”.
  + Theory: focus on Payor Income: more P earns, the more is paid; more children, the greater the pmt
* s. 5: Spouse in place of a parent [some discretion]
  + Where a spouse “stands in the place of a parent” court *can* order CS it considers appropriate

Arguments for restricting judicial discretion?

* More certainty, law is clearer for laypeople 🡪 promotes settlement
* Reduces inconsistent orders (in similar circumstances), across country?
  + But accounts for account geographic economic differences

**Child Support Guidelines – s.7, Extraordinary Expenses** (judicial discretion)

* Won’t change table amount, but gives judges power to order additional amounts
* Courts MAY award amounts in addition to table amounts for certain expenses
  + “taking into account necessity of expense in relation to the child’s best interests and reasonableness of the expense in relation to means of the spouses and family’s spending pattern prior to the separation”
  + ie) expensive orthodontics (started before separation)?
* NOTE: s.7(1.1) – definition of “extraordinary expenses”

1. expenses exceeding those a spouse can reasonably cover; consider spouse’s income + table amount etc.
2. if (a) not applicable, amount of expense in relation to income of spouse requesting + nature & number of educational programs etc; special needs and talents; overall cost; etc.

* s.7(2) **–** expense shared in proportion to spouses’ respective incomes
  + One of the FEW guideline sections where you’re supposed to look at recipient spouse’s income

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| McCrea v. McCrea (1999) BCSC | **F:** Many extraordinary expenses being claimed by custodial parent, large discrepancy btwn husband/wife income.  **C:** Ct held NO oblig to add an amt for extraordinary expenses, must assess re: necessity of expense in relation to child’s “best interests” and reasonableness of expense (consider means of spouses, family’s spending pattern prior to divorce). | **Assess necessity of expense (re: child’s best interests) and reasonableness**  **(means of spouses, spending before separation)** |

* Accepted expenses:
  + Child Care Orthodontics Counselling Testing & Tutoring
  + NOT: dance, piano, catechism education fund medical & dental premiums
    - Medical premiums are borne by every family, not necessarily “extraordinary”

Consider: well-off payor 🡪 large amt, per table vs. low-income payor 🡪 smaller amt, per table

**Child Support Guidelines – s.8, Split Custody** ... each parent has custody of child(ren)

* Where each spouse has custody of one or more children, the amount of CS owed is difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

**Child Support Guidelines – s.9, Shared Custody**

* If parent exercises a right of access or physical custody of a child for not less than 40% of the time over the course of a year, CS must be determined by taking into account: (how do you count 40% ??)

1. Table amounts
2. Increased costs of shared custody arrangements
3. Conditions, means, needs and other circumstances of each spouse & child.

* Does this contribute to increased certainty? Encourage out-of-court settlements? NOT REALLY
* CRITIQUE
  + Even if ex-spouse has children more often, doesn’t necessarily mean custodial parent has “less cost”
  + “Cliff effect” – if spouse has children for 39%, table guidelines; if 41%, custodial parent gets less?

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| Green v. Green (2000) BCCA | **C:** How to calculate per s.9, in practice? Two amounts calculated (per 2 prev cases), judge chose neither, reflecting judicial discretion under s.9 | **Judges have discretion re: s.9, shared custody** |

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| Contino v. Contino-Leoncelli (2005) SCC | **C:** First, apply table amts owed by each parent then apply set-off. No presumption to reduce or increase amts. Total costs MAY be higher in shared custody arrangements. Discretion is paramount! | **Comments re: s.9** |

...may be cases where access parent CAN show evid that costs have gone up, since having increased custody

**Child Support Guidelines – s.10, Undue Hardship**

* Either parent can claim table guidelines create undue hardship
* May award different amt if ct finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship
* Either spouse can apply (recipient could get higher amount, but more likely that payor would argue)
* s. 10(3): MUST deny if undue hardship spouse’s household would still have higher standard (after pmt)

**Child Support Guidelines – s. 4, Income over $150,000**

* Payor has income > $150,000, ct can determine appropriate amt payable IF table amt is consid “inappropriate”
  + Only for that part of payor’s income that exceeds $150,000 [s.4(b)(i)]

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| Francis v. Baker (1999) SCC | **F:** Wealthy payor, were his pmts “inappropriate”?  **C:** “Inappropriate” means “unsuitable” rather than “inadequate,” so ct can increase OR decrease table amts above 150K. Presumption that table amt applicable to $150,000 is appropriate. Onus on party arguing table amts should not apply. | **“Inappropriate” (s.4) means “unsuitable”**  **(not “inadequate”)** |

**Child Support Guidelines – s.3(2), Post-secondary education** (for “children of the marriage”)

* Parents have no automatic duty to financially support their children after they turn 19; depends on whether still a “child of the marriage” under DA s. 2.
* Where a child to whom a child support order relates is age of majority or over:

(a) Guidelines amount OR (b) what is appropriate

***WPN v BJN, (2005) BCCA***

* If child is still a “child of the marriage” (i.e., still under the charge of his/her parents”), CS may still be payable, including s. 7 expenses (special or extraordinary expenses)
* Note ***Farden v. Farden, (1993) BCSC***factors (student loans, plans etc)
  + Full-time or part time studies? Applied for student loans? Career plans? Child’s ability to contribute?

***Haley v. Haley, (2008) ON***

* Child left school after turning 18, child support stopped; after 2 years he wanted to attend animation school
* Held: Child support ordered, including table amount and s. 7; child also had to contribute

## Retroactive Child Support

* + Where income of payor spouse has increased since a child support order was made or an agreement was made; or there may have been no order or agreement

***DBS v. SRG (2006) S*CC**

* When does the obligation arise? What are the responsibilities of the recipient parent?
* Normally retroactive only to date effective notice given

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| Greene v. Greene (2010) BCCA | **F:** Father paying certain amt, per agreement by spouses. Then, his income went up. Should he be ordered to retroactively pay more child supports?  **C:** Ct said no, this doesn’t necessarily substitute what father should pay. Compromise remedy: partial retroactive award (2 yrs), payor pd expenses for hockey and skiing | **Both payor and recipient parents have duties to monitor/inform re: income changes** |

* + Recipient parent has some duties too ... (*DBS, Greene* – pay attention to ex-spouse’s income)
  + Recipient should give notice that they expect payments to increase

## Arrears and Variation of Child Support

***Ghislieri v. Ghislieri, (2007) BCCA***

* Parents have positive duty to earn as much as reasonably they can to provide child support
* Otherwise income may be imputed

***Earle v. Earle (1999) BC***

* Parents have joint legal obligations; child support is the right of the child
* Payment based on ability to pay, what the parent CAN earn
* Before judge can vary a maintenance order, must be material change:
  + If known when last order made, would have resulted in different order; significant & long lasting
* Cancellation or reduction of arrears is form of variation
* Heavy onus on person asking for reduction or cancellation of arrears

## Enforcement of Child Support

***McIvor v. The Director of Maintenance Enforcement, (1998) BCCA***

* Duty to pay child support is separate from a parent’s ability to see his/her children.
* Child has a right to support even if there are problems with access.