FAMILY LAW CAN

Prof: Susan Boyd – Fall 2011

DEFINITIONS

Law responds to changes in the way we think about family and relationships & vv. Reciprocal relationship

**FAMILY**

* Persistent idea that the family is a core institution in society that must be protected – private, separate from public
* Notion of the family as a private institution that ought to be protected from state interference
* Traditionally defined according to a **hetero-normative model**, with 3 key aspects
	+ 1. Nuclear (two adults; monogamous; heterosexual; married, dependent children)
	+ 2. Biological or sexual division of labor
	+ 3. Family as a private haven

*Statistics Canada*: A family is a now married couple or CL couple living either with or without children of at least one of them, or a lone parent with at least one child living in the same dwelling. Couple may be same-sex or opposite sex. Children may be by birth, marriage or adoption regardless of their age or marital status as long as they live in the dwelling and do not have their own spouse or child living in the dwelling.

* This def does not really capture intergenerational ties. Adult children may take care of parents; siblings may take care of one another with no parents; a child may have the same relationship with parents after having own child

We have started to move towards a FUNCTIONAL rather than FORM-BASED model. *(Mandell/Duffy)*

* Protecting CL couples like married couples
* Same-sex couples now get same custody, support and access orders that opposite-sex couples get
* But extended family acting as parents do not get family financial support from state

TRENDS:

* Proportion of traditional families (married or CL with children under 24 living at home) decline, while families with no children at home increasing
* Increasing # of adults (20-29) living in the parental home
* Decreasing # of couples are married, while increasing # of couples are common law
* 16% of all families are lone-parent families, with 80% headed by women
	+ massive decrease in # sole-custody awards to women, with only slight increase to men 🡪 more JC awards
* 19% of all children do not live with both parents
* Low-income families are disproportionately lone-parent families
* 7% of children are being raised by an extended family member – no financial benefits from the state

**SPOUSE**

BC *FRA s 1(1)*: a *person* who

1. Is **married** to another person
2. Lived with another person in a **marriage-like relationship** for a period of **at least 2 years** if the application under **FRA made within 1 year** of ceasing to live together, can be of same gender [CL couples not included in MP division!]
3. Applies for an order under FRA within 2 years of the making of an order
	1. For **dissolution of the person’s marriage** (still considered ‘spouse’ for 2 years after divorce for purposes of applying for support, etc)
	2. For **judicial separation**, or
	3. Declaring the person’s marriage to be **null and void** [\*spouse although was not valid!\*]

DA *s 2*: either of two *persons* who are married to each other.

* Must apply for divorce to invoke the ***DA***

*Convention on the Rights of the Child* (1990)

* Right not to be separated from parents unless in child’s best interests
* Best interests must be primary consideration when state authorities make decisions about children
* Children must be given opportunity to make views know if parents are separated

Growing trend for lawyers to invoke laws in international treaties – Binding? Incorporated?

JURISDICTION

|  |  |
| --- | --- |
| **FEDERAL S 91 CA, 1867** | **PROVINCIAL S 92 CA, 1867** |
| **(26) MARRIAGE AND DIVORCE**Essential elements of marriage – capacity, age, consent.* *Marriage (Prohibited Degrees) Act*
* *Civil Marriage Act*

Divorce & corollary issues (custody, CS, SS)* *Divorce Act* – Married couples only, and must have filed for a divorce.
* Not matrimonial property division! *(use FRA)*
* (Married couples can deal with everything under *FRA* and never file for a divorce.)
* Once you have applied for a divorce, can use *DA*. May still go to *FRA* for some procedural remedies such as restraining orders.

**(27) CRIMINAL LAW**Assault, homicide, necessities of life, corporal punishmt* *Criminal Code*

**(29) ANYTHING NOT IN PROVINCIAL HANDS**Fed power = overriding but must take the field | **(12) SOLEMNIZATION OF MARRIAGE**Formalities of marriage – issuing of license, qualifics of person performing ceremony, reqs relating to witnesses and reqs of parental consent* *Marriage Act (BC)*

**(13) PROPERTY & CIVIL RIGHTS*** *FRA* – **div of property** for married couples only;

 CL/married: CS, SS, custody & access* *Child Support Guidelines*
* *Adoption Act*
* *CFCSA* – child welfare
* *Law & Equity Act* – legitimacy
* *Vital Statistics Act* – parenthood, naming
* *Estate Administration Act*: succession

**(16) GENERALLY ALL MATTERS OF A MERELY LOCAL OR PRIVATE NATURE IN THE PROVINCE** |
| **S. 88 INDIAN ACT (N.B. federal statute)**🡪 *cannot divide MP as per FRA that is on reserve b/c Indian Act applies. But FRA can still be used for movable property on reserve.*The CL recognizes the validity of aboriginal customary law in the fields of adoption *(Casimel)* and marriage *(Connolly v Woolrich)* |  |
| **CDN CHARTER OF RIGHTS & FREEDOMS**1. Causing gov to amend leg to ensure it is Charter-compliant (e.g. both men + women can apply for SS)
2. Direct const challenges to stat provisions (sex equality s 15, child protection s 7, freedom of religion re decision-making for kids s 2) – cts have flatly rejected on grounds that Ch cannot be invoked in priv matters. “BIOC” doctrine prevails.
3. Arg that even in absence of gov action, JJs must take account of fundamental Charter values (e.g. *Moge* case on SS - equality rights s 15)
 |  |

**\*\*must apply for Divorce to invoke *DA*** (married couple may do everything under *FRA* & never get divorced)

**Paramountcy Doctrine**

* Where there are inconsistent federal and provincial orders, the federal order prevails.
* \*Note: Conflicting support orders aren’t tech inconsistent b/c both could be paid, but treated as inconsistent.
* When divorce granted but no order for corollary relief granted under *DA*, provincial order for relief prob valid (applying the “express contradiction” test).
* An order made under provincial law can be varied by a subsequent order under the *DA (Gillespie).*
* A province has no jurisdiction to vary an order for the custody of a child made under the *DA* in a different province *(Re Hall and Hall;* cf *Ramsay* obiter)

**Where to Commence Action**

**BCSC**

*Divorce Act s. 2(1) “court*

Property matters – *FRA* part 5 & 6 🡪 *ss 5, 6*

*Adoption Act* *s 1 ”court”*, s 29

*FRA s 5(3)*: (sole) inherent jurisdiction to act in *parens patriae* capacity respecting a child before the court.

*FRA* s 5: BCSC continues to have jurisdiction in all matters concerning he custody of, access to and guardianship of children, dissolution of marriage, nullity of marriage, judicial separation, alimony and maintenance.

**Concurrent jurisdiction** btw Provincial Court and BCSC

*Matters under FRA* (except property matters) 🡪 *ss 5, 6*

* Custody, access & guardianship of children
* Child Support
* Spousal Support
* Parentage of a child
* Occupancy o fthe family residence and the use of its contents
* Making of orders that a person must not enter premises while they are occupied by a spouse, parent or child

**Provincial Court**

Sole jurisdiction in matters of child protection 🡪 *CFCSA s 1 “court”* 🡪 but appeals to BCSC

**[No** jurisdiction for divorce apps or claims for division of matrimonial property]

COHABITATION AND MARRIAGE

1. **Private law** – contract, property
* ☺ Autonomy, similar to business approach, freedom to negotiate own terms
* Traditional approach – dowry
* ☺ Works well if the parties are relatively equal, relatively wealthy, standard relationship
* ☹ Pretty unrealistic option for most people, need a lawyer.
* ☹ Changes over time… can’t predict changes between start and end of relationship

**2. Ascription**

* Ascribing spousal status to couples who have not formally contracted as spouses
* *FRA s 1:* “spouse” if (b) lived together in a marriage-like relationship for at least 2 years
* ☺ Protection from exploitation
* ☺ Inclusive
* ☺ Don’t have to take active steps
* ☹ No choice / infringes on autonomy (but can try to opt out through contract)
* ☹ Inclusive only if relationship follows the form in the statute

3. **Registration**

* Registration of an unmarried relationship
	+ E.g. Civil Partnership system in England, parallel to marriage system – same sex only
	+ QB, NS, AB, MA
* ☺ Autonomy / equality / no uncertainty
* ☺ Broader recognition of various types of relationships (e.g. AB recognizes sibling relationships)
* ☹ But ascription should still be used when there is evidence of exploitation

**4. Marriage**

History of Marriage

* Marriage was originally a **private customary contract *(Roman law)***
* Rise of Christian church turned it into a **religious institution** (opposite sex, monogamous, for life)
* Now returning to its secular roots.
* Canada: both church and state have authority to solemnize marriage for legal recognition.

While marriage used to mean that the wife’s legal personality was subsumed into that of her husband, the

***Law & Equity Act s 60***is a remedial provision changing the CL rules on consequences of marriage (1985 to encapsulate equality provisions in Charter):

* Married man and wife have legal personalities separate from each other
* Various consequences of this:
	+ Each of the parties to a marriage has the same right of action in tort against the other as if they were not married
	+ Married woman can acquire domicile separate from her husband, etc.

Definition:

**CL def: “**voluntary union for life of **one man and one woman**, to the exclusion of all others” *(Hyde v Hyde, 1866)*

***Civil Marriage Act s 2:*** “lawful union of **two persons** to the exclusion of all others”

Effects of legal marriage v cohabitation

**Fed: *Modernization of Benefits & Obligations Act***('00): extends almost all marriage benefits in fed statutes to CL couples.

**Prov:** Matrimonial property (***Walsh v. Nova Scotia***, SCC, 2002): provinces can treat CL couples differently with regards to post-separation property distribution.

Annulment / Decree of Nullity

While divorce pre-supposes a valid marriage, is based on a post-nuptial event, and dissolves the marriage *ex nunc* (from the date of the decree), a marriage is a **nullity / there never was a marriage** if some defect prevented the marriage from coming into existence. Could be:

* *Void ab initio* = void 🡪 decree of nullity declares that there never was a marriage. Fewer obligations.
* *Voidable* 🡪 marriage stands until annulled by some positive action (ie if H dies before marriage annulled, wife would still stand to inherit)

TODAY, annulment does not have such far-reaching effects:

* *FRA s 1:* “spouse” includes sb who applies for an order under the Act within 2 years of an order declaring their marriage null & void
* *FRA s 56:* parties can have an interest in family assets even if their marriage is annulled
	+ 🡪 more rights than CL couples

How do you contract a legal marriage? – 4 general requirements

**1. Capacity (generally void, except in some age cases)**

* **Age**
	+ Old CL age of consent = 14 for males, 12 for females. Marriages for parties under 7 = void (over 7 = voidable)
	+ If married too young and live together until old CL age of consent, could eventually be viewed as ratified
	+ *BC Marriage Act* appears to have overwritten the CL (but note point above about ratification)
		- *S 28 –* marriage under 19 requires parental consent
		- *S 29 –*marriage under 16 requires a court order
		- *S 30 –*No parental consent / no court order does not invalidate a marriage (i.e. not void)
* **Consanguinity** (blood) **& affinity** (family) *Marriage (Prohibited Degrees) Act* – 1990 federal
	+ Narrowed prohibitions – now only not allowed to marry real, half, or adopted brothers or sisters. (step ok)
* **Single (void)** *Civil Marriage Act*  - federal
	+ makes it clear only allowed 1 spouse (“lawful union of 2 persons to the exclusion of all others”)
	+ Complicated by fact that some countries permit more than one spouse. Canada will not recognize those marriages, but will allow those couples to divorce
	+ *DA, s 22* – will recognize a foreign divorce if either spouse was ordinarily resident in that country for at least 1 year immediately prior to the commencement of the divorce proceedings
	+ *Criminal Code s 290* – polygamy is an indictable offense.
* **Formerly, req of opposite sex** – but *Civil Marriage Act* 2005 same sex marriage okay.
	+ *Civil Marriage Act, s 2:* “lawful union of *two persons*”
	+ *Ref re Same Sex Marriage* – new definition of marriage consistent with the Charter
* **Sanity**
	+ **Test:** Whether the parties are able to understand the nature of the marriage contract.

**2. Consent (void) (possibly voidable)**

* **Duress** vitiates consent
	+ if entered marriage with belief that if they didn’t, their life, health or liberty would be threatened. Cout can consider (1) age; (2) emotional state (3) vulnerability (4) length of time btw duress & marriage, (5) whether marriage consummated.
* **Mistake or fraud** vitiates consent – mistaken as to who they married (ie identical twin) or what they are doing
	+ Lies about status, name, age, and wealth have not been treated as grounds for annulment

**3. Formalities (void)** (provincial domain – meet formalities of where you get married) – *Marriage Act (BC) ss 20, 28, 29, 30*

* *S 20 –* may be solemnized by marriage commissioner on payment of prescribed fee if contracted in public manner with 2 or more witnesses; requirements of declarations the parties must make.
* *Ss 28 – 29* parental consent / court order if too young before allowed to solemnize
* **Exception**: Aboriginal customary marriage

**4. Consummation (voidable)**

* **2-Part Test:** (1) Practical impossibility of consummation, whether physical or psychological; (2) If for psychological reasons, have to show invincible aversion or repugnance to the act of consummation

Aboriginal Customary Marriage

* *Connolly v Woolrich (1867)*: Cdn law accepts validity of Aboriginal marriage by custom where (1) validity in the community (2) voluntariness (3) exclusivity and (4) permanence
* Provincial powers of formalities in *Marriage Act*  technically prevent recognition of customary marriage as a marriage won’t be registered.
* But *Casimel* *[1993] BCCA* lays the groundwork for recognition of customary marriages as a s 35 right. [Ratio: If indigenous customs were properly adhered to in marriage between white man & aboriginal woman, valid marriage.]

\*People of the Doukhobor religion do to go through all the same formalities as others. (*BC Marriage Act, s 12)*

Note: General presumption in favour of marriage (e.g. *Marriage Act (BC) ss 11, 18, 30* – solemnized by religious rep not auth’s to solemnize marriage an in ignorance of the Act; irregularity in issue of marriage license; no consent/order when under-age

**SAME SEX MARRIAGE & RELIGIOUS FREEDOMS**

***Civil Marriage Act, 2005***

*S 2: “*Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.”

*S 3*: religious officials may refuse to perform marriages that are not in accordance with their religious beliefs.

(even though it is provs that have jurisdiction over solemnization, fed gov put this in)

*Reference Re Same Sex Marriage*

Issue: Is it constitutional for marriage to be defined as the lawful union of 2 people to the exclusion of all others?

Holding: New definition of marriage was consistent with the Charter.

* Religious officials could not be compelled to perform a marriage if contrary to religious beliefs.
	+ Equality must be balanced with religious freedom
	+ Ultimately contained with the legislation.
* Obviously, the solemnization of marriage was within provincial power.

*Smith v. Knights of Columbus 2005 (BC Human Rights Tribunal)*

2 lesbians wanted marriage ceremony in a hall owned by a Catholic men’s group that did not allow it once they discovered it was a lesbian wedding.

Held: Permissible for Knights to discriminate b/c of protection of core religious beliefs. Religious protection also extended to buildings owned by the church.

* Refusing access was okay - but because Knights caused undue hardship and affronted complainants' dignity & self-respect, they had to pay damages for deposit & invitations

Note: Decision reinforces *Reference on Same-Sex Marriage* that it is permissible for a person not to assist a same-sex marriage if it is contrary to religious beliefs.

Legal Parenthood

**Different legal models of parenthood**

1. **Biological Presumption ("natural parents")**
2. **Social model**
* Note disjuncture b/t *biological* parents and *genetic* parents (i.e. surrogate vs female egg donor)
* The law imposes legal parenthood to subject the person to rights and responsibilities.
* The law might look to social parents to force someone else to pay child support than the state.
1. **Caregiving:** who does the most caregiving?
2. **Gestational mom & Genetic mom:** mom bears child (gestational), but egg comes from donor (genetic)

**Intention** has emerged as part of legal parenthood formula when there are sitns of conflict.*(Johnston-Steeves,* AB*; GES*, Sk*)*

**LEGISLATIVE DEFINITIONS OF PARENTHOOD**

Canadian law is committed to a **biological model** of parenthood, based on **assumptions around biology, marriage and cohabitation**. This is challenged today in the modern era. [The law is in a state of flux. Not a lot of legislative guidance, and not really reflective of reality]

* ***Law & Equity Act s 61(1)(b):***A person is the child of his/her **natural parents**. 🡪 Abolished illegitimacy distinction between born in and out of marriage, showing we now emphasize GENETICS over MARRIAGE.
* ***FRA***does not define motherhood, though presumption is that person who gives birth is the legal mom
* ***VSA s 1***defines “birth” as “complete expulsion or extraction from its mother” – presumption is that the **woman who gives birth** is the child’s legal mother
* ***Adoption Act s 13***refers to fathers as **biological fathers.** But the Act also states that fathers are **men who acknowledge paternity** in some way. (for the purposes of giving consent for adoption)
* Parenthood (**fatherhood**)is defined in **Part 7 (*FRA, ss.94-95*)** for the purposes of child support.
* ***s.94:*** if parentage is denied, the court can determine issue of parentage by applying ***s.95***
* ***s.95(1):* presumptions of paternity** re **male** parenthood
* If a man denies legal parentage in order to avoid child support responsibility, then the court must determine whether he is a father of the child
* If the man meets one of the ***s.95*** presumptions, the Court may presume that he is the biological father, unless he proves to the contrary on BOP. Same rules apply to CL couples.
1. Man was married to the child's mom at the time of birth
2. Man was married to the child's mom, and marriage was terminated (i) by death of the man or by nullity within 300 days before the birth, or (ii) by divorce if decree took effect w/in 300 days before birth of child
3. man married the child's mom after the birth and acknowledges that he is the natural father
4. man cohabitated with the child's mom in a relationship of *some permanence* at the time of the birth, or the child was born w/in 300 days after the man & mom ceased to cohabit
5. the man has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the child's dad
6. the man has acknowledged paternity of the kid by signing a statement under s 3 the *VSA* within 30 days of the child’s birth
7. the man has acknowledged paternity of the child by signing an agreement under the *Child Paternity and Support Act*
* ***s.95(3):*** If circumstances give rise to a presumption that more than 1 man falls under these provisions, then none of the presumptions apply; and you use ***s.95.1*** for DNA testing
* ***s.95.1***: DNA testing provision
* Note that if you have held the child out to be *your* child, and *then* get a DNA test which says that you are not the child's father - you may still be a parent for the purposes of child support.

**How can one establish legal parenthood?**

1. **Birth registration = presumptive proof *(VSA; Gill v Murray)***
	1. ***Gill v Murray (2001) BCHRT*** – lesbian parents attempting to register birth of a child. VS wouldn’t allow the non-birth mother to register as the other parent.
		1. Held: VS discriminated against same-sex couples by refusing to register the same-sex partner of birth mother on the Birth Reg b/c she had no biological relationship with the child.
		2. Since ***VSA*** does not require fathers to verify biological parentage on Registration of Live Birth form or inquire whether opposite sex couples used DI so as to require non-biological father to adopt the child, should not do so for same sex couples.
		3. Birth certs are not a declaration of legal parentage, only **presumptive proof of relationship**
			1. But *Trociuk* (SCC) says birth certificates are crucial in memorializing biology (wrong)
		4. **Best to go through 2nd-parent adoption for a legal relationship that is not rebuttable**
	2. Today, the Registration of Live Birth form only allows registration of co-parent if father is incapacitated, unacknowledged, unknown, refuses to acknowledge the child. Seems to be at odds with this decision, which appears to say that a mom can *always* put a co-parent on a birth certificate. If mom had a known donor, but wanted to put a co-parent on cert, would have to unacknowledged the donor.
2. **Court order permitting Birth Registration / declaring legal parentage**
	1. If father excluded by birth mother🡪 ***Trociuk [2003] SCR*** – mother did not include birth father on Birth Registration because she wanted the kids to have her name. He did not have much of a social relationship with the kids, just biological.
		1. Mr. T got a symbolic victory: Excluding father from Birth Registration would violate his equality rights under s 15. Including particulars on the Birth Reg is an important means of participating in the life of a child.
		2. Implications: **Reinforces role of BIOLOGICAL ties in establishing fatherhood.**
			1. CRITIQUE: **Legal parenthood should not be only about biological ties!**
			2. CRITIQUE: From what we know of VS process, birth certs do not give proof of biological ties (see *Gill v Murray)* – they are presumptive only.
		3. **Amendments**
			1. ***VSA s 3(6.1****)* – excluded father can apply for a court order to include his particulars on the Birth Registration.
			2. ***VSA s 4****:* If parent’s don’t agree, child gets their surname if they have the same one, otherwise hyphenated.
			3. ***S 4.1*** Parent can get child’s surname changed! take into account BIOC, get child’s views if aged 7-12, get child’s written consent if 12 or older.
	2. To exclude birth mother in favour of others 🡪 ***Rypkema [2003] BCSC***surrogacy case – 2 people contracted with surrogate mother to bear child for them. VS refuses to register in name of genetic & intended mother b/c she did not give birth as per *VSA s 1.*
		1. BCSC: The genetic & intended mother should be officially listed as the “mother” on the birth cert, rather than the surrogate mother who carried the child.
		2. VS again changed their forms. **Filing of Surrogacy Arrangements Procedures:**  Now need to (1) Notice of Birth, and must notify VSA that surrogacy arrangement involved, (2) need court order declaring parties to arrangement to be the parents before complete Birth Reg.
		3. NOTE: All decisions so far have been consensual. No court decision on what will happen if surrogate mother decides she doesn’t want to transfer over parental rights.
	3. If >2 legal parents wanted 🡪 ***AA v BB [2007] Ont CA*** *(parens patriae)* – lesbian birth mother chose to list as the other parent the genetic father who donated sperm and would play an engaged father-type role, although the two women were to be the primary parents. Asked if they could list the co-mother as 3rd parent.
		1. Ont CA: **Allowed 3 parents.** In this case, where everyone is in agreement, we can rule under *parens patriae* (courts have equitable powers to look out for the best interests and welfare of vulnerable parties).

*d.* ***K(L) v L(C) [2008] Ont SCJ –* anonymous** donor – non-biological lesbian mother.

Court gave access but without further information declined to rule on declaration of parentage.

1. **Adoption as single parent or co-parents** *(see Adoption Act s 29(2), 37(2) –* see ‘2nd-parent adoption’ below*)*
	1. 2nd parent adoption adds a co-parent and excludes a birth parent such as sperm donor/father:

***Re SM (2007) ONCJ*** – **2nd-parent adoption when sperm donor known:** 2 lesbian women asked a male friend to be their sperm donor. He agreed and together they drew up a donor contract. Based on misapprehended legal advice, they listed him as one of the legal parents, and then launched an application for a second parent adoption.

* + 1. ONCJ would not allow adoption until clear that the father understood that his consent meant he would not be a legal parent.

***C(MA) v K(M) (2009) ONCJ –*** known donor; intention to create 3 parent family but possibly adoption; blood ties plus relationship; the mothers blocked the father’s access and tried to adopt.

Court: Motion for dispensing with his consent is dismissed. In an application to dismiss with the necessary consent, the burden is on the applicants to show that dispensing with the consent is in the child’s best interests. Loving relationship here. Adoption not in child’s best interests.

***KGT v PD (2005)* BCSC**: 2 lesbian mothers separated amicably and shared parenting arrangement for approx 1 year. Dispute arose when biological mother indicated she wished her new partner to adopt the little girl. **Non-biological lesbian mother** opposed the adoption and attempted to adopt herself.

Court: refused to declare her a legal parent or allow her to adopt without the birth mother’s consent. She was awarded joint guardianship and her pre-separation access rights. Biological mother retained sole custody and her new partner was barred from adopting

See these cases at pp 135-138

**Acquiring parenthood rights and responsibilities**

**CUSTODY: Do not need to be a ‘parent’ in order to apply for custody**

***FRA s 35***- parents, grandparents, other relatives and persons who are not relatives of the child

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***DWH v DJR (2007) ABCA*** – Gay couple raised child for three years. When they separated, biological father prevented non-biological father from having access to the child.

Court: found **in favor of the non-biological father**, holding that he had acted ***in loco parentis*** – had enjoyed a close parent/child relationship. Direct involvement in parenting also meant that it was in the child’s best interests to have the relationship maintained. Granted **reasonable access**.

**CHILD SUPPORT ORDER**

* Presumptions of paternity: *FRA ss 94-95* (CAN 7)
* Definitions of ‘parent’, ‘stepparent’, ‘spouse’ in *FRA s 1*
* The legal system has tended to expand its categories of persons who might have CS obligations

**BC’s *White Paper* Proposals:**

* Birth mother is legal mother @ birth
* She can relinquish her status by adoption or surrogacy
* If no assisted conception, presumptions of paternity will apply + DNA testing if contested
* If assisted conception, birth mother’s spouse is presumed to be a legal parent
* Partner can contest if proves did not consent
* 3p donors of eggs/sperm/embryos NOT parents
	+ UNLESS everyone agrees in writing prior to assisted conception that donor = legal parent
	+ *AA v BB scenario – more than 2 want to be parents – quite a radical suggestion*
* Surrogacy contracts unenforceable but process after birth can give parentage to intended parent(s) [no court order needed]
	+ *Courts deal with enforceability of contracts differently when dealing with children, in order to look at the best interests of the child.*
	+ *Same with adoption, if someone refuses consent at the end – can w/d consent (K(L) 2008 Ont SCJ)*
	+ *Discomfort with saying a woman who has carried and given birth to a child should have to live up to plan she made 9 months ahead of time.*

Adoption

Adoption is a creature of statute: ***Adoption Act (BC)*** – provincial jurisdiction 🡪 **BCSC** *(s 1 “court”)*

***STRICT INTERPRETATION*** – wording very important

Strictly regulated to avoid child trafficking, etc.

*S 84:* May not pay or receive any payment for assisting with adoption (certain expenses okay)

*S 85:* May not publish advertisements dealing with placement or adoption of a child (adoption agencies can advertise their services but not refer to specific children)

“Private adoptions” regulated as well

*SS 4-12*

**ADOPTION ORDER**

**A court can make an adoption order if satisfied that: *S 35***

(1)(a) the child has resided with the applicant for at least 6 months immediately before adoption hearing – this requirement can be altered or adopted after considering any recommendation made by a director or an adoption agency

(1)(b) it is in the child’s best interests

***S36:*** Names may be changed (child’s views considered If 7-12, consent if 12 +)

**Effect of adoption order**

**It is an *in rem action* that** **permanently changes legal relationship** of child to parents, usually for all legal purposes. ***S 37***

* Permanently severs parental rights and obligations of birth parents and substitutes legal relationship between child and adoptive parent(s)
* (exception in 37(7) adoption order does not affect aboriginal rights of child)

**BEST INTERESTS OF THE CHILD (& BLOOD TIES)**

* ***s.2:*** purpose of Act is to provide for "new & permanent family ties thru adoption, giving paramount consideration in every respect to **child’s best interests"**.
* ***s.3:***Factors used to assist court in determining a child’s best interests:
	+ ***(a)*** the child’s safety ***(b)*** physical and emotional needs ***(c)*** continuity ***(d)*** quality of the relationship with the birth parent ***(e)*** importance of the child developing positive relationship with parents and having a secure place within the family ***(f)*** child’s cultural, racial, linguistic heritage ***(g)*** children’s views are part of the adoption process: if the child is over 11, the child can veto adoption; if child is between 7-11, views must be taken into account, ***(h)*** effect on child if there is a delay in making a decision
	+ ***s.3(2):*** If child is Aboriginal, importance of preserving the child’s cultural identity must be considered**.**

**Mid-1980s shift in the weight given to biological ties** in cases where an adoption is disputed by a birth parent

**🡪 Best interests or welfare of the child asserted as paramount 🡪 BONDING important**

***King v Low [1985] SCR – emphasizing welfare of child, diminishing right of biological parent***

Facts: Birth mother panicked and gave child up, regretted decision, signed consent, asked for child back 3 months later and tried to revoke consent. TC & CA went on side of adoptive parents.

SCC: **No presumption in favour of biological parents. Must look at welfare of child.** 3 months is enough to say child has bonded with the people taking care of it. In this case, BIOC that adoption go through.

*“Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.”*

***Racine v Woods [1983] SCC – diminishing cultural specificity***

Facts: Birth mother aboriginal (Inuvik). Adoptive parents one aboriginal, one not.

SCC: At least one adoptive parent is aboriginal and that is sufficient to address the cultural issue.

*“[T]he significance of cultural background and heritage as opposed to bonding abates over time.”*

**WHO CAN APPLY**

***S 5/29:*** A child may be placed for adoption with **one adult or 2 adults jointly** – must be resident of BC (no requirement that they be married or spouses or opposite sex)

**2nd-parent adoption**: ***S 29(2):*** One adult may apply to the court to jointly become a parent of a child with a birth parent of the child.

**Same-sex parents**: ***Re K [1995] Ont Ct Prov Div*** – Violates Charter to exclude same-sex couples from adoption

Facts: Same sex lesbian non-biological mother wanted to adopt with the biological mother. Ont CFSA prevented that as said only opposite sex couples or married couples or individuals could apply.

Court: Won the Charter Challenge for equality rights.

🡪 Ontario had to change def. of “spouse” in *Child & Family Services Act* to include same-sex couples.

**WHOSE CONSENT IS REQUIRED**

***S 13****:* **Consent required from:**

1. The child if 12 years or over
2. The birth mother
	1. *s 14*: consent only valid if child is at least 10 days old when consent is given
	2. *s 15*: can give legally valid consent even if under 19)
3. The “father”
	1. s 13(2) defines “father” for purposes of consent. – NOTE consent not needed from all birth fathers! (concerns about privacy and security of birth mother)
		1. ***s.13(2)***: for the purposes of giving consent to the adoption, the **child's father in anyone who: *(a)*** acknowledges paternity by signing birth reg, ***(b)*** is or was child's guardian or joint guardian w/ birth mom, ***(c)*** acknowledges paternity & has custody/access rights by court order or agreement, ***(d)*** acknowledges paternity and has supported/maintained/care for child voluntarily or under court order, ***(e)*** acknowledges paternity and is named by birth mom as child's dad, or ***(f)*** is acknowledged by birth mom as father and is registered on **birth father's registry** as child's dad
	2. *s 15*: can give legally valid consent even if under 19)
4. Any person appointed as the child’s guardian

***Dispensing with Consent***

Court may dispense with consent if satisfied: (***S 17(1))***

1. in child’s best intereststo do so **or**
2. one of the following situations occurs:

*(1)(a)* not capable of giving informed consent

*(1)(b)* unable to find the person

*(1)(c)* has abandoned or deserted the child; has not made reasonable efforts to meet parental obligations to the child; or is not capable of caring for the child; or

*(1)(d)* or other circumstances justifying dispensing with consent.

***In the Matter of a Female Infant, BC Reg No 99-00733 [2000] BCCA – Dispensing based on BIOC***

Facts: Birth mother did not tell birth father putting child up for adoption.

Issue: Can the father’s consent be dispensed with?

BCCA: **Dispensed with birth father’s consent. No concrete plan for the child** so no indication of stable envt. Uncertainties with transf’g custody of child to birth father and potential for conflict amongst caregivers.

May only dispense with child’s consent if child is not capable of giving consent: (***S 17(2))***

***Revoking Consent***

***S 18:*** Any of the above may revoke their consent but must be in writing, and received by the director or adoption agency before the child is placed

***S 19:*** Birth mother may revoke within 30 days of child’s birth even though the child has been placed

***S 20:*** A child can revoke at any time before adoption order is made (could well be after placement) (*evidence of weight placed on the views of the child)*

***S 21:*** A consent given under the law of another jurisdiction may be revoked in accordance with the laws of that jurisdiction (ss 18-19 not relevant, but child can still revoke as per s 20)

***S 22:*** A court may revoke consent after a child is placed for adoption but must be before an adoption order is granted (because that is an *in rem* action that changes legal status) – failure to comply with openness agmt is not grounds to revoke a consent.

***Notice to birth father:***

***S 6(1)(g****):* Director or adoption agency must make reasonable efforts to give noticeto:

* Anyone named by birth mother as the birth father if his consent is not required under s 13
* Anyone who is registered in the birth father’s registry under s 10 in respect of the proposed adoption

***Registration Number 06-014023 [2007] BCSC***

Facts: Birth mother not in relationship with birth father, chose not to inform him of adoption. Master dismissed application on grounds that father was required to receive notice of adoption.

BCSC: **The Adoption Act did not require notice to the birth father** of the adoption in circumstances where the birth mother did not name or acknowledge the identity of the birth father and he was not registered with the birth father’s registry.

***Test for dispensing with notice:***

***S 11****:* On application, the court may dispense with notice of a proposed adoption to a birth father if satisfied:

1. That it is in the child’s best interests to do so, or
2. That the circumstances justify dispensing with notice

***Discussion with aboriginal communities:***

1. ***S 7:*** Before placing an aboriginal child, director or adoption agency must make reasonable efforts to discuss the placement with the relevant indigenous group.
2. Exceptions: *(2)(a)* child 12+ objects*; (b)* birth parent / guardian who requested child be placed for adoption objects

**EFFECT ON ACCESS RIGHTS** (Step-parent adoptions; Grandparents)

* **Access orders or agmts terminate** unless ct orders otherwise under (2) b/c of child’s best interests ***S 38***
* If access order made under DA, would stand despite adoption order (provincial) b/c of paramountcy *(North v North (1978) BCSC)*

***Re Alberta Birth Registration 78-08-022716 (1986) BCCA***

* **The tie with a parent with access should not bar a child from being adopted**
* A child being adopted should not be cut off from her or his other parent if tie is useful to him/her
* Any person who has a “sufficient tie” with the child **ought to be heard** before an order is made
* The petitioner should identify, and normally give **notice** to,a person with a right of access, a parent in whose home the child lives and any person who has a “substantial tie” with the child
* An adoption order terminates a right of absence if no special order otherwise
* Adoptive parents have the same right to resist an access application as natural parents have
* **Step parent adoptions**: ***BC Birth Reg 02369 (1998) BCSC – does not necessarily mean no access***
	+ Facts: Birth mother opposed adoption by the father’s new wife, b/c she was concerned her access rights would be weakened.
	+ Court: Dispensed with her consent, granted adoption order, provided for reasonable access.
	+ Dispensing with consent *ss 17(1)(c),(d) –* abandoned or deserted child, not made reas efforts to meet parental obligations, not able to care for the child, other circs that justify dispensing w consent
* **Grandparents:** Not easy to claim access or custody if parents consent to adoption because ties to biological family normally severed. ***C(DH) v S(R) (1990) ABQB:*** Parents gave child up for adoption. Grandmother claimed custody, or access in the alternative. Court denied both and granted adoption order.
	+ Can try to deal with via openness agreement *(ss 59, 60)*
	+ Or access order maintained post-severances *(s 38*, or under Divorce Act)

**SECOND-PARENT ADOPTION**

*Adoption Act, s. 29(2):* allows for Stepparent Adoption—allows one adult to apply to court jointly with a birth parent to become a parent of the child

* + So you can adopt the child of your partner
	+ Now, *s.29* is used primarily for second parent adoption for same-sex couples (to create parental status for a non-biological mother in a lesbian relationship).
	+ Second-parent adoptions permitted in same-sex context (*Re K*)

*s.37(2):* stepparent/second-parent adoption: when an individual adopts a child to become a parent jointly w/ child’s birthparent (stepparent becoming a parent), the birth parent’s parental rights will not be affected. Other birth parent's rights are terminated (*s.37(2)(b)*)- so he/she needs to consent to the stepparent adoption.

***Re K.*, [1995] O.J. No. 1425 (Ont. Ct. J. Prov. Div.)**

Court: Allowed a step-parent adoption in the same-sex context.

* *Child and Family Services Act* (Ontario) - found the opposite-sex definition of spouse to be unconstitutional.

**INTERRACIAL ADOPTION & ABORIGINAL CHILDREN**

* ***s.2:*** “paramount consideration in every respect to **child’s best interests"**.
* ***s.3:***Factors used to assist court in determining a child’s best interests:
	+ ***(a)*** the child’s safety ***(b)*** physical and emotional needs ***(c)*** continuity ***(d)*** quality of the relationship with the birth parent ***(e)*** importance of the child developing positive relationship with parents and having a secure place within the family ***(f)* child’s cultural, racial, linguistic heritage** ***(g)*** children’s views are part of the adoption process: if the child is over 11, the child can veto adoption; if child is between 7-11, views must be taken into account, ***(h)*** effect on child if there is a delay in making a decision
	+ ***s.3(2):* If child is Aboriginal, importance of preserving the child’s cultural identity must be considered.**

Some view transracial adoption as a partial solution to the need for permanent homes for children from less advantaged backgrounds. Others view it as tending towards racial and cultural genocide. On the whole, however, courts use the direction under the **best interests** test to consider race in disputes regarding children.

***Racine v Woods [1983] SCC – diminishing cultural specificity / focus on bonding with adoptive parents***

Facts: Birth mother aboriginal. Adoptive parents not. By the time she wanted the child back, the child had been in the care of the adoptive parents for more than 3 consecutive years. History of substance abuse.

SCC: At least one adoptive parent is aboriginal and that is sufficient to address the cultural issue.

1. **Focus must be on best interests of child**
2. **Aboriginal cultural heritage must be balanced against bonding with adoptive parents**

***“****In my view, when the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates over time.”*

***Sawan v Tearoe (1993) BCCA – Bonding matters more than race in this context***

Facts: Aboriginal birth mother gave child up but tried to revoke her consent six days later. Was not accepted b/c it was verbal, written not received. Went to court to try revoke consent.

BCCA: Mother’s consent not revoked. Adoptive parents keep child. BI bonding overrides cultural heritage.

*“The trial judge stated the T. are "competent, caring, loving, proposed adoptive parents" and that a close relationship had developed****.  To return this child as requested by the respondent, is to place him in an uncertain future that would take away from him the continuity and stability which he now has.  As in the Racine case, the cultural background and heritage must give way*** *in the circumstances of this case.  A difficult choice must be made.****The child's best interests must come first.****The respondent has not discharged the onus which s. 8(7) places on her.  It is not in the best interests of this child to revoke Ms. S.'s consent to adoption.”*

***DH v HM [1999] SCR (custody, not adoption) – more complex than just bonding and aborig heritage***

Facts: Aboriginal birth mother had been adopted as a child by Caucasian parents. When she had her own child, she was unable to take care of it and the adoptive grandparents looked after him for a while. Mother then brought him back to BC to be raise in her own birth family – both bonding (2 yrs) and aboriginal heritage in favor of biological grandfather in BC. Adoptive grandparents sought custody.

SCC: Aboriginal heritage is an important factor but the most important thing is the child’s best interests. Considering the stability of the respective homes… [$$ seems to win out in this case]

 [But explicitly stated in statute that socioeconomic advantages should not be a factor!]

*“The submission that Ishmael’s Aboriginal heritage is virtually a determining factor here oversimplifies a very complex case. The trial judge did not agree that an order granting custody of Ishmael to the respondents would uproot him from his culture. Ishmael is African-American on his putative father’s side, Aboriginal Canadian on his mother’s side, and has lived a significant part of his life with his adoptive grandparents, who are neither. As the trial judge said, “this is not a case of taking an Aboriginal child and placing him with a non-Aboriginal family in complete disregard for his culture and heritage. The fact is that Melissa is the [adopted] daughter of the respondents and Ishmael is their grandson.” (para 3)*

**Note:** The **best interests** of the child standard serves in practice to privilege and **understanding of children as *decontextualized individuals* whose interests are separate and distinct from those of their families, communities, and cultures**. To this extent, it tends to render irrelevant or unimportant the child’s cultural identity and heritage, thus helping **to justify her separation from it**.” *(Marlee Kline)*

🡪 some argue greater consideration should be given to their aboriginal heritage, than bonding w adoptive parents

**ABORIGINAL CUSTOMARY ADOPTION**

***S 46***– the court **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.

BENEFITS:

* Defining family on own grounds rather than that of Cdn state
* Keep the children in their own culture – not removed from communities & family connections
* Parents can know where the child was placed (what we are now creating as “open adoption”)
* Avoid cultural genocide

***Casimel v ICBC [1993] BCCA*** – intersxn btw adoption in aborig customary practice & the prov legislative scheme.

Facts: Ernest Casimel died. Under Insurance Act, claimants had to show both that they were parents and dependents of Ernest. In reality, they were his grandparents. Mother had left him and they had taken him in as their child. TC said it had only a moral effect, not a legal effect.

CA: **Aboriginal customary adoption should be viewed as equivalent for purposes of Insurance Act**.

***Discussion***:

* Whether adoption tends to export children from more disadvantage families (and countries) to more privileged ones.
* Early adoption leg was enacted in context where pregnant women placed babies for adoption to avoid stigma of “illegitimacy”. Goals of adoption: (1) secrecy in relation to history of birth family and (2) secrecy in relation to adoption itself. Most children were not told they were adopted. Now we have an enormous **emphasis on open adoption.** Doubt as to enforceability of **openness agreements**. ***S 59, 60***

Child Protection

Need for balance between state intervention and family autonomy – the public/private divide.

*Margaret Hall* argues non-interventionist approach bad for ch. *(Matthew Vaudreil* / *Gove Inquiry*)

* On the other hand, particular child care practices in some cultures might attract the attention of child protection authorities, because they vary from the expected norms of a dominant culture. Unfair targeting of aboriginal child care practices for example.
* Interesting questions about when state intervention is / is not appropriate
	+ Parents choosing to raise their child genderless (p 139)
	+ Parents teaching children that black people and other minorities deserve to die – Child Services applying for guardianship (Manitoba)

Regulated in BC by the ***Child, Family and Community Services Act (BC)* – safety and well-being of the child** made paramount among the guiding principles.

***s. 13*** – **definition of a “child in need of protection”**

* + Applies to situations where
		- a child has been, or is likely to be, physically harmed, sexually abused or exploited, or
		- a child is going to be harmed due to neglect, emotional harm or abandonment, or
		- a child is being deprived of necessary healthcare (***s.13(1)(g)***) [i.e. Jehovah's witness case]

Domestic Abuse

**STATISTICS**

* + Majority of victims of spousal violence are female (83%)
	+ Common assault most frequent, followed by major assault, uttering threats, crim harassment, stalking
	+ Spousal homicides account for 15% of all homicide deaths in Canada
	+ 3x as many women as men are killed by their intimate partners / woman more likely to be killed by her intimate partner than anyone else
	+ Aboriginal women experience higher rates of spousal violence and homicide

**WHY DO WOMEN NOT REPORT?**

* + Shame
	+ Deterrents such as hearing women or both partners arrested, or have experienced that in past
	+ Fear of having to start over
	+ Victim loses all control over the process once police are involved (no say whether partner charged or told not allowed to communicate with each other)
	+ Risk of losing children to the state – triggers social services visiting home. If a mother is being abused and there is evidence her children have witnesses the abuse, she may lose her kids for “failing to protect” them
	+ Fear of retaliation

🡪 New research – **“family conflict” studies** – broader definition of violence

* Includes psychological and emotional
* Doesn’t weigh the harm that resulted / injury / hospitalization rates
* Doesn’t consider whether cyclical or single incident
* Doesn’t consider “fear” as a component
* Does not require police report

**WHAT DETERS WOMEN FROM LEAVING**

**1. Separation does not always end abuse**

**Separation abuse:** Attacks on the woman’s body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return (Professor Mahoney)

* Note the presumption of gender and assumption of heterosexual relationship
* Separation can be a very dangerous time
* Clinical psychologists have identified 3 phases: (1) gradual escalation manifested by verbal abuse and less extreme acts of physical violence; (2) the acute battering incident; (3) loving contrition phase of remorse, gifts, promises to change, and affection – positive reinforcement for victim to remain in the relationship. (debate about accuracy of this 3-phase theory, but cited quite a bit).

**2. Terrified of losing kids or being impoverished** (harder to leave when don’t know rights, or don’t have control over the finances)

**3. Cost of trial** (may not have access to bank accounts etc)

**4. Practical / material / economic reasons**

**5. Concerned about safety of the children.** (Can be a difficult choice to get yourself out of the situation to set up alternative living arrangement and then come back for the children. (1) Their safety; (2) In the interim, the partner may have gone to court for an interim order for custody; (3) Makes it look like you abandoned them.)

**CUSTODY & ACCESS DECISION-MAKING & DOMESTIC ABUSE**

**Domestic abuse has a significant impact on children**

* + Parents underestimate (1) what their children know about the violence that goes on & (2) how often they witness it.
	+ **Witnessing violence can leave children with the same psychological problems as the direct experience** of violence. Almost 60% of children who witness violence show symptoms consistent with a DSM diagnosis of PTSD.
	+ Children who witness violence can internalize it as an appropriate method by which to resolve conflict.
	+ **In families where there is spousal violence there is a significant probability that children are also suffering direct physical or sexual violence**. *(Kerr & Jaffe s*tudy)

**Yet in family law spousal abuse has little relevance to custody and access determinations!!!**

(general consensus in family law decision-making that violence directed towards a parent does not raise the same concerns as violence directed towards a child)

**Why isn't spousal abuse a consideration in custody and access determinations?**

* Difficult for lawyers to discuss domestic violence issues w/ clients (whether client is abuser or victim). Fear & safety issues attach to it - do you become a target yourself if you air allegations of abuse in court?
* **UN Convention on the Rights of the Child** states that children have a right to know both of their parents unless it is contrary to their best interests. Unfortunately, the second "best interests" part usually gets left off.

**Current Legislative Framework in BC**

* Both ***FRA, s.24*** and ***DA, s.16(a)*** state that "best interests of the child" are paramount consideration in **custody/access**
* But neither ***FRA*** nor ***DA*** facilitates consideration of domestic abuse in determining custody/access
* ***FRA*** provides some guidance to court when considering what might be in BI of child.
	+ But ***FRA*** makes no mention of "safety" or "violence" as a factor in BI test - although it does refer to "well-being of the child".
	+ It does require Court to look at capacity of the person seeking custody/access to exercise those rights *adequately*. But Courts have said that someone who is violent to their spouse is not necessarily a bad parent
* ***DA*** provides no guidance as to the "best interests" test.
	+ ***DA, s. 16(10):*** "maximum contact and friendly parent" rules reward the parent who appears most cooperative in facilitating contact. Not such a good thing in context of abuse.
		- A child of the marriage shall have as much contact w/ each spouse as is consistent with child's BI.
		- Court will take into consideration the willingness of the custody-seeker to facilitate such contact.
		- So if mom refuses to facilitate contact, she may be designated an "unfriendly parent" and lose custody
		- **No-access orders are virtually non-existent**. Canada has a 50% joint custody order rate

**COMMON COMPLAINTS BY PEOPLE IN THE COMMUNITY ARE:**

* **Family law is insensitive to domestic abuse issues**
* When a victim does get access to a lawyer, he/she is sometimes not aware as they could be of the complex dynamics of abuse and how they can impact the whole process of trying to separate from a relationship or specific issues such as disputes over children or economics
* If a case does go to court (a minority go before a J), all too often the J seems to not understand the pattern of abuse or how it should impact on who should care for children, sharing of custody, financial issues, etc.

***Kerr and Jaffe:*** Practical advice: Lawyers need to recognize the vulnerability of their clients during separation, during custody and access exchanges, and the complexity of the system.

**CRIMINAL REMEDIES**

* BC has a pro-arrest and pro-charging policy with regards to domestic violence
* Peace Bond (*CC s 810)* – Court orders that another person keep the peace for a certain amount of time, obeying certain conditions. BENEFITS: doesn’t cost anything, don’t need a lawyer. DISADVANTAGES: not a criminal conviction. SUMMARY: easy to get but pretty weak.
* Sanctions under CC for assault etc. (p 235) – not always realistic for victim

**CIVIL REMEDIES**

* Order restraining harassment *(FRA s 37)*
* Order prohibiting interference with child *(FRA s 38)*
* Order preventing economic harassment / restraining from disposing of FA *(FRA s 67)*
* Order for temporary exclusive occupancy of family residence *(FRA s 124)*
* Order restricting from entering premises *(FRA s 126)*
* Interim order for custody, spousal or child support

**OTHER SAFETY MECHANISMS**

* policy/crown attorneys/probation officers
* victim support services
* shelters; supervised access centres
* provincial legal aid plans
* Alternative dispute resolution facilities.

**ALTERNATIVE DISPUTE RESOLUTION AND DOMESTIC VIOLENCE**

* BC now requires most parties to go through ADR before hitting the judicial system
* While can often be timely inexpensive and low conflict means of resolving family law issues, can be dangerous in situations of violence. A woman’s fear of her partner could be seen as *thwarting* the ADR process where partners encouraged to put own concerns aside in favour of their child’s needs.
* **ADR assumes the parties of equal bargaining strength**. Mediators who understand the dynamics of domestic violence usually refuse to mediate custody and access issues in cases of domestic violence.
* **Avoid ADR if sitn involves domestic violence,** and put **safeguards to minimize face-to-face contact**

**WHITE PAPER RECOMMENDATIONS**

Changes may increase a J’s ability to deal with family violence by:

* Identifying children’s safety as an overarching objective in the BIOC 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
* Defining family violence & legislating risk factors to be considered in parenting 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 professions, including lawyers, family justice counselors, and mediators to screen for violence.

**Add to BI of child factors:** **the impact of any family violence**

1. directed towards the child or another family member, on the health, emotional well-being and safety and security of the child;
2. on the ability of the person who perpetrated the family violence to care for and meet the needs of the child;
3. on the appropriateness of an arrangement that would require the guardians of the child to co-operate on issues affecting the child, including consideration of whether requiring the guardians to co-operate would increase the risk to the safety and security of the child, or other family members; and

Also: any civil or criminal proceedings relevant to the safety or well-being of the child

**“Family violence”** includes the following actions by a person towards a family member:

1. causing or attempting to cause, physical or sexual abuse including forced confinement or deprivation of the necessities of life, and
2. **psychological or emotional abuse** that constitutes a pattern of coercive or controlling behavior, which may include, but is not limited to, the following behaviors by the person towards the family member:
	1. intimidation, harassment or threats, including threats to harm the family member,
	2. unreasonable demands to know where or with whom the family member is or restrictions on the family member’s activities or contact with friends or family members,
	3. financial abuse, including unreasonable prevention of the family member from access to or knowledge about family income, and
	4. stalking or following the family member, or
	5. intentional damage to property,

but does not include acts of self-protection, or protection of another person, if the force does not exceed what is reasonable in the circumstances.

**In assessing the impact of any family violence in accordance with the BI of the child**, a court must have regard to the following matters:

1. the nature and seriousness of the family violence;
2. how recently the family violence occurred;
3. the frequency of the family violence
4. the physical, psychological and emotional harm caused to the child by the family violence;
5. any steps the person causing the family violence has taken to prevent further family violence from occurring; and
6. all other matters the court considers relevant.

Divorce

Federal jurisdiction – governed by federal *Divorce Act* 🡪 must go to BCSC / Superior court in province in which one spouse has been ordinarily resident for at least one year immediately preceding commencement of proceeding *(DA s 3)*

* *“*ordinarily resident” is a question of fact – the place where a person regularly, normally or customarily lives in a settle routine *(Thomson v MNR [1946] SCR)*
* If each spouse applies in a different province – *see DA s 3(2), (3)*
* Proceedings can be transferred by a court if there is a custody dispute and the child at the centre of it is more substantially connected to another province *(DA s 6)*

Note: “Spouse” includes both opposite-sex and same-sex couples *(DA s 2(1))*

**No-fault regime introduced** through amendments to the federal DA **in 1987** – Caused divorce to skyrocket!

* + No-fault divorce created a **one-year separation as the primary basis for divorce**
	+ **Fault still included:** Two fault-based criteria are still maintained within the DA: (1) Cruelty and (2) Adultery

**GROUNDS FOR DIVORCE**

Sole ground for divorce is “breakdown of the marriage” *(s 8(1)).* Three ways to establish breakdown:

1. **Adultery** ***s.8(2)(b)(i)***: only the “innocent” spouse can apply. – DON’T HAVE TO WAIT 1 YEAR
	1. “Voluntary sexual intercourse between a married person and another person of the opposite sex other than his or her spouse”*(Orford v Orford (1921)*
		1. artificial insemination w/o H’s knowledge = adultery (*Orford*)
	2. **same-sex**: now includes same sex adultery (intimate sexual activity outside marriage) – wife granted divorce on grounds of adultery after discovered her H having affair with another man. *P(SE) v P(DD) (2005) BCSC*
	3. Not a high std: Prove opportunity & intimacy on BOP 🡪 burden on adulterer to call ev to rebut presumption.
2. **Cruelty** ***s.8(2)(b)(ii)***: “physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.” – DON’T HAVE TO WAIT 1 YEAR
	1. conduct at issue must be “grave and weighty” going beyond incompatibility. *(Balasch v Balasch (1987) Sask)*
	2. Does not go to intent to be cruel, but **subjective effect** of the treatment on the other spouse *(Balasch)*
	3. partner was ‘grossly addicted to alcohol’ and verbally viscious *(Knoll v Knoll (1970 RFL)*
	4. Not a high std: Once opp & cruelty established on BOP 🡪 burden to rebut on abuser.
3. **Living Separate and Apart for 1 year *s.8(2)(a)***: spouses **must have lived separate & apart for at least 1 year** immediately preceding the determination of the divorce proceeding and must be living separate and apart at the commencement of the proceeding. If the parties meet this requirement, then the divorce is granted "**on consent**"
	1. ***s.8(3)(b):*** spouses **can resume cohabilitation** for period of not more than **90 days**, w/ reconciliation as primary purpose
		1. If the spouses exceed 90 days in cohabilitation, the clock starts again.
		2. You can keep trying to reconcile over the 1 year period, so long as each reconciliation period is no more than 90 days
	2. ***s.8(1):*****application can be made by one or both spouses** - so you can't be held ransom by your spouse.
		1. Statute is silent on issues on **whether you can live separate & apart while still living under same roof** (***Oswell 5 factors***)
		2. There must be **physical separation between the spouses** - usually done through separate bedrooms. Remaining in the same home for economic reasons does not mean that the parties are not living separate and apart.
		3. There must be **withdrawal by one or both of the spouses from the matrimonial obligations** with the intent of destroying the matrimonial consortium - **no sex**!
		4. The **absence of sexual relations is not conclusive** but is a factor to be considered

a. Ceasing sexual relations and living in separate bedrooms is a factor but not conclusive *(Riha v Riha [2001] Ont SCJ Vol* 2: p8)

* + 1. **Other matters include** (1) the discussion of family problems and communication between the spouses, (2) presence or absence of joint social activities, (3) meal patterns, etc
		2. **Division of household tasks between the spouses**.
	1. ***s.8(3)***: parties must have the **mental capacity** to form the intention to live separate and apart
		1. A period during which the spouses have lived separate & apart will not be interrupted by reason of either spouse becoming incapable of forming an intention to live apart (i.e. the spouse becomes afflicted with a mental illness) *s 8(3)*
		2. **The minimum capacity required to form the intent to separate is the capacity to instruct counsel** *(Wolfman-Stotland v Stotland, 2011 BCCA)*
		3. **Divorce requires** (understanding) **the desire to *remain* separate and to be no longer married to one’s spouse** (***Calvert***)

***Oswell v. Oswell*, [1990] O.J. No. 1117 (HC) Vol 2: p 5** – test for “living separate and apart”.

**Facts:** 2nd marriage for both parties. Wife commits adultery in 1984. Husband tells her following adultery that they should separate. Wife didn't want to separate. Husband argued that from that point on (1985), they lived separate & apart under one roof. Wife argued that it was not until a significantly later date (1987), and relied on following evidence:

* + - while no sex in matrimonial home since 1985, they would go on holidays together and have sex while holidaying
		- when guests came over, they would sleep in the same bed - but otherwise, they slept in separate rooms
		- he gave her an expensive fur coat as a present during that period of time
		- they attended her father's funeral together, and he comforted her
		- they shared some meals
		- she cooked and drew up shopping list, while he shopped for food
		- they attended couples counselling briefly
		- they attended many social functions together related to their employment
		- she did his laundry
		- when they submitted their tax returns, the husband listed them as "married", not separated

Wife served the divorce petition in January 1988.

**Issue:** The date of separation was important for the determination of the valuation of family property.

**Held:** Declares that the separation began on January 1988. While husband may have formed intention to live separate & apart in 1985, no extrinsic evidence that this actually happened.

**Note:** Court is most interested in whether the couple appears socially to be a couple.

**Note:** 5 factors are most applicable to determining whether parties who live under the same roof as actually living separate and apart. But you can also use these 5 factors to assess couples who are living physically apart, but are ambiguous (i.e. spending a lot of time together).

***Foreign Divorces recognized*** if either spouse was ordinarily resident in that country for one year immediately preceding commencement of divorce proceedings *(DA s 22)*

**BARS TO DIVORCE** – rarely comes up

1. **Collusion** *(s 11(1)(a), 11(4))* – partying lying together about factors & falsifying evidence 🡪 absolute bar
2. **Lack of reasonable arrangements** for support of children of the marriage *(11(1)(b)* 🡪 stay divorce
3. In the case of adultery or cruelty claim *(s 11(1)(c))* 🡪 not an immediate bar to divorce, J decides
	1. **Condonation** – they cohabit after knowledge of adultery / clear agreement to non-monogamy
		1. note *s 11(3)*: resumption of cohabitation to try to reconcile does not = condonation
	2. **Connivance** - a spouse encourages (even passively) their spouse to commit adultery / clear agreement to non-monogamy

**EFFECT OF DIVORCE**

* Effective 31 days after date of judgment *s 12(1)* unless special circs *12(2)* or appeal *12(3)*
* Has legal effect throughout Canada *s 13*
* Dissolves marriage *s 14*

**DUTIES OF LEGAL ADVISERS AND JUDGES**

***s.9:*** duty of lawyer to (1) **draw to attention of the spouse provisions of *DA* that have as their object the reconciliation of spouses**, and (2) to discuss the possibility of reconciliation, and to inform the spouse of marriage counselling or guidance facilities, unless circumstances of case are of such a nature that it would clearly not be appropriate to do so.

***s.10:*** duty of court to satisfy itself that there is no possibility of reconciliation (unless circumstances of case are of such a nature that it would clearly not be appropriate to do so) before considering the evidence. Otherwise, must adjourn for 14 days. Evidence of any admission or communication made in course of attempting to achieve reconciliation is not admissible in legal proceedings.

**LEGAL AID**

* **State removal of a child from parental custody** constitutes a substantial interference with the parent’s s 7 rights (psychological integrity), and the principles of fundamental justice require that **judicial discretion to order state funded counsel be preserved**. Effective legal representation is required to assure adherence to the “BI of the child” principle. Judicial discretion is tightly structured by consideration of 3 factors: (1) seriousness of the interests at stake; (2) complexity of the proceedings; (3) capacities of the parent. *(JG v New Brunswick [1999] SCR)*
* *JG* duty to provide state funded representation **only applies where the state is the party seeking to interfere** with the parent’s custody (not priv custody disputes) *(Miltenberger; Mills; NB v RW 2004 NBCA)*
* BC cuts to legal aid for family law
* LSS: EMPHASIS ON THE FOLLOWING FOR LEGAL REPRESENTATION: **immediate court order needed for safety; serious denial of access; threat of permanent removal of child from province**

**ALTERNATIVE DISPUTE RESOLUTION**

Major initiative in BC to move away from adversarial procedures. Only 2-5% of family law disputes go to trial. Majority family law cases settle out of court:

1. **Direct Negotiation**
2. **Lawyer-assisted Negotiation**
3. **Mediation**
	1. ***s.9:*** duty of lawyer to (1) **draw to attention of the spouse provisions of *DA* that have as their object the reconciliation of spouses**, and (2) to discuss the possibility of reconciliation, and to inform the spouse of marriage counselling or guidance facilities, unless circumstances of case are of such a nature that it would clearly not be appropriate to do so.
	2. Mediators are not decision-makers – attempt to help parties reach consensual agreement
	3. Mediation does not preclude later litigation
	4. Full disclosure and confidentiality are required – nothing said in mediation can be used later in trial
	5. ADVANTAGES: lower cost; less adversarial; ownership of agreement; avoid stress of court
	6. Argument that it should never be used where there is abuse or serious power imbalance. Victimized spouse is more vulnerable to manipulation and will easily compromise more than they should.
4. **Collaborative Family Law** (what makes it different? Vol 2: p 20)
	1. 4 way process of negotiation: 2 clients and 2 lawyers – work together with sole goal of settlement
		1. Each lawyer’s retainer specifies he/she may not represent the client if the matter goes to court – incentive to reach agreement
		2. Sometimes divorce coaches or financial advisers are also part of the team
		3. Litigation is not the best way to deal with parenting disputes – emotional.
	2. ADVANTAGES: Much cheaper than regular family law; Interest-based method of advocacy
	3. PROBLEMS: Power disparities; not enough focus on substantive so allowing women to suffer afterwards; many women lack financial resources to hire a lawyer; and criticisms of mediation.
5. **Judicial Case Conferences**
	1. JCC = informal session with a Master or Judge, disputing parties and legal representatives
	2. Normally a JCC must be held before a BC court will hear a contested application *(BCSC Family Rules 7-1(2))*
		1. Exceptions: The following applications ay be brought before a JCC: *Rule 7-1(3)*
			1. Applic for declaration under FRA *s 57* that there is no reas prospect of reconciliation
			2. Application under *s 67* of FRA restraining the disposition of assets
			3. Consent order
			4. Application without notice
			5. Application to change a final order
		2. Court may relieve party from requirement of JCC if: *Rule 7-1(4)*
			1. Premature to require parties to attend JCC
			2. Impracticable or unfair to require party to comply
			3. Application is urgent
			4. Delaying application or requiring JCC is or might be dangerous to the health or safety of any person
			5. Court considers it appropriate that the party be relieved from JCC requirement
	3. GOALS: Streamlining costs and time by identifying & narrowing issues + encouraging settlement

**WHITE PAPER SUGGESTIONS**

* New **statute** should encourage use of **ADR where appropriate**
* **Duty** on all family justice professionals to **screen for violence**
* **Duty** on all family justice professionals to provide people with information about non-court DR options (this already in *s 9)*
	+ Lawyers must file certificate confirming discussion about non-court based process has occurred
* Parenting coordinators can mediate or determine a dispute (extra power to do so before it goes back to court. Quite controversial)
* Arbitration Act should say: In case of conflict, family law prevails (over religious law, secular law prevails)
* Encourage agreements unless unfair (or not in child’s BI)
	+ (The courts have been more likely to uphold agreements that deal with economic issues than agreements that deal with children)

Order of Analysis for Divorce/Separation

1. Custody & Access Issues
2. Marital Property
3. Child Support
4. Spousal Support (if appropriate – sometimes marital property division is sufficient to resolve econ. issues)

Custody & Access

Shared jurisdiction:

* When corollary to divorce (must have filed) – federal – *DA ss 16, 17 🡪* BCSC
* When separating / no divorce – provincial – *FRA Parts 2, 3, 4 🡪* BCSC/Provincial Court

Neither ***DA*** nor ***FRA*** are very different - likely to produce exact same results - both use BI test as sole criteria for decision-making

**LEGISLATIVE FRAMEWORK**

**Custody, Access, Guardianship**

* **Custody / Joint Custody:** *DA s 2; 16(4); FRA s 35(1)*
	+ Orders can be made for sole or joint *legal* custody (very common: ability to participate in decision making for child – education, healthcare, religion) or sole or joint *physical* custody (shared care)
	+ To ‘one or more persons’ (*DA 16(4); FRA s 35(1))*
	+ Usually includes having guardianship plus the right to physical care and control of the child
	+ **Access:** Right to spend time with the child
	+ ***DA, s.16(5):*** Access includes the right to make inquiries and to be given info as to the health, education and welfare of the child (court can order custodial parent to give notice of change of address, *DA s 16(7))*
	+ ***FRA*** ***s.21***: access includes visitation.
	+ **Guardianship:** right to direct upbringing of the child – can be sole or joint
	+ only granted under the *FRA*
	+ Courts don’t like granting guardianship b/c no one knows what it means
	+ having custody includes guardianship rights, but not vice versa
	+ going to be abolished under new ***FRA***
	+ **Joint Guardianship** normally means each parent has full and active role in providing sound moral, social, economic and educational environment for the children, and they should consult each other in planning religious upbringing, education, athletics, recreation, etc. **Not really different from joint legal custody** – some cases suggest there is but then definition looks very similar to legal custody *(Lennox [1990] BCCA)*

**WHO CAN APPLY FOR CUSTODY OR ACCESS – anybody!**

***DA S 16(1)*:** Either or both spouses **or any other person** may seek custody or access

***DA S 16(3)*:** A person other than a spouse must seek leave of the court

***FRA S 35(1)*:** Court may order that **one or more persons** may exercise custody or have access

***FRA S 35(1.1)*:** “persons” includes **parents, grandparents, other relatives of the child and persons who are not relatives of the child**

**WHO HAS GUARDIANSHIP OR CUSTODY IN DIFFERENT CIRCUMSTANCES**

**Guardianship:** Unless tribunal of competent jurisdiction determines otherwise… *(FRA s 27)*

* As long as they are living together, the mother and father are joint guardians *(1)*
* If living separate and apart, the one who usually has care and control of the child is sole guardian *((2), (3))*
* If divorced, judicial separation, or marriage null and void, parent with custody is sole guardian *(4)* – relationship w *DA*
* Parents can make an **agreement** determining sole or joint guardianship *(s 28(1))*
* **Power of court to override agreement** *(28(2))*

**Custody:** *(FRA s 34)*

* If father and mother live together, have custody jointly
* If they live separate and apart, person with whom child usually resides
* If person has custody rights under a court order, that person
* If custody under written agreement, that person
* **Power of court to override custody agreement** *(FRA s 34(2)(a))*
* Hierarchy: court order 🡪 agreement 🡪 person with whom child usually resides 🡪 person who usually has day to day personal care of the child *(FRA s 34(2))*

**HISTORY**

The focus on children is new

* **Early 1800s:** **paternal rights** to guardianship over children
* **Early 1900s: rights of children**, propensity to mothers in certain circs, if they had been well-behaved wives, etc.
* **Mid 1900s: tender years doctrine** 🡪 child under 7 went to mom; over 7 to dad 🡪 any legal decision-making done by dad. Assuming nobody had misbehaved as spouse, etc.
* **1940s/50s**: **welfare of child** seen as paramount 🡪 no fast & hard rules about who should get custody 🡪 no legislation on issue 🡪 rules unpredictable
* **1968 first Cdn DA:** Courts can look at **conduct**, condition, means, etc. 1975 SCC in *Talsky* – ok to deprive bother of child if she was misbehaving (still in punitive mode)
* **1970s/80s**: w/ skyrocketing divorce rates, issue of child custody becomes more pertinent
* **1985 new DA: BI of child is only consideration** (can no longer look at conduct of parents) – no joint custody presumption, but maximum contact provision *s 16(10)*
* **early 1990s**: **gender neutral language in legislation** (words ‘mother’ ‘father’ removed & replaced w/ parents) 🡪 mothers & fathers should have equal rights to custody *(still archaic language in FRA*)
* Current issues: father’s rights groups powerful force; women’s groups concerned that spousal violence not taken into account when shared parenting suggested, still using language of custody & access
* **2011**: New *Family Relations Act*

**STATISTICS**

**Increase in JC awards. Major decrease of sole custody awards to mothers. Slight decrease of sole custody to fathers.**

Many of the sole custody awards to mothers were by consent – stats are not only judge-made decisions:

**1991**: Mothers awarded sole custody in 73.6% of cases; Fathers in 11.8%: Joint custody in 14.2%

🡪**2004:** Mothers 45%; Fathers 8.3%. JC 46%.

**BI OF THE CHILD PRINCIPLE**

Both under *DA* and *FRA*, **JJs should take into account only the BI OF THE CHILD!!**

* ***DA s.16(8):*** in making a custody or access order, court shall take into consideration **only the best interests of the child** of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
* ***FRA s.24(1)****:* when making, varying or rescinding a custody, access or guardianship order, a court must give **paramount consideration to the best interests of the child** and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child’s needs and circumstances: (not limited to these factors)
1. the **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. **capacity** of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

APPLYING IT: “courts must attempt to balance such consideration as the **age, physical and emotional constitution and psychology** of both the child and his or her parents and the particular **milieu** in which the child will live” *Young*

**1. The FRA provides factors** (above)

**Views of the child:** *Windle v Windle* – Boy did not want to see his father and J said he shouldn’t be forced. Obtained views via expert report. J doesn’t have to follow recc but often will take guidance from expert recommendation / report

**2. Maximum Contact Rule & Friendly Parent Rule**

* ***s.16(10):*** Court must give effect to the principle that a child should have as much contact with each spouse as is consistent with the best interests principle **(maximum contact rule)**, and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact **(friendly parent rule)**
* ***FRA*** **No friendly parent rule – BUT JUDGES MORE OR LESS READ IN, SO RELEVANT UNDER FRA**
* Absent direct harm, best interests of the child are met by **maximum contact & access w/ both parents**. A custodial parent cannot arbitrarily dictate limitations on access - they can only limit access if it is in the BI of the child (*Young*).

***Young v. Young*, [1993] S.C.J. 112 – maximum contact in BI of child**

**Note:** Leading case in interpreting BI of child. First real statement by SCC on custody & access.

**Facts:** Mom had sole custody by consent, dad had access. Mom didn't want dad imposing JW views on kids (i.e. taking them door-to-door to proselytize). Children were interviewed & said they didn't like dad's religious instructions.

**Issue:** Can a custodial parent limit what goes on during access visits? Religious freedom?

**Holding (4-3):** Dad wins.

**Analysis:**

* The only criterion for limiting access is the best interests of the child.
* Significant weight must be given to **"maximum contact"** rule (***s.16(10)***) that a child of the marriage have as much contact with each spouse as is consistent with his or her best interests.
* Limitations on access are only permissible if they are in the BI of the child.
* When determining BI, **risk of harm is not a condition precedent** to limiting access.
	+ But in some cases, harm or risk of harm may be important to consider before limitations on what a parent may say or do during access visits are imposed. Argue harm anyways!
* **Scope of access**: the right of a custodial parent to determine the religious upbringing of child cannot interfere with the right of an access parent to share his/her religious beliefs with child.
	+ In other words, custodial parents can’t impose restrictions on access parents.

**Dissent (LHD):** doesn't make sense that BI of child would require unlimited rights during access 🡪 father was interfering w/ custody rights here (that is, custody right to make decisions re religion). Custodial parent has unfettered rights to limit access.

***TS v AVT [2008] ABQB - friendly parent rule can win out over violence to spouse***

**Facts:** Mother had been sexually assaulted by H at least five times. Brought up. Meanwhile, father said he was willing to make sure child was not alienated from mother.

**Court:** saw mother’s allegations against father as spurious and father as the “friendly parent” for being more accommodating. Ordered primary residence to father.

**3. Status quo – who are they currently residing with? –** court prefers to maintain status quo *(MMG)*

**4. Questions of access**

**5. Questions of location**

**6. Is one parent wanting to move? / maintain the status quo**

***Sutherland v Sutherland (BC)***

Facts: Mother left relationship and became a lesbian, plus she **wanted to move to Vancouver**. Also wanted custody which would have meant moving with the children.

Holding: She lost custody

**Ratio:** J seemed to see her as putting her own interests first, and pursuing her own adventure in Vancouver. Kids shouldn’t necessarily be pursuing that adventure with her. They were happy in their house and life in Kamloops.

***MMG v GWS [2006] SKQB – custody to wife would involve children moving to city – maintain status quo***

Facts: Wife leaves father for a lesbian relationship. Giving wife custody would involve children moving to city.

Holding: Joint legal custody, with residence to father (who appeared to be “friendly parent”) and frequent access to mother.

Reasoning: 1. Custody to wife would involve moving children to a city – maintain the *status quo*. 2. Allegations of bad parenting and prone to exaggeration. 3. Finds the father did not promote negative feelings about mother to younger children though he could have done so.

**7. Does it appear parent has tried to place the interests of the child foremost? Will they be sufficiently attentive to the care and interests of the child?**

* ***Van de Perre v. Edwards, [2001] SCR (below) –*** Don’t give custody based on whether their PARTNER is a good parent, but whether THEY are!

***Sutherland v Sutherland (BC) – lost custody b/c wanted to move to Vancouver – putting own interests first***

Facts: Mother left relationship and became a lesbian, plus she **wanted to move to Vancouver**. Also wanted custody which would have meant moving with the children.

Holding: She lost custody

**Ratio:** J seemed to see her as putting her own interests first, and pursuing her own adventure in Vancouver. Kids shouldn’t necessarily be pursuing that adventure with her. They were happy in their house and life in Kamloops.

**8. Race**

* + - Neither DA or FRA require courts to consider **race** as a factor in the BI test (contrary to *Adoption Act,* esp for FN)
	+ Race can be a factor (not a critical factor) in determining the BI of the child, depending on the context. **Other factors are more directly related to the primary needs and must be considered in priority**. *Van de Perre*
	+ (1) Which parent will **facilitate contact** and the development of racial identity in a manner that avoids conflict, discord and disharmony? *Van de Perre [2001] SCR –* ***MORE IMPORTANT IS THE FRIENDLY PARENT RULE – The main issue is which parent will facilitate contact and development of racial identity in a manner that avoids conflict, discord and disharmony…***
	+ (2) Evidence of race relations in the **relevant communities** may be important to determine the context in which the child will function. *Van de Perre [2001] SCR* ***Racial identity is but one factor – the relevance of this factor depends on the context***

***Van de Perre v. Edwards, [2001] S.C.J. No. 60 – race is just one factor among others – not critical***

**Note:** The only SCC case to deal with custody & access. Sadly, they didn't say anything useful.

**Facts:** Rich black married basketball player has affair w/ poor white uneducated groupie who gets pregnant. Kid is born into mom's care. Mom seeks permanent custody order & child support order when kid is 3 months old. Dad files for custody. At trial, dad claims that wife is supportive & will take care of kid. At CA, wife becomes party to litigation.

**BCSC:** Mom gets custody on basis that she is primary caregiver and had consistent family support; dad wouldn't have parented kid at all; dad's wife had never met kid. Doesn't mention race.

**BCCA:** Dad gets custody, based on stable family unit that he can provide & his supportive wife. Race should never be a predominant consideration, though it is important to ask whether the non-minority parent is capable of appreciating the child's racial and cultural heritage, but it is not a significant part of the Court's decision-making.

**SCC:** Grants custody to mom. Doesn't discuss race; focuses on narrow scope of appellate review in custodial cases.

**Analysis:**

* BCCA cannot just reassess the facts and come to different decision. BCCA can only overturn BCSC decision if it shows that the judge did not adequately consider the facts before them.
* SCC finds that Valerie Edwards was not a proper party in the case.
* Court cannot give custody to a father simply because his new or existing wife is a good mother.
* Despite trial court's negative description of mom's employment & economic history, trial judge also noted that VDP had strong parenting skills. She had been his sole caregiver since birth, custody was not transferred after the BCCA decision because it had been appealed, and it was in kid's BI to remain in her care.
* **In** **relation to race,** the SCC states:
	+ There are key tools that a biracial child needs to foster their racial identity & racial pride such as the need to develop a means to deal with racism encountered, and to develop a positive racial identity.
	+ But **race is only ONE factor that should be considered in determining a child's BI**
	+ Explicitly rejects argument that if race was raised in a case, that it should always be a critical factor.
	+ Simply b/c biracial child is involved does not mean that race automatically becomes critical factor

**9. Violence – past Conduct**

* + - * **Conduct of parent irrelevant in both except to the extent…**
* ***DA s.16(9)****:* irrelevant unless conduct is relevant to **ability of that person to act as a parent** of a child.
* ***FRA s.24(3),(4):*** the court must consider the conduct only to the extent that it **affects the BI of the child**
* Violence not part of legislated BI factors in DA or FRA
* Should be seen in context of **maximum contact** rule *(Carlson* – access despite abuse)
* **Physical violence relevant to custody** but will rarely result in a “no access” order *(Carlson)*
* **Unproven allegations of abuse** may be seen as being **“unfriendly”** and the accused will be the “friendly parent” who gets access ***TS v AVT [2008] ABQB***

***Carlson v. Carlson*, [1991] B.C.J. No. 3130 (C.A.) – abuse factor in custody but not important for access**

**Facts:** Violent marriage; dad abuses mom & kids; dad is alcoholic & druggie. Dad admits all violence to family counselor. Children have severe psych problems. Post-separation, mom given custody by consent w/ dad having liberal access. At trial, dad is awarded custody largely based on family counselor report which fails to mention abuse.

**Holding (CA):** Trial decision reversed as serious errors of fact were made.

* Mom given custody - dad given unsupervised access to kids
* Mother shouldn't have been criticized for raising sexual abuse - if she hadn't raised it, she could have been penalized for not protecting her children
* Family counselor report was deeply flawed b/c it failed to consider the relevance of the abuse
* Clearly not in kids' BI to have abusive dad as custodial parent - despite fact that kids were currently living w/ dad

***TS v AVT [2008] ABQB – friendly parent rule can win out over violence to spouse***

**Facts:** Mother had been sexually assaulted by H at least five times. Brought up. Meanwhile, father said he was willing to make sure child was not alienated from mother.

**Court:** saw mother’s allegations against father as spurious and father as the “friendly parent” for being more accommodating. Ordered primary residence to father.

**10. Lifestyle - working mothers**

* Working arrangements
* Use of babysitter v grandmother/grandfather available
* **An aggressive, career-oriented lifestyle can cause a woman to lose custody *(Tyabji v Sandana)***

***Tyabji v. Sandana* (1994), 2 R.F.L. (4th) 265 (B.C.S.C.)**

**Issue:** What is the effect of an ambitious mother on her ability to gain custody of a child?

**Facts:** Judy Tyabji was a provincial MLA who left husband for a fellow politician. Mom granted interim custody of 3 kids w/ liberal access for dad. Mom was primary caregiver during marriage. Dad sought custody.

**Holding:** Dad granted custody, on grounds that mom's aggressive, career-oriented lifestyle made her less attractive as parent than dad, and that kids' needs were being sidetracked by mom's career. Conduct (including adultery / responsibility for breaking up the marriage) is not necessarily a test for awarding custody, but conduct is relevant if it is shown that one parent pursued - and will continue to pursue - his or her self-interest to the detriment of the children.

**11. Lifestyle - Sexual preference – lesbian custody**

General rule: A Judge is not permitted to deny custody/access to a parent based on their sexuality unless it can be shown to be contrary to the child’s BI *(FRA)* or the parent’s ability to parent *(DA)*. But parents who are **less discreet** in their homosexual relationships may have **less success** obtaining custody. ***(N v N [1992] BCSC)***

***N v N [1992] BCSC – requirement of discretion… not as important anymore?***

Facts: Mother of 4 children separated from father and entered relationship with a woman.

Holding: Custody awarded to mom. Strong suggestion she succeeds only b/c discreet in homosexual relationship, partner not previously promiscuous, and no evidence the children were affected by their mother’s lesbianism.

**Ratio:** Moms and dads who are less **discreet** in their homosexual relationships may have less success in custody disputes

***Sutherland v Sutherland (BC) – focus not on lesbianism but putting own interests first by moving***

Facts: Mother left relationship and became a lesbian, plus she wanted to move to Vancouver. Also wanted custody which would have meant moving with the children.

Holding: She lost custody

**Ratio:** J seemed to see her as putting her own interests first, and pursuing her own adventure in Vancouver. Kids shouldn’t necessarily be pursuing that adventure with her. They were happy in their house and life in Kamloops.

***JSB v DLS [2004] ONSC – race and sexuality are not critical factors.***

Facts: Mohawk parents. Father, drinking problem, more in touch with FN community. Mother leaves for long-term lesbian relationship, less connected with community. Original order gave joint physical custody which was difficult for the children.

Holding: Original order for joint physical custody disruptive for kids so changed to maternal custody, paternal access

Reasoning**:** Race and sexuality are only factors to be considered in determining BI, not decisive, cites *Van de Perre.* Past conduct not relevant unless impact on ability to parent. Decisive factor? (father’s drinking?)

***MMG v GWS [2006] SKQB – focus on “friendly parent” rule and maintaining “status quo”***

Facts: Wife leaves father for a lesbian relationship. Giving wife custody would involve children moving to city.

Holding: Joint legal custody, with residence to father (who appeared to be “friendly parent”) and frequent access to mother.

Reasoning: 1. Custody to wife would involve moving children to a city – maintain the *status quo*. 2. Allegations of bad parenting and prone to exaggeration. 3. Finds the father did not promote negative feelings about mother to younger children though he could have done so.

***JT v SCT [2008] ONSC – focus on maximum contact***

Facts: Lesbian mothers separate. Biological mother does not believe they can successfully parent together

Holding: Court orders joint legal and physical custody; neither parent to move out of region

Reasoning: BI of child test focuses on maximum contact

**JOINT CUSTODY – is the rising trend in Canada** (Vol 2: p 73)

*DA 16(4), FRA s 35(1) – orders to ‘one or more persons’*

JC almost always means joint *legal* custody - parents do not often have joint *physical* custody – normally mothers get kids.

**Often JC is presumed to be the optimal arrangement for meeting the BI of the children**. Courts have not been clear in determining what type of evidence is required. Some appellate courts emphasize that maximum contact is in the BI of the child, and others exercise caution, finding that JC can aggravate conflict.

**No presumption of JC** in DA or FRA. *(Robinson v Filyk)*

* No longer law - JC requires parties be totally in agreement and do not need assistance of the courts *(Stewart (1994))*
	+ PROS: Avoids putting children in conflict situations which are harmful to them
	+ CONS: One parent can simply refuse to communicate to veto JC
* **No presumptions should be used to decide custody** *(Robinson v Filyk [1996] BCCA)* – still good law, undoes *Stewart*
	+ No presumption of JC
	+ **no presumption that JC improper unless parties in agreement**
* Court found JC not in BI of children where **parents’ inability to communicate sensibly and to cooperate in caring for kids** father had **anger issues, conflict real and continuing** *(Javid v Kurytnik [2006] BCCA)*
* Court found JC / JG not appropriate as applicant had **assaulted** plaintiff in past, had obvious **animosity** towards her, **blamed** her for his problems and had a demonstrated **lack of reliability** *(Narayan v Narayan [2006] BCCA)*
* Court found JC not appropriate – there was **conflict and inequality between the parties** *(JSB v DLS)*
* There must be evidence that **the parents are able to communicate effectively** (especially where the child is extremely young and hardly able to communicate their own needs) *(Kaplanis v Kaplanis [2005] ONCA)*
* Joint custody or joint guardianship not appropriate b/c the **parties cannot communicate without conflict**. *(Windle v Windle [2010] BCSC)*

***JSB v DLS [2004] ONSC – race and sexuality are not critical factors.***

Facts: Mohawk parents. Father, drinking problem, more in touch with FN community. Mother leaves for long-term lesbian relationship, less connected with community. Original order gave joint physical custody which was difficult for the children.

Holding: Original order for joint physical custody disruptive for kids so changed to maternal custody, paternal access

Reasoning**: Joint custody inappropriate b/c 1. Subject to peace order; 2. Exchanges have had to be at a public location 3. INEQUALITY BETWEEN THE PARTIES**

**No primary custody presumption in Canada:** that the parent who was primary caregiver of the children while a relationship was intact would be presumed to be the parent who should receive custody in contest cases, unless proven ‘unfit’.

**SOCIAL SCIENCE RESEARCH** (against the maximum contact rule)

* No clear evidence that having greater contact with non-custodial parent benefits a child *(M. Shaffer)*
* It is the type and quality of parent rather than time spent with the parent that is key *(M. Shaffer)*
* Where there is a high conflict situation between parents, that does produce a risk for children if they are exposed to constant arguing / conflict *(M. Shaffer)*
* Children are most concerned with QUALITY RATHER THAN QUANTITY of time and flexibility of schedules *(Carol Smart)*
* One size does not it all! There should not be presumptions…

Some of the key factors in a child doing well after parents separate:

* + 1. Good relationship with well-adjusted (subjective) custodial parent
		2. DIMINUTION OF CONFLICT and reasonable cooperation between parents
		3. Whether or not child comes to divorce with pre-existing psychological difficulties

**ACCESS**

**Statutory Definitions of "Access"**

* ***DA, s.16(5):*** defined in French version as “the right to visit”. Unless court orders otherwise, access parent “has the right to make enquiries, and to be given information, as to the health, education and welfare of the child.”
* ***DA, s.16(7):*** Court can order custodial parent to give notice of change of address
* ***FRA s 21*** Access includes visitation.

*DA ss 16(5), (10), 17(5)*

*CC ss 280-6*

*FRA ss 42-55*

**Access is the key focus of *DA***

* maximum contact = maximum access
* **Custodial parent cannot arbitrarily revoke access** 🡪 harm is not an overriding factor, but proving some sort of **harm is important in order to revoke access** (***Young***)
* **Access is rarely denied** (***Carlson – despite abuse of kids***)
* But access & handovers can be supervised, and may occur in a public place

**The child owns the right to access.** This right cannot be bargained away by the mother (***Johnston-Steeves v. Lee***). But the courts have interpreted the "child's right to access" to mean **access can be ordered even when the child doesn't actually want to see their access parent** (***Fullerton*** *– witnessed abuse****)*** Access not terminated despite children’s wishes to do so ***(Al-Maghazachi Dueck*** *– unproven sexual assault allegations*). Maximum contact means maximum access, even in the event of family violence ***(Carlson)*.** Unsupervised access after acquittal in relation to assault charges *(****Baggs v Jesso (2007****).*

**On the other hand, courts may take views of the child into consideration** ***(Windle*** *– 14 y.o. boy, expert report ordered under FRA s 15, allowed to decide for himself whether to see dad on visits).* Access terminated **b/c child screamed constantly when in presence of dad** (allegations of sexual abuse and evidence of physical abuse) ***H(E) v G(T****).*

* **The ultimate and only criterion for limiting access is the BI of the child *Young v Young [1993] SCR***
	+ Significant weight to *DA s 16(10)* – maximum contact rule
	+ In applying BI of child test, risk of harm is not a condition precedent to limiting access but may be important to consider before limitations are imposed
* **Scope of access: Custodial parent** (with right to determine religious upbringing of child) **cannot interfere with the right of an access parent to share his/her religious beliefs with the child *Young v Young [1993] SCR***
* **Custodial parents can’t impose restrictions on religious parents *Young v Young [1993] SCR***

**Supervision:** Where court feels there may be a risk to child by access, there may be conditions such as supervision. Seen as a TEMPORARY SOLUTION and eventually parent should see the child on their own. Yet, some cases seem to be sent to supervised access where eventual move to unsupervised access is not necessarily likely to happen.

***Johnston-Steeves v. Lee***, [1997] A.J. No 512 (QB)

**Issue:** Who owns the right to access? Is there a nexus b/t child support payments & access?

**Facts:** Dad agreed via K to provide sperm & child support, but not interfere w/ health & welfare decisions of kid. Dad assumed he'd get access; mom didn't think so. Access dispute arises when kid is 10 mths old. Mom sees dad as biological dad, not social dad - and says bio dads (absent social relationship) don't get access. Kid is 4 by trial; hasn't had contact w/ dad since baby; mom says he has plenty of male role models. Judge brings in expert witness who says that dads are good for children (esp. boys); limited relationship is better than none; good relationship b/t boy & dad improves intelligence & drive, empathy, good relationship w/ peers, etc.

**Holding:** Dad gets access that grows incrementally.

**Analysis:**

* K can never be binding b/c child's BI is paramount test. But K can be used as evidence of parties' intentions.
* Based on his biological relationship, Dr. Lee is a father and parent.
* Being bio parent doesn't automatically give you access - but access is always a determination of what's in child's BI
* (1) Expert evidence: dads are good, (2) dad had contributed financially, (3) child was conceived thru intercourse and not DI - given these 3 factors, Court determines that it is in a child's BI to have access with his father.
* Right of access belongs to the child, and it is not up to his mother to bargain access away.
* Court tells the mom off - it was selfish of her to try to create a family w/o a father, and that her concern was with her own stability, and not about her son. The court also holds that no man would ever contribute financially without the expectation of a reward - they disbelieve that Dr. Lee would have entered into a K without expecting any access.

**Ratio: Access is the right of the child and not his mother’s right to bargain away.**

***Fullerton v Fullerton***(1994), 7 RFL (4th) 272 (N.B.Q.B.)

**Facts:** Couple separates after violent marriage; **dad continues to beat wife during access handovers**. Dad is charged criminally. Mom seeks to vary access - and denies access at the same time [charged with contempt of court]. Mom says that kids don't benefit from access; get nightmares from seeing abuse; don't want to attend access visits. Kids have warped sense of appropriate, healthy relationships.

**Holding:** Dad keeps access rights. Access handovers are monitored. Dad is of no danger to the kids. **Mom held in contempt for failing to allow access,** but no costs awarded against her.

**Analysis:**

* Court takes into account the violence
* But they return to the argument that access is a child's right
* **In order to vary an access order**, you need to show a "**change in circumstance**" - court finds that dad's violence is a valid change in circumstance, which merits varying the order.
* But complete denial of access to dad is contrary to kids' right to access, b/c of "maximum contact" rule (***Young***)
* Court is not willing to completely deny access to dad.

**Ratio: Child’s right to access means that access may be ordered even when the children themselves do not wish to exercise it.**

**Ratio:** "A child's right to access" has been interpreted by the courts as a de facto right to access for an access parent.

**When would the courts ever deny access???**

* If the kids are in danger of harm by the access parent
* If supervised handovers not enough to offset the risk of harm

***Al-Maghazachi v Dueck***[1995], 17 RFL (4th) 732

**Facts:** Unable to prove sex abuse allegations. Kids don’t want to see dad. Court held that "it's their right" & continues access.

***H(E) v G(T****)* (1995), 18 RFL (4th) 21

**Facts:** 7 yo child alleges sexual abuse against dad; examined by docs who say she has def been physically abused (dad admits to severe spanking, causing bruising); possible sexual abuse. Court not willing to say sexual abuse had occurred.

**Holding:** Court terminates access b/c child screams constantly when in the presence of her dad.

***Young v Young [1993] SCR – marked a shift in treatment of access by SCC***

Facts: Father very religious. Trying to share with children. Daughters were registering discontent with engaging heavily in religious activities. Before got to SCC, father had agreed to cut back on activities he brought the kids with him to.

***Windle v Windle [2010] BCSC***

Facts: Interim order in 2002 giving joint custody and guardianship of 3 sons – supervised then specified access. Status quo from 2009 order: primary residence with mother. Specified access, including telephone access and taping of calls. Oldest son Zachary (14) not required to visit father without son’s agreement – he refused and a court order supported his refusal. *Section 15 FRA* expert witness report ordered (Family Justice Counsellor – report a Vol 2: pp 88-89)

Held: Sole custody and primary residence to mother. Joint custody or joint guardianship not appropriate b/c the parties cannot communicate without conflict. Father may request visits – all with consent of mother for younger sons. Zachary can decide himself.

**DENIED OR FRUSTRATED ACCESS**

**Court's Options when custodial parent denies access**:

* Find denying parent in **contempt**, and order one of the following penalties:
	+ **imprisonment,** *(B(L) v D(R) [1998] Ont SC)*
	+ **fine** *(Cooper [2004] Ont SC)*
	+ **cancellation of driver’s license.**
* **Varying of custody order** to a joint custody order if they find a “change of circumstance”, or
* **Cancellation of spousal support** *(Ungerer)*
	+ *DA s 17(6)* does not forbid court considering post-separation conduct 🡪 TEST: Where “the misconduct is of such a morally repugnant nature as would cause right thinking persons to say that the spouse is no longer entitled to the support of her former husband, or to the assistance of the court in compelling the husband to pay”, misconduct can be a reason to terminate spousal support ***(Ungerer BCCA)***

**Primary Custody Parent turns child against Access Parent 🡪 may lose primary custody *(JKL v NCS [2008] Ont SCJ)***

Facts: Father had primary custody, turned boy against mother and all women in general. Accused mother of assaulting son.

Held: Awarded primary custody to the mother and sent the boy for “deprogramming”

**Failure to exercise access**

CBA 1998: fare more access parents voluntarily curtail contact with their children than custodial parents deny access.

-We wouldn’t want to enforce access orders b/c would be exercised reluctantly and not in BI of child.

***Ungerer v Ungerer*** [1998] BCJ No 698 (CA)

**Facts:** Application by dad to have spousal & child support payments reduced b/c ex-wife is frustrating all attempts for him to exercise access. Previous contempt orders against wife had had no effect, nor had a 21 day jail term.

**Holding:** Court finds that the wife's actions had warped the children so much that they didn't want access. Dad gets an order in his favour granting access. Spousal support is discontinued. Child support is continued.

**Analysis:**

* ***DA, s.17(6):*** does not prohibit Court from considering conduct “outside of the marriage” and after its termination.
	+ So while you cannot consider conduct *during the marriage* in determining custody & access, you can consider post-separation conduct.
* **Test** [where misconduct is alleged as reason to terminate post divorce spousal support]: whether misconduct is of such a morally repugnant nature as would cause right-thinking persons to say that spouse is no longer entitled to the support of her former husband, or to the assistance of the ct in compelling the husband to pay.
* Mom's actions sufficiently egregious to disallow cont'd spousal support. Turning kids against dad was reprehensible.

**Ratio: *DA, s.17(6)*** [can't consider conduct in making variation order] does not prohibit the court from considering post-separation conduct in determining spousal support, custody & access

**THIRD PARTY ACCESS**

* ***FRA, s.35*** & ***DA, ss.16(1) & 16(4):*** permit an order of access in favour of a third party.
	+ ***FRA, s35***: Court may order one or more "persons" to have custody/access [including parents, grandparents, relatives, and non-relatives]
	+ ***DA, ss.16(1)***: Upon application by…­any other person [other than spouses], Court can order custody/access
	+ ***DA, ss.16(4):*** Court may order joint custody/access
* ***Bridgewater v Lee*****(1998):** where access order would disrupt kid's nuclear family (in this case, parents still together), Courts must exercise extreme caution in evaluating effects of access on kid's BI. Grandma's access app denied.
* ***Chapman v Chapman*****(2001):** not in BI of children to be forced to visit their grandmother when they did not have a positive relationship with her
* ***Parsons v Parsons*****(2002 Ont SC):** Court found that the mother stopped her kids from seeing their grandmother to force her parents to accept her new partner when she entered a homosexual relationship. She placed her own need for vindication ahead of her child’s relationship with grandparents. In BI of child to continue relationship with grandparents so access order was granted.
* ***GES v. DLC* (2005)**: man was neither kid's bio dad, nor ever in intimate relationship w/ mom; still granted access on grounds of BI of the child.

**VARIATION OF ORDERS** – different from an appeal. Arguing that since last order, circumstances have changed.

***DA S 17(1)*** – a court may make an order varying, rescinding or suspending, prospectively or retroactively (b) a custody order.

***DA S 17(5)*** – **Factors:** Court shall satisfy itself that there has been a **change in the condition, means, needs or other circumstances of the child** of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration the **best interests of the child** **as determined by reference to that change**

***DA S 17(5.1)*** – A former spouse’s **terminal illness or critical condition** shall be considered a change of circs of the child, and the court shall make a variation order in respect of access that is in the BI of the child.

***DA S 17(6)*** – Court not to take conduct into consideration

***DA S 17(9)*** – In making variation order, court shall give effect to the maximum contact principle and friendly parent rule

**RELOCATION / MOBILITY –** applying for change in custody under b/c the other parents is relocating ***DA, s.17(5)***

**Approaching a Relocation question – TEST: (*Gordon v. Goertz*)**

* 1. **Threshold test: Has there been a material change in the circumstances affecting the child?**
		+ Relocation is always a material change in circumstances (***Gordon***)
		+ If access parent doesn't exercise access rights, then relocation may not be a material change – cannot seek custody on basis that other parent is leaving if you don’t exercise your access rights
	2. **If you meet the threshold test, or if there is no custody/access order in place yet** (***Nunweiler***), then apply ***Gordon*** factors to determine **BI of the child:**
		+ Existing relationships b/t child and custodial parent
		+ Existing relationship b/t child and access parent
		+ Disruption to the child due to the moving and removal from family, school and community
		+ Disruption to child on a change of custody
		+ Views of the child
		+ Desirability of maximum contact w/ both parents
			- Courts favour maximum contact w/ both parents; loathe to separate children and parents
			- Might be an outlier case – some other cases show more flexibility: *Karpodonis [2006] BCCA* – mother forced to move to Texas for work but was effectively prohibited b/c father and extended family would lose contact.
		+ What is the relationship b/t the child and the extended community? [Grandparents, cultural groups, etc]
		+ Custodial parent’s reasons for moving only to be taken into account in exception cases where it is relevant o that parent’s ability to meet the child’s needs
			- In practice, reasons for moving taken into account a lot

\*If threshold test is not met, J cannot embark on fresh inquiry of BI of child.

**\* Practice note: If trying to relocate, helpful if willing to waive support order, or pay for other parent’s expenses to see child, or pay for child to go back and forth.**

Addition from Hamilton J at Externship Training: RELEVANCE OF REASON FOR MOVE

* Gordon v Goertz says reason for move not relevant
* Later cases say if reason for move is to disrupt… (?) … then relevant
* Stav v Stav (spelling?) (CA) says reason is NOT relevant – Sep 2012 SCC denied leave to appeal
* V Felvi v Felvi (spelling?) (CA) says reason IS relevant.
* [include all 3 of the above in a discussion of a mobility issue]

***Gordon v Goertz,* [1996] 2 SCJ No 52**

**Facts:** Application by access dad to prevent custodial mom from moving to Oz to pursue school. He applied for custody of kids, & for order restraining mom from moving from Saskatoon.

**Holding:** Court finds for mom & permits relocation. Dad is given access rights that can be exercised in either Canada or Oz.

**Analysis:** Parent that is applying for change in custody under ***DA, s.17(5)*** must meet threshold req't of a **material change in circumstances affecting the child.**

* **Relocating is *always* a material change in circumstances** but may **not** be material change **if access parent is not exercising access rights - cannot then intervene to prevent relocation**
* Court finds that threshold test has been met
* Court rejects ***McIvor*** test: Court will not show automatic deference to custodial parent.
* Court accepts ***Carter:*** finds that guiding test is best interests of the child
* Applying the factors to the case: SCC finds that TJ was correct in allowing the mom to relocate.
* While maximum contact is mandatory rule, it is not absolute.
* But TJ incorrect in holding that access could occur only in Oz. SCC holds that access can occur in both Oz & Canada

**Two part test** (per McLachlin J.):

1. **Threshold test to vary custody/access order:** Demonstrate **material change** in circs affecting child (***DA, s.17(5)***)
	1. It must be a material change:
		1. in conditions, means, needs or circumstances of the child - or in the ability to meet the conditions, needs or circumstances of the child,
		2. which materially affects the child, and
		3. which was either not foreseen or couldn't have been reasonably contemplated by TJ making initial order
	2. Shows that you can't seek to vary an order as an indirect appeal. You must actually show a material change.
	3. Only when threshold test is met that judge is entitled to embark on fresh inquiry of the child's best interests.
2. **Best interests analysis:** after threshold test has been met, judge must determine BI of child taking into consideration:
	* Existing custody relationship and relationship b/t child and custodial parent;
	* Existing access arrangement and relationship b/t child and access parent;
	* Desirability of maximizing contact b/t child and both parents;
	* Child's views
	* Custodial parent’s reason for moving only in exceptional case where it is relevant to that parent’s ability to meet the child’s needs; *[i.e. argue that you're moving to increase income to benefit kid; not just to repartner]*
	* Disruption to child of a change in custody; and
	* Disruption to child consequent on removal from family, schools and community.

**REMOVAL OF CHILDREN FROM JURISDICTION & PARENTAL CHILD ABDUCTION**

**Jurisdiction of BC Courts***: FRA Part 3*

* Generally under s 44, a BC court can exercise jurisdiction to make a custody or access order only if the child is *habitually resident* in BC, or a child is physically present and on the balance of convenience, it is appropriate;
* Or under s 45, if child is present and serious harm might otherwise come to the child (e.g. if returned to custodial parent or removed from BC)
* Under the **Hague Convention** on the *Civil Aspects of International Child Abduction*, the removal of a child to another country is wrongful if it breaches the right of custody under the law of the jurisdiction in which the child was *habitually* resident immediately before removal / retention, and those custody rights were actually being exercised.
* Idea is to return child to home jurisdiction and hear any custody disputes there
* Some narrow exceptions (e.g. grave risk of harm to child, to protect human rights) – *(*BC court took jurisdiction under s 5(3) where if they did not, mother might have been deported w/o very young children so in their BI, *Yassin v Loubani)*
* (see *FRA ss 5(3) – parens patriae jurisdiction, 47 – court may make interim orders were child wrongfully removed to or wrongfully retained in BC, 55 – Hague Convention has force of law in BC)*

**WHITE PAPER RECOMMENDATIONS**

* Replace ‘custody’ and ‘access’ with ‘guardianship’; very broad definition of rights and responsibilities
* Draft section 45: Subject to an agreement or court order respecting 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
* BI of the child to be defined in detail (the *only* consideration). Draft section 43 (paraphrased somewhat): *In determining what is in the BI of the child,*
	+ a) *The greatest possible protection of the child’s physical, psychological and emotional safety and security must be ensured; and*
	+ *b) All the child’s needs and circumstances, including*
		- *Health and emotional well-being*
		- *Views of the child unless inappropriate to consider*
		- *Nature and strength of child’s relationship with significant persons*
		- *Ability of each person to exercise his or her responsibilities adequately*
		- *History of care of the child*
		- *Child’s need for stability*
		- *Impact of any family violence*
			* *Directed towards child or another family member, on health, emotional well-being and safety and security of the child*
			* *On ability of perpetrator to care for and meet the needs of child*
			* *On appropriateness of arrangement requiring parents to cooperate*
		- *Any civil or criminal proceeding relevant to safety or well-being of child*
* S 44 gives guidance as to how to assess the impact of the family violence – how serious, recent, frequent, etc.

Matrimonial Property

Provincial jurisdiction under CA 1867 s 92(1) property & civil matters. ***FRA***governs. 🡪 BCSC

**MARRIED COUPLES *FRA Part 5, ss 1, 120.1***

We have a **deferred community property legislative regime** *(FRA part 5 & 6)*

* Sep property while married 🡪 proprietary interests vest upon marriage break-up
* Can contract out of the regime *(ss 56(3)(b) & 65, Hartshorne)*
* Can also contract *into* the regime *(s 120.1)*

**FAMILY ASSETS**

* + - 1. **Share in corp/int in trust** owned by a spouse if the corp or trust would be FA if owned by a spouse *58(3)(a)*
			2. **Property over which the spouse has sole or joint power** of appointment exercisable in favour of himself/herself, or disposed of by the spouse but over which he/she has sole or joint power to revoke the disposition or a power to use or dispose of the property, if the property would be a FA if owned by the spouse. *s 58(3)(b)*
			3. **Money of a spouse in a savings account** if the account is OUFP *s 58(3)(c)*
			4. A right under an **annuity or pension, home ownership or retirement savings plan** *s 58(3)(d)*

Must be determined in accordance with part 6 *(s 71)*

Pension division is confined to the **portion of the pension that accrued during marriage** *(65(3))*

**If that leads to unfairness**, court can deviate from part 6 *(s 75.1)*

Reapportion using some other asset *(ss 65, 66, 75.1)*

Divide the portion earned before marriage into shares fixed by court *(s 65(3)*

But unless s 65 requires it, ct order must leave the primary member of the plan with at least a 50% interest. *(s 75.1)*

**Permits agreement** that divides the pension in proportions different than Part 6 *(s 80)*

Must leave owning spouse with at least ½ the value of the pension or benefits *(s 80(1)(a)*

An agreement may provide that despite the ***Canada Pension Plan***, there be no division of unadjusted pensionable earnings under that Act. *(s 62)*

**RRSPS** are also pensions and are clearly divisible but they are not workplace pensions, and so you do **not exclude the value that had accrued prior to marriage**.

* + - 1. **Interest in a** **venture** to which the non-owning spouse has directly / indirectly contributed *s 58(3)(e)*
				1. Any investment in which there is an element of risk, and which has the potential for profit even though its primary function may be to serve some other purpose. **Does not include** passive deposits or investments: **bank deposits, bonds and term deposits** would not be considered ventures. However, they have included most professional practices, real property investments and stock portfolios.
			2. **Business asset** towards which the non-owning spouse has made a direct or indirect contribution *s 59(1)*
				1. Patent rights *(Coulthard)*; farm land and operations *(Laxton*), professional practices *(Wilson)*
				2. An indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property *(s 59(2))*
				3. **Division of shares rather than liquidation of business** *(Balic [2006] BCCA)*
				4. **Or might trade off another asset *(ss 65, 66)***

**Direct / Indirect financial contributions –** BOP on non-owning spouse

Homemaking and child care are now recognized as financial contributions *(s 59(2)) (Murdoch [1975] SCR*

**Paid work can constitute a direct contribution**. (wife had been doing salaried work for business – medical practice, short marriage) *Robertshaw [1979] BCSC*

**Contributing FA** or permitting use of FA to acquire/maintain the business asset

**Assuming risks**

**Household management / child rearing.**

Direct contribution via effective household management – hostess & companion on business trips, attendance at business premises to fill bottle, etc and answer phones. *O’Keeffe [2002] BCSC*

Homemaking, entertaining, childcare, companionship; direct = floral arrangements in family restaurant *(O’Bryan [1996] BCSC)*

She looked after him and took care of business matters when he was sick; home care; entertaining; family care; companionship. But 6 year marriage, he was wealthy, she lived well during 6 years, had housekeeper and gardener. BCCA: Contribution but s 65 reapp’t 85% to H b/c he brought a lot in and short marriage. *(Piercy (1991) BCSC)*

* + - 1. **Meets OUFP test** s 58(2):
				1. “Property owned by one or both spouses and **ordinarily used by a spouse or a minor child of either spouse for a family purpose** is a family asset” ***(s 58(2)***
				2. Trend towards BROADER INTERPRETATION OF FA: Important factors **(1) Intention; (2) *S 60* presumption (3) The value of the asset in the context of the family economy.**
				3. **Onus** is on the spouse opposing the FA designation for OUFP assets. Otherwise the onus is on the applicant. *(60)*

**OUFP cases**: - Trend towards BROADER INTERPRETATION OF FA: Important factors

 **(1) Intention**

* ie. Modern family, pattern of separate property, implied intention not to share *(Lye)*
* ie mutual funds not FA b/c not clearly intended for retirement security *(Martin)*
* ie insurance policies and proceeds = FA b/c planned family security *(Jiwa)*

 **(2) Use**

 **(3) Value of the asset in the context of the family economy.**

 **(4) *S 60* presumption –** Onus on party claiming it is not OUFP

* + - * 1. Rolls-Royce found not to be a FA. Family members had been in it but always in the presence of Mr. F. If this had been the only car in the family, I may have come to a different conclusion. *(Fong v Fong (1982) FLD)*
				2. **Disability benefits and insurance policies and proceeds = FA** b/c were used to provide a sense of future security for the family unit in the event of decreased incomes, thus were OUFP (*Jiwa v Jiwa [1991] BCCA*)

Facts: 20 year marriage. Insurance policy taken out so that if sth happened to H, family would be okay.

* + - * 1. **Mutual funds = not** FA *(Martin v Martin [1991] BCCA)*

Facts: Older couple, both been married before, married 56 & 60. Short marriage. H brought more assets into marriage (home, mutual funds, Canada Savings Bonds, pension, savings, etc.) but wife brought in mobile home. Her mobile home sold ~$28,000, ~$7,000 used to renovate his home. Around same time, he got inheritance from father’s estate which he put into mutual funds.

BCCA: Should not automatically be viewed as assets. **Not intended for retirement security** but for travel. Also fairness issues around short marriage and both coming in with assets 🡪 parties returned to positions prior to marriage.

* + - * 1. **Modern marriage** *(Lye v McVeigh [1991] BCCA)*

Facts: Both been previously married, didn’t want messy divorces again, her first H hadn’t let her have control of her own $, Wife chose to keep assets separate. Both wanted independence so kept own savings and, deposited into joint acct for expenses. H earned more but split expenses 50/50 = more savings for him. H had contributed lots to pension before marriage. Short marriage (7 years). No children.

**Savings stocks (his) = not FA.** Evidence didn’t **intend** to share – pattern of separate property during marriage.

**Pensions** – he kept his larger and she kept her smaller – J said fair b/c she is younger and has time to accumulate. Also, much of his pension accrued prior to marriage (sth to take into acct under s 65)

* + - * 1. **Capital Asset / Investment -** Examine in each case whether in the ordinary course the present use **commitment to meet a present or future need *includes* a use for a family purpose.**

**The fact that income from a capital asset is used occasionally for a family purpose does not of itself make the capital asset a FA** *(Samuels v Samuels [1981] BCSC)*

Facts: Rental property inherited from his father.

Holding: Rental income OUFP but property itself not a FA

The fact that capital from the asset **is used from time to time**, when required, for a **family purpose may be an indication** that the asset is a family asset ***(Brainerd)*.**

Facts: There *were* children. Not long marriage (8 years). Properties on island at issue. *(Brainerd v Brainerd [1989] BCCA)*

1. **Lake property = FA** 🡪 family clearly used it for rec purposes; spent lots of time there; combined evidence of rental income for family purpose & frequent family use of property = ordinary use for family purpose.
2. **Trust fund = FA** (not business asset) 🡪 H frequently drew from capital for family purposes; transferred money to joint account.
3. **Reapportionment**: 80/20 split was fair: (1) inherited by H, (2) W made no direct/indirect financial contrib, (3) acquired prior to commencement of marriage.

**Ratio:** Visiting a property several times/year is sufficient to show property was ordinarily used for family purpose.

* + 1. Use of the asset to provide **financial security and protection** against erosion of income or other family misfortune in the **future may constitute a present OUFP** *(Tezcan)*.

Inherited rental property which spouse helped maintain and acted as guarantor was part of plan for **future security** = FA. (*Campbell v Campbell [1991] BCCA*

* + 1. Fact that income from capital asset used for family purpose occasionally does not automat make the capital asset a FA. Use of capital from asset from time to time may be indication it is a FA. **Capital asset held to be FA b/c it was the H’s sole income**. ***Evetts [96] BCCA***

f. **GIFTS to Wife / Jewelry**

H’s mother’s wedding ring given to the wife b/c court decided the intention was for her to have it. **GIFTS = intention is important.** *(Brainerd v Brainerd [1989] BCCA)*

But *Hauptman (1981) BCSC* jewelry given to wife – ct found intention was for her to show it off to colleagues and family members, making it OUFP. She only got ½.

g. **Inheritance / Gifts from others** – turn on individual facts – to be used for FP?

 i. Inherited rental property which spouse helped maintain and acted as guarantor was part of plan for future security = FA. (*Campbell v Campbell [1991] BCCA)*

 ii. Inheritance **not** a FA. Had largely not discussed whether it would be used for FP. *(Hefti)*

iii. S 65 can be used to reapportion since acquired by inheritance

* + - * 1. **Hobbies**

i. Depends on whether OUFP (50%) or not (100%) – Q of Fact in each case.

ii. *O-Bryan [1996] BCSC* p 191

Facts: Sports memorabilia in H’s den and on display in home. Wife attended memorabilia conventions and discussion.

BCSC: Found collection = FA. But s 65, wife got 20%.

i. **Professional Qualifications**

i. Qualification and income stream from it NOT FA, regardless of any contribution by a non-owning spouse. *(Samson [1996] BCCA)*

ii. In BC, contributions made by a spouse towards the other spouse’s degree or qualification may be considered in the context of SS. *(De Beeld [1999] BCCA; Caratun)*

Comm fishing license *(Seymour)* and a milk quota *(Verschuur)* have been held to be FA

**TRACING**

* If property is acquired with the proceeds from the sale of a FA, that property can be “traced” back to the original FA and thereby can itself be classified as a FA *(Tratch [1981] BCCA; Milan [1989] BCCA)*
* Also note the court can order a spouse to pay comp to the other spouse if property has been disposed of *s 66(2)(c)*

**FA are subject to a *prima facie* equal division btw the spouses on the occurrence of a triggering event *(56).***

* The fact that an asset was acquired prior to marriage is immaterial at this stage. But may be a consideration supporting reapportionment.
* Interest is undivided half interest as TIC *(56(2))*
* **Triggering events** *(s 56)*
	+ *(1)(a)* separation agreement
	+ *(1)(b)* declaratory jdgmt that the spouses have no reasonable prospect of reconciliation with each other under s 57 – one spouse can go to ct and ask for this (can be imp if other may go bankrupt)
	+ *(1)(c)* order for dissolution of marriage or judicial separation
	+ *(1)(d)* order declaring the marriage null and void

**Subject to a marriage agreement or a separation agreement** *(ss 56(3), 61)*

* + Parties to a marriage can enter into a marriage agreement before or during their marriage regarding division of their FA or other property during marriage or upon marriage breakdown *(FRA s 61(2)(b))*
	+ Must be: *(FRA s 61(3)*
		- **In writing**
		- **Signed by both spouses**
		- **Witnessed by one or more other persons**
	+ In BC, courts determine the **VALIDITY OF A MA** based on **fairness** *(Hartshorne; FRA s 65)*

**DETERMINING WHETHER MARRIAGE AGREEMENT IS UNFAIR**

***Hartshorne v Hartshorne [2004] SCR –*** (paras 43, 47) – *application only to MP*

Seeking to strike an appropriate balance b/t INTENTION / FREEDOM OF CONTRACT and FAIRNESS / EQUITABLE RESULT

* + 1. **Was the execution of the agreement unfair?**
* Was there independent legal advice?
* Was there duress, coercion, fraud or undue influence?
	+ 1. **Does the MA operate unfairly?**
			1. **Apply the agreement.** In particular, assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support
			2. **Consider the factors in *s 65* to decide whether contract operates unfairly** – did things turn out as the parties expected?
				- **Were the current circs within the contemplation of the parties at the time the Agmt was formed?**

If not, may be evidence that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances

If they were, did the parties make adequate arrangements in response to those anticipated circs?

**Plaintiff’s burden to est unfairness is heavier** if the post-sep situation is what the parties expected when they signed the MA, and the parties actually carried out those MA plans.

**Would have to prove that** **the economic circumstances of marriage breakdown were not shared equitably** in all of the circumstances

**Subject to: *s 56(3)* an order under *Part 5 or 6***

* **Reapportionment** *(s 65)* – judge discretion on basis of unfairness

***s. 65*** **– Judicial** **reapportionment** - Court may reapportion if 50/50 split or **MA unfair** having regard to:

* + - 1. the **duration of the marriage** [*most frequently cited factor. Longer marriage may invalidate unfair MA*]
			2. the **duration of the period during which the spouses have lived separate and apart**, [*rarely cited*]
			3. the **date when property was acquired or disposed of**,
			4. the **extent to which property was acquired by one spouse through inheritance or gift**, [*ppty gained via inheritance by one spouse is less likely to be divided equally b/t spouses*]
				* Although gifts and inheritance may be found to be FA, s 65 may allow for reapportionment.
				* Evidence of donor’s intention?
			5. the **needs of each spouse to become or remain economically independent and self sufficient**, or
				* W had kids and needed home, so court reapportioned entire home to her and all RRSPs to H *(Narayan [2006] BCCA)*
			6. **any other circumstances** relating to the acquisition, **preservation, maintenance**, improvement or use of property or the capacity or **liabilities of a spouse**. *[sounds a bit like constructive trust]*
				* **Debts** *(s 65(1)(f))* - …”liabilities of a spouse”
		- ***Young v Young [1990] BCCA*** – the court cannot make a spouse jointly liable for a debt of the other
		- ***Mallen v Mallen [1992] BCCA***:
			* Onus on party seeking reapportionment to **convince fairness requires the other spouse to share burden of the debt (easier if used for a family purpose)**
			* If debt is charged against a FA 🡪 value – debt = value of FA
			* But J can still consider under s 65 – ie apportion some other asset in spouse’s favor
			* Do not subtract all debts from all assets. Only deal with at reapportionment stage
		- **\*SHAKEN UP BY *Stein v Stein [2008] SCR***– W is equally responsible for contingent liability for tax shelters held in H’s name as well as for half the family debts b/c they both benefited during the marriage.
			* but no presumption debts be divided equally
			* **Where a debt has been incurred for use within the family unit**, it is more likely appropriate to reapportion assets to account for that debt than if it were accumulated solely for use outside of the marriage.
			* The presence of debt **is only one factor under s 65** and it is **necessary for a judge to consider all the relevant factors** in order to determine whether or not the presumptive division of assets leads to unfairness.
* **Court has auth to make any order necessary to give effect to reapportionment *(s 66)***
	+ (2)(a) declare ownership or right of possession
		- W had kids and needed home, so court reapportioned entire home to her and all RRSPs to H ***(Narayan [2006] BCCA)***
	+ (2)(b) order transfer of title, including for life or term of years
	+ (2)(c) **compensation order**
		- Valuation date of assets is the **date of trial** unless there is some reason to depart from that *(Gilpin [1990] BCCA) –* b/c s 56 gives ½ int in assets, not in assets at date of triggering event.
	+ (2)(d) partition or sale, then payment out of proceeds
	+ (2)(e) transfer to, or in trust for, child
	+ (2)(f) security for performance
	+ (2)(g) sever JT
* **Interim orders to restrain a spouse from transferring property *(s 66(3), 67)***
* **Court can grant to one spouse exclusive temporary use of family residence *(s 124)***
	+ Often done if there is an abuse scenario going on

**IF A SENSE THAT A PARTY IS TRYING TO DISSIPATE ASSETS**

* Tracing *(Tratch)*
* Interim order to restrain from transfer *(s 167)*
* ***Narayan v Narayan [2006] BCCA***p 209
	+ Facts: H trying to dissipate assets.
	+ BCCA:
		- Reapportioned all of home to wife b/c (1) H behaved particularly badly and (2) W would be there with kids and needed it.
		- Reapportioned all RRSPs to H. Largely gone anyway b/c he tried to dissipate them by deregistering them.

***Hartshorne v Hartshorne*, 2004 SCC 22**

**Background:** Principles of choice, finality in separation, and private contracting as the right of couples [that their decisions need not be scrutinized heavily by the state] pervade this decision.

**Facts:** Couple marries after living together for 3 years; and leaving previous marriages. Both were lawyers (she was an articling student at his firm). Shortly before wedding, he presented her with MA. She was pregnant w/ couple's 2nd child by time of wedding. MA stated that if marriage broke down, parties would take exactly what they brought in with 3 exceptions: (1) she was entitled to 3% interest in family home per year, up to 49%, (2) joint interest in car, (3) joint interest in contents of home. Significant departure from ***FRA*** (50/50 of all family assets). Coming into marriage, he had $1.6 million of assets and she had student loans & no assets. She had independent legal advice which told her that MA was grossly unfair & that she should not sign it; but that if MA ended up in court, would likely be found invalid & lead to reapportionment. Before signing, MA redrafted to include entitlement to spousal & child support for wife. MA signed on morning of wedding; acknowledged by both parties that she didn't sign voluntarily; she was crying. When marriage began, he was making $175,000 and she didn't work outside the home. Couple separated 9 years later. She challenged the MA's provisions re: family home & spousal/child support. She won at trial; he appealed.

**Issue:** Should the MA be struck down as invalid due to unfairness?

**Holding (6-3):** SCC upheld the MA as valid.

**Analysis:** SCC sets out wider principles for considering MAs, and also the 2-part test for determining validity.

**Wider Principles**

* FREEDOM OF CONTRACT: Strict contract law principles should be applied in evaluating MAs
* MAs should not be set aside if MA entered into w/ ILA & no duress, coercion, fraud or undue influence
* ***FRA, s.61*** clearly permits people to contract out of legislative regime - so it would be contrary to permit people to contract out, and then have the courts scrutinize their agreement.
* **Fairness**
	+ But in interpreting ***s.65***, you can't just compare outcome of MA w/ outcome of ***FRA***, and state that any difference = unfairness.
	+ Not comparative exercise - because to do so would always lead to unfairness.
	+ Instead, the Courts should apply a **2-step test** (see above)

**Applying the Test to the Facts:** SCC upheld MA b/c it reflected clear intention to maintain independent financial lives - that's how the couple conducted their marriage. They kept their finances apart. She knew what she was signing and knew implications. She had ILA, and signed contrary to that advice, evidencing that she made a personal choice. The fact that the lawyer told her that the MA would likely be overturned in court was irrelevant. He brought most of the assets into the marriage; very little was brought in by her; very little was gained throughout the marriage. She had not suffered any economic disadvantage during the marriage, though she had given up her legal career. Any economic loss could be dealt with by spousal support. No need to mess with the MA.

**Dissent (Deschamps, LeBel & Binnie JJ.):** Strong dissent which critiques majority's conclusion. Too much was paid to intentions and expectations of parties. Not enough emphasis on legislation's intention of upholding only fair agreements.

* Minority applied a **substantive fairness test:** was the MA actually fair?
* Just because MA reflects expectations of the parties doesn't mean that the MA was actually fair.
* By focusing on s.65 factors, as opposed to overall principle of fairness, majority missed the point of the legislation.
* Would have found that MA was unfair, b/c it doesn't compensate her for years of work in the home, or recognize the benefit of that work to him.

**Discussion:**

* + Wasn't the execution of the agreement unfair in itself? Crying, not voluntary, etc. She had quite her practice and had a young child – did she really have a choice to sign?
	+ Decision is part of trend of allowing private contracting in family law - to get parties out of the courts, and use more ADR. But problem is that private contracting doesn't work in family law - historically, family law legislation arose because the state wanted to get rid of unfair private contracts.
	+ Unconscionability? Power Imbalance? Courts seemed to claim that this was "feminist" case - majority found that women were independent, and could make their own personal choices; too paternalistic to change MA. Even his lawyer was a feminist lawyer, and she spun this view (she could have gotten married, walked away, her choice!).
	+ Would set a bad precedent to allow parties to sign MAs with the thought that it wouldn't be upheld by the courts - She probably signed the agreement thinking that it wouldn't be upheld...
	+ What if the gender roles were reversed?

**PROPERTY ON FN LAND**

The *Indian Act* precludes application of the following to real property on reserve:

* Provincial matrimonial property laws
	+ - Interim occupancy order under s 124 *(Derrickson; Paul)*

**But can use:**

* **Compensation** under ***s 66(2)*** can be given in lieu of property division*(Derrickson, SCR)*
	+ - * Aboriginal couple built house on reserve together - Mrs. G was entitled to compensation order for her interest in the house *(George [1996] BCCA)* – (but $ comp may be unsatisfactory to her!)
		- MOVABLE property can still be divided, as it is not inconsistent with rules under the *Indian Act*

**COMMON LAW COUPLES**

SCC says it is legitimate to distinguish between CL & married couples – we should be respecting **choice** & autonomy *(****Nova Scotia v Walsh [2002] SCR****)*

**ENTER STATUTORY REGIME BY MAKING AN AGREEMENT s 120.1**

* Def. of “spouse” s 1 includes unmarried cohabitants but excludes them for purposes of Parts 5 & 6
* ***FRA s 120.1*** Unmarried spouses can make an agmt that would otherwise be a marriage or separation agmt
	+ Does not apply to agmts made before the sxn came into force (4 Feb 1998). *Wiest v Middelkamp [2003] BC*
* **SEPARATION AGREEMENT** – look for (1) full honest disclosure (2) exploitation (ie mental instability)

***Rick v Brandsema [2009] SCR*, p 299**

Facts: 27 year marriage, 5 children. Had dairy farm business together. When negotiating sep agmt, wife had severe mental disability and H did not disclose all financial info.

Holding: Allowed wife’s appeal for variation.

1. H’s failure to make full and honest disclosure
2. His knowledge that the negotiations were based on erroneous financial information
3. Exploitation of his wife’s profound mental instability

Ratio:

* **Duty on separating pouses to provide full and honest disclosure of all relevant financial information**
* **An agmt negotiated with full and honest disclosure and without exploitative tactics will likely survive judicial scrutiny**
* **MARRIAGE AGREEMENT** – look for fairness

***Johnston v. Wright (BCCA) (2005) ---* Apply *Hartshorne (incl s 65*) for CHA**

**Note:** Common-law version of ***Hartshorne***. **Co-habitation agreement**

**Facts:** Mrs. Johnston and Mr Wright made CHA. Significant age/income disparities**.** She was 48 yo graphic artist w/ $30,000 salary. He was 74 yo businessman w/ $60 million assets. CHA stated that parties would take what they put in, and would keep finances separate. Her ILA told her not to sign CHA, but she signed it anyway. During 7 year relationship, they did not share bank accounts or credit cards. She covered all expenses, except for his personal & clothing expenses. He gave her $50/week for groceries. He eventually altered his will to give her much more than what CHA would have given - but they did not alter the CHA. Relationship ended, and she sought to have CHA overturned for unfairness.

**Holding:** CHA upheld.

**Analysis:**

* Court reaffirmed ***Hartshorne*** test, and principles of private contracting
* **Agreement had been followed to a tee** - the parties had indeed kept their finances separate
* **No children were involved**, which made his case stronger
* Changes to the will were irrelevant b/c they were premised on parties being together when he died.
* Emphasis on
	+ **(1) not second-guessing private agreements,**
	+ **(2) significance of independent legal advice, and (**
	+ **(3) if things turn out as planned, the courts should be reluctant to overturn the agmt**

**RELY ON EQUITABLE PRINCIPLES IF NO AGREEMENT**

* CL couples in BC must rely on equitable principles (constructive trusts) – unjust enrichment cases are very hard to prove and very expensive cases – at the discretion of the JJs *(Renee Cochard, QC)*

**3 elements of unjust enrichment** *(Pettkus; Sorochan; Peter v Beblow; Kerr v Baranow)*

1. Enrichment / tangible benefit to the owner of the property
2. Corresponding deprivation to the party making the contribution (can include domestic services)
3. No juristic reason for the enrichment (e.g. gift / contract, *Kerr)*

**The remedies** available in cases of unjust enrichment include the application of a **constructive trust** wrt the **property** or a **monetary award**

**1. Starting Point: Monetary award for unpaid services *(quantum meruit)***

**2.** For a **constructive trust** to be ordered, the **Plaintiff must show**:

* **That a monetary award is insufficient** ***(Peter, Kerr)***
* **Connxn btw the contribution & the assets (maintenance sufficient, doesn’t have to be acquisition, *Sorochan)*** – contrib must be “sufficiently substantial and direct” ***(Pettkus; Peter****)*.
	+ Preservation & maintenance ***(Sorochan)***
	+ Causal contribution to acquisition of assets or
	+ Household labour & childcare ***(Peter)*** – hh labor not valued as highly as other 2

-Extent of interest awarded must be proportionate to the contribution ***(Peter)***

-“Value survived” approach – what portion of the property can be attributed to the P’s efforts ***(Peter)***

1. **Joint family venture** – where the joint efforts of the parties are linked to the accumulation of wealth**: *Kerr v Baranow****:*
	1. **Unjust enrichment** where one party retains a disproportionate share of the assets produced by the joint efforts of the couple.
	2. ***Pettkus* elements of unjust enrichment still apply**
	3. Can be “value survived” - $ remedy should be calc’d according to the share of the accumulated wealth proportional to the claimant’s contributions).
	4. **MUST SHOW:**
* **1. Joint family venture.** Relevant circumstances:
	+ Factors related to **mutual effort**
		- Pooling of effort and teamwork
		- Having children together
		- Length of relationship
	+ **Economic integration**
	+ **Actual intent**
		- Holding themselves out as married
	+ **Priority of the family**
		- Whether one party relocates or left workforce or foregoes career/education or accepted underemployment for sake of family
* **2. And a link** between the contributions and the accumulation of wealth
* ***Pettkus v Becker* (1980), 19 R.F.L. (2d) 165 (S.C.C.)**
	+ 20 year cohabitation
	+ All property and bee-keeping business acquired together during relationship. All in Mr P’s name.
	+ W paid all hh expenses so H could save $ to buy business. Contributed unpaid labor for 19 years
	+ Holding: Mrs P receives equal share
* ***Sorochan v. Sorochan*, [1986] 2 S.C.R. 38**
	+ 40 year cohabitation on male partner’s family farm, 6 children.
	+ Property brought into relationship by husband. Very little acquired during relationship
	+ Preservation and maintenance of property for 7 years, raising 6 kids
	+ Holding: Wife contributed significantly to maintenance of assets. She gets interest.
* ***Peter v. Beblow* (1993), 150 N.R. 1 (S.C.C.)**
	+ 12 year cohabitation, 6 children (blended family)
	+ Domestic services caring for his kids from first relationship, ran household, worked part time
	+ Holding: Beneficial interest in the house (value survived), but not as much as other cases where there was a contribution to acquisition or maintenance

***Kerr v Baranow,* 2011 SCR, p 156**

* 25 year relationship, kept financial affairs separate
* Ms. Kerr had title to a home. To prevent home from being foreclosed, title put in Mr. Baranow’s name. He sold the property and spent $105,000 to build their dream home.
* She was involved in planning, interior decorating, landscaping and cleaning. She also made contributions to chattels, paid utilities, insurance and groceries. He paid for property taxes and upkeep.
* Holding: Ms Kerr awarded approximately 1/3 of the value of the house. (& SS)

**White Paper**

* **Include unmarried spouses in property division regime** if lived together for 2 years or if have had child together
	+ Repeal s 120.1
* **No more OUFP Test**. **Family property** (all real & personal property owned by one or both spouses at triggering event) **presumptively shared 50/50** unless excluded.
	+ Then a great list of property excluded (got by gift/inheritance, brought into relationship, etc.).
		- Pre- and post-relationship property
		- Gifts & inheritances to one spouse
		- Settlements / damage awards from tort claims unless meant to compensate both or replace wages
		- Non-property insurance awards unless to compensate both or replace wages
		- Trust property, unless beneficiary spouse has immediate & absolute interest or power to terminate it
	+ If excluded, only divide increase in value during relationship
	+ Judges have discretion to vary equal division if ‘clearly unfair’
* Presumption that debts are shared
* Can still contract out of equal division
	+ *Contracts* subject to judicial discretion if ‘clearly unfair’, based on certain factors

Child Support

Shared jurisdiction:

(Married couples who have applied for divorce) *DA s 15.1, 15.3, 25.1, 26.1* 🡪 BCSC

(Not married or have not yet applied for divorce) *FRA ss 88, 93, 93.1, 93.2, 94, 95* 🡪 BCSC / Provincial Court

*Federal Child Support Guidelines*

CS takes priority over SS *(DA s 15.3(1); FRA s 93.2)*

Tax consequences of CS can make a difference in negotiation:

* Recipient of CS does not have to include the income for tax purposes
* Payor cannot deduct CS payment from his income

1997 reforms from a system with broad judicial discretion to one with new tax rules, Guidelines & tables, and enhanced enforcement measures

**CS Responsibility: Who is a Parent? Which Children?**

**WHO IS A CHILD?**

***DA s 15.1: Spouses are responsible for any “child of the marriage”***

* + ***DA s 1:*** “child of the marriage” = **child of two spouses or former spouses** who, at the mat’l time,
		- a) is **under the age of majority** and **who has not withdrawn from their charge,** or
			* ***JMS v FJM [2005] Ont Div Ct***
				+ Facts: Son severely disabled. In order to get services he needed, parents obliged to accept the province would take custody. Mother still bringing son home for significant periods & paying expenses related to him.
				+ Majority: **Father not liable for CS b/c disabled son was Crown ward & therefore no longer in his parents’ “charge”**
				+ Dissent: Court should address the wider context and not financially penalize a child on the basis of his disability. “Charge” should be understood to include financial context.
		- b) is the **age of majority or over and under their charge** but **unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life**
			* includes university attendance…
	+ ***DA s 2(2):*** For the purposes of the definition “child of the marriage”, child of two spouses or former spouse includes
		- ***(a)*** any child for whom they **both stand in the place of parents**; and
		- ***(b)*** any child of whom **one is the parent and for whom the others stands in the place of a parent**
			* ***Chartier v Chartier [1991] SCR -* Chartier test: Who is a PARENT?**
				+ Facts: Short relationship: CL for 2 years and married for 1 year. **W brought a child into the marriage from previous relationship**.
				+ Held: Mr C held to be ***in loco parentis.*** Facts indicating he was *in loco parentis:* only father figure since she was a baby, treated her like a daughter, had talked about adoption, amended her birth reg to indicate falsely that he was a natural father to change her surname.
				+ **TEST: Whether an individual stands in the place of a parent must take into acct all factors relevant to the determination, viewed *objectively***

**Intention** is only one factor – can be inferred from behavior

**Relevant factors** include but are not limited to:

Does the child participate in the extended family in the same way as would a biological child?

Does the person provide financially for the child?

Do they discipline the child as a parent?

Do they hold themselves out in the world as a parent to the child?

What is the role of the absent biological parent?

(may be obliged to pay CS even if another also paying)

* + - * ***Doe v Alberta [2007] ABCA*** – **cannot k out of standing in the place of a parent**
				+ Facts: Couple want to stay together. She wants child, he doesn’t. She found donor and used artificial insemination. Wrote up k that he would not be viewed as standing in place of parent. Took to court to see if would stand up
				+ Decision: Despite k, he may later fall into definition of *in loco parentis*
			* ***CSG s 5:*** Where spouse found to stand in place of parent, amount of CS order will be **such amount as the court considers** **[judicial discretion]** appropriate having regard to these Guidelines and *any other parent’s legal duty to support the child*

***FRA s 88: Each parent of a child is responsible and liable for the reasonable and necessary support and maintenance of the child.*** (Note *JMS* and *Chartier* do not apply)

* **Child:**
	+ any person under 19 *(FRA s 1(1))*
	+ Part 7 – A child includes a person over 19 and, irt the parents of the person, is unable, b/c of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life *(FRA 87)*
* **Parent includes** *(FRA s 1(1))*
	+ a **guardian** or guardian of the person of a child, or
	+ a **stepparent** of a child if
		- the stepparent **contributed to the support and maintenance** of the child for **at least one year** and
		- proceeding against them **commenced within 1 year** after the date they last contributed
		- **“stepparent”** if the person and a parent of the child *(FRA s 1(2))*
			* are or were married, or
			* lived together in a marriage-like relationship for a period of at least 2 years… may be persons of the same gender
	+ An order against 1 parent for CS does not affect the liability of another parent for CS *(88(1))*

**Framework**

**Court’s authority**

***DA* –** for married couple who have applied for a divorce *(15.1, 1, 2(2))*

* Court may make an order requiring a spouse to pay support of any or all children of the marriage *(15.1(1))*
* May make an interim order pending determination of CS order *(15.1(2))*
* A court making an order under (1) or (2) shall do so in accordance with the *Guidelines (15.1(3))*

***FRA* –** for CL couples or married couple who have not applied for a divorce *(88, 1)*

* Each parent of a child is responsible and liable for the reasonable and necessary support and maintenance of a child *88(1)*

**Agreement or other arrangement**

***DA***

* Court may take any order, judgment, or written **agreement** into account in making an order if satisfied that it **directly or indirectly benefits the child** or that special provisions have otherwise been made for the benefit of the child and that the **application of the *Guidelines* would** result in an amount of support that is **inequitable** given the provisions in the order, judgment, or written agreement *(CSG s 15.1(5))*
	+ A court may order an amount different from the *Guidelines* on the **consent** of both spouses if it is satisfied that **reas arrangement have been made for the support of the child** *(CSG s 15.1(8))*
		- In determining whether reasonable arrangements have been made, court shall have regard to the *Guidelines* but shall not consider the arrangements unreasonable solely b/c the amount of support agreed to is not the same as the *Guidelines* amount *(CSG s 15.1(8))*
		- ***Greene v Greene [2010] BCCA***

Facts: Father argued he had been paying for hockey stuff

Holding: That did not substitute for reasonable arrangements.

***FRA***

* Court may make an order using the *Guidelines* but can take into account an **agreement or other arrangement** as long as it is satisfied that provisions have been made for the benefit of the child *93(1, 2)*
* ***Language in new FLA will mirror more closely the language in the DA***

*Pre-Guidelines*: *Dube* discussed hidden v direct costs of raising a child. Hidden (additional shopping / nurturing costs; opportunity costs etc – all these additional costs to be dealt with under SS, not CS) *(Willick [1994] SCR)*

**Child Support Guidelines – Vol 2: p 388**

Enacted as Regulations under the *DA* and the *FRA*

* Based on the **principle that spouses have a joint financial obligation to maintain the children of the marriage** in accordance with their relative abilities to contribute *(DA s 26.1(2))*
* Our system looks at income of *payor* parent, not recipient parent

**Objectives:** *(s 1)*

1. **fair standard** of support for children that ensures they continue to **benefit from** the financial means of **both spouses** after separation
2. **reduce conflict and tension** btw spouses by making calculation of CS more objective
3. **improve efficiency** by giving guidance in settling levels of CS and **encourage settlement**
4. **ensure consistent treatment** of spouses and children who are in similar circumstances

**Presumptive Rule [limits discretion]:** The amount of CS for children under the age of majority is the **Table amount** table (according to # children & income of the spouse)**+ any *s 7 “special or extraordinary expenses”***: *(CSG s 3(1))*

* The applicable table is the **table of the province** where the **payor** resides *(CSG s 3(3))*
* **Income may be imputed** where a parent is intentionally under-/unemployed or doesn’t ustilize property reasonably to generate income ***(CSG s 19)***
	+ Parents have positive duty to earn as much as reas they **can** to provide CS. ***Ghislieri [‘07] BCCA***
	+ Payment is based on ability to pay what the parent can earn. CS = right of child. ***Earle [99] BCSC***

**Spouse In Place of Parent 🡪 [some discretion for amount] *(CSG s 5)***

* Where spouse stands in place of parent for a child, the amount of CS is such amount **as the court considers appropriate, having regard to these Guidelines & any other parent’s legal duty to support the child**

**Special or extraordinary expenses 🡪** Court *may* award additional **discretionary** amount ***(CSG s 7(1))***

* **1.** Demonstrate they are not already taken account of in Table amounts
	+ court presumes parents will spend $ on kids daily expenses
	+ but what is “extraordinary” will depend on the family’s income
	+ **To cover all/portion of the following expenses *(CSG s 7(1))***
		- **(a) child care** related to custodial parent’s employment, illness, disability, or education for employment
		- (b) child’s **medical and dental insurance** premiums
		- **(c) health-related expenses** exceeding the insurance reimbursement by at least $100 annually, including orthodontics, counseling, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses
		- (d) extraordinary **expenses for education**
		- (e) expenses for **post-secondary education**
		- (f) extraordinary expenses for **extracurricular activities**
		- **“extraordinary expenses”** (for (d) & (f)) means: *(CSG s 7(1.1)*
			* *(a)* expenses the requesting spouse cannot reasonably cover, taking into account their income and the amount they would receive under the applicable table or order of the court, or
			* *(b)* where (a) is not applicable, expenses that the court consider extraordinary taking into account
				+ amount of expense in relation to income of requesting spouse (incl CS amount)
				+ the nature & number of educational programs and extracurricular activities
				+ any special needs and talents of the child/ren
				+ the overall cost of the programs and activities, and
				+ any other similar factor that the court considers relevant.
* **2**. Demonstrate that the expenses are ***(CSG s 7(1); McCrea)***
	+ **1 NECESSARY** in relation to the child’s BI
	+ **2 REASONABLE** in relation to the means of the spouses and those of the child and to the family’s spending pattern prior to separation
		- Income of both spouses is taken into account
		- Family’s spending pattern prior: court will look at discussions parents had irt child’s future

**Guiding principle in determining the amount of an expense in *7(1)*** is that the expense is **shared by the spouses in proportion to their respective incomes** after deducting from the expense any contribution from the child. ***(CSG s 7(2))***

***McCrea [1999] SCR***

Facts: One child of marriage, divorced before *CSG* in 1997. Quite a discrepancy btw their incomes.

Holding: Accepted extraordinary incomes: child care; orthodontics; counseling; testing & tutoring

Not accepted: dance lessons; piano; catechism; educational fund; med/dental premiums (borne by every family, high support already in table amount in this case)

 Rule: **No obligation to add an amount for extraordinary expenses**. Assess irt the factors in *CSG 7(1)*

* **Table amount can be relevant:** If you have a well-off payor, recipient’s amount for extraordinary expenses will be healthier as well. But the healthier the initial amount, the less likely everything listed in extraordinary expenses will be granted.

**Splitting Custody 🡪** Amt of CS is the difference btw the amount that each spouse would pay in CS if an order was sought against them *(CSG s 8)*

**Shared Custody / Right of Access 🡪** If a parent has physical custody of or exercises right of access to child for not less than 40% of time over course of a year, the amount of CS must be determined **taking into account: *(CSG s (9))***

* ***(a)*** table amounts for each spouse
* ***(b)*** increased cost of shared custody arrangements
* ***(c)*** the conditions, means, needs and other circumstances of each spouse and of the child

***Green v Green [2000] BCCA*** – essentially replaced by *Contino* but imp for policy re shared custody & deviation

Rejects strict methods for calculating CS under s 9. Will be **a lot of judicial discretion in these cases.**

Facts: Dad increases access and seeks reduction in CS.

Analysis:

* ***s.9*** was introduced primarily to provide financial relief to parents who are exercising extensive access
* 40%+ access often results in increased costs for access parent, may lead to reduced costs for custodial parent.
* But case-by-case analysis required, b/c these assumptions will not be valid for all families
* **3 important factors for Courts to consider in *s.9* cases:**
	+ **Who actually pays for the child?** The amount of time spent w/ a parent doesn't actually correlate w/ who actually pays for the child's material needs.
	+ **Even when the costs of access do increase, this doesn't always result in decreased costs for the custodial parent**. Many costs are fixed. Increased access costs might actually lead to higher costs overall. A decrease in CS might actually lead to a significant disparity b/t households.
	+ **"Cliff Effect":** Small increase in access often has absolutely no impact on actual costs for either side.

***Contino v Contino-Leoncelli [2005] SCR*** – no guidelines 🡪 **Discretion is paramount / case-by-case basis**

* No presumption either way (use set off or modify) – **JJs need to consider what shared custody means for the expenses of each parent** (wide open judicial discretion)
	+ Would a set-off amount result in the custodial parent not being able to meet the needs of the child or would result in a significant variation in the standard of living when the child moves b/t the 2 households?
	+ Courts must take into account that shared custody often leads to n increase in overall costs
		- Should determine whether shared custody has resulted in increased costs globally
	+ Look at standard of living in each household & ability of each parent to absorb costs
	+ Look at objectives of *Guidelines* in s 1.
* Facts: Dad took child for an extra night each week so mom could attend school, then sought decrease in CS
* Held: No change in CS. His costs increased *marginally*. No evidence that mother’s costs increased. Remaining costs were fixed & unchanged.

**Undue hardship 🡪** Cts may award amt different from that determined under ss 3-5, 8, 9 if it finds the requesting spouse or child would otherwise suffer undue hardship ***(10(1))*.** Circs that may cause undue hardship**:*(2)***

1. Responsibility for unusually high level of debt reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
2. Unusually high expenses in relation to exercising access to a child
3. Legal duty to support any person
4. Legal duty to support a child other than a child of the marriage who is under the age of majority or over the age of majority but unable to obtain the necessaries of life.
5. Legal duty to support any person who is unable to obtain the necessaries of life due to illness or disability

**COMPARE STANDARD OF LIVING IN THE 2 HOUSEHOLDS:** Despite determination of undue hardship, court **must deny application if** it finds the household of the spouse who claims undue hardship **would** thereby **have a higher standard of living** than the household of the other spouse. ***(10(3))***

***McCrea [1999] SCR***

Facts: One child of marriage, divorced before *CSG* in 1997. Quite a discrepancy btw their incomes.

Holding: H’s hardship claim rejected. Despite his new obligations to his 2nd family, still obligated to support 1st family. Court particularly reluctant to entertain hardship claim given that 2 of his new kids were over 19.

**Income over $150,000 (payor parent) 🡪** CS amount is: ***(CSG s 4)***

Amount determined under s 3 (ie table amount) – special formula

*If the court considers that amount to be “inappropriate”*: Table amount applies up to $150,000 and beyond that, the court can determine the **appropriate** amount having regard to the conditions, means, needs and other circs of the children entitled to support and the financial ability of each spouse to contribute to the support of the children. S 7 expenses can still be added *(4(b)(iii))*

***Francis v Baker [1999] SCR***

* “**Inappropriate”** means **“unsuitable” rather than** “inadequate”, so **court can either increase or decrease table amounts** above income of $150,000
* Presumption that table amount past $150,000 is appropriate – Can only increase/decrease if party seeking to vary can rebut presumption that the table amounts were supposed to apply.
* **Objectives of CSG: Children should benefit from financial means of both parents**: rich kids shouldn’t be financially harmed b/c their parents split.

Facts:Parties married in 1979; had 2 kids; husband leaves wife when 2nd kid is 3 days old. Couple has agreement that wife keeps car; gets $30,000 share of home; receives $2500/mth in CS. Wife is teacher & returns to work when kid is 3 months old; earns $60,000. Husband is lawyer; earns $945,000; has 3 luxury cars; Prez/CEO of Seven-Up Canada; remarries; supports new family. Wife then applied to Court to seek the Table Amount ($10,000/mth). Husband argues that Table Amount payable by him was inappropriate & sought to have it reduced.

Ratio:above

Analysis:Here, husband had failed to provide any evidence for departing from the guidelines

* + $10,000/mth CS payments were not outrageous, given his $1M income
	+ While he does have a new family to support, that shouldn't be at the expense of his 1st family

**Post-secondary education 🡪** Parents have no automatic duty to financially support their children after they turn 19. Depends on whether they are still a “child of the marriage” under *DA s 2* (not w/d from their charge)

* Has been successfully argued that child is still in charge of parents b/c still financially dependent
* **If no longer living with either parent, becomes harder to claim post-secondary as part of CS**
* But courts are becoming more opening to allowing post-sec support b/c of increasing costs

**When a CS order relates to a child over the age of majority, the amount is: *(CSG s 3(2))***

1. *Guidelines* amount as though they were under age of majority, or
2. *If the court considers that amount inappropriate,* the amount it considers **appropriate**, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

***WPN v BJN / aka Neufeld v Neufeld [2005] BCCA:*** If child is still a “child of the marriage” (ie still under charge or his/her parents), CS may still be payable, including s 7 expenses

* **Factors to consider whether an access parent should be ordered to pay for post-secondary ed:**
	+ Still a “**child of the marriage**” (under charge of parents)?
	+ Enrolled **full-time or part-time**
	+ Applied for **student loans** or other funding?
	+ **Career plans** of child?
	+ **Ability of child to contribute** by way of part-time employment
	+ **Age** of child
	+ Child’s past **academic performance**
	+ **Plans that the parents made** for the children when married
	+ Whether the child has unilaterally **terminated the relationship** with the parent from whom support is sought
* Facts: Kid goes to med school, W applies to have H share costs of tuition. H argued CS was to end @ 19, but agreement had stated CS would continue if child continued to live with parents. TJ says dad has to pay. He argues she can seek student loans etc and they only expected her to do one degree.

Factors at issue: Whether child elig for student loans; plans made by parents during cohabitation

Holding: Dad ordered to pay 50% of med school tuition as **s 7 extraordinary expense**. Mom bore remaining 50% of tuition. Court also orders **Table amounts to continue in addition**. Notes that daughter receives mom’s support by living at home, and also has assistance from student loans.

***Haley [2008] Ont SC***

Facts: Child left school after turning 18 so CS stopped. After 2 years wanted to attend animation school

Held: CS ordered, including table amount and s 7. Child also had to contribute

**RETROACTIVE CHILD SUPPORT**

Where income of payor spouse has increased since CS order made, or there was no order or agreement, court may order retroactive CS.

* **Custodial parent has responsibility to give notice to the payor parent that the amount of support should go up** so should pay attention to indicators that other parent’s income has gone up
* Normally, a retroactive order only goes back to the date effective notice was given ***DBS v SRG [2006] SCR***

***DBS v SRG [2006] SCR***

* When does the obligation arise?
* Responsibilities of recipient parent to give notice to payor parent that amount should go up
* Normally retroactive only to date effective notice given

***Greene v Greene [2010] BCCA***

Facts: Payor paid expenses of hockey. Indicators that his income shot up but she did nothing about it b/c happy he was paying hockey & skiing.

Holding: **Partial retroactive award – not all the way back to date it should have been changed b/c both parents were remiss.** She didn’t give notice.

**ARREARS & VARIATION OF CS**

***Dickie v Dickie [1007] SCR***: **Can be found in contempt of court for refusal to pay order** 🡪can go to jail

* Where there is willful non-compliance with family court orders by a person who has the ability to pay, the consequences of non-payment should be severe
* Facts: Dr. Dickie had plenty of money but went to the Bahamas and refused to pay his obligations or the security for his wife’s legal costs. Was jailed for contempt of court and appealed.

The **Director of Maintenance Enforcement (BC) has the power to bring actions enforcing a support order.**

* Requiring payor to submit regular T1 forms (so CS recipient doesn’t need to contact payor to do so)
* Refusing to renew driver’s license
* Entitlement to demand info about payor’s income (ie approaching employers)
* If payor is a federal employee, gov can garnish your wages for CS
* Passports can also be denied

***McIvor v The Director of Maintenance Enforcement [1998] BCCA***

Facts:Dad sought to vary CS award on basis of material change in circumstances, which was that his 3 daughters refused to exercised access. Dad had remarried; had stopped paying CS; argued that CS payments should go towards mortgage payments on house owned by him & new wife.

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

***Earle [1999] BCSC* -** Before a J can **vary** a maintenance order there must be a **material change of the kind that, if known when last order made, would have resulted in a different order; significant and long lasting**

* Cancellation or reduction of arrears is a form of variation
* Heavy onus on person asking for reduction or cancellation of arrears

***DA S 17(1)*** – court may vary, rescind or suspend, prospectively or retroactively *(a)* a support order

***DA S 17(4)*** – Before varying a CS order, ct shall satisfy itself that a **change of circumstances as provided for in the applicable *Guidelines*** has occurred since the last CS / variation order.

***DA S 17(6)*** – Shall not take conduct into consideration

***DA S 17(6.1, 2, 3, 4, 5)*** – *Guidelines* apply to variation order. May take agreement / consent of both spouses into account in same was as for initial CS order.

Spousal Support

Parallel jurisdiction for SS:

* *Divorce Act*: s 15.2 (in claims re divorce) 🡪 BCSC
* Family Relations Act*, ss 89, 93(1)(4)(5)* (outside divorce – couples separating instead of divorcing, or not married) 🡪 either BCSC/Provincial Court

**INTERSECTION BETWEEN MP & SS**

* Divide property first before deciding SS. MP division might be sufficient to resolve economic issues between spouses *(Narayan v Narayan [2006] BCCA)*
* If pension equalized, be cautious about ordering support to be paid out of same portion of pension *(Boston [2001] SCR)*
	+ Facts: He keeps pension, she gets home, he’s ordered to pay SS, then retires some years later
	+ Argues: Now I’m drawing on my pension, please let me out of SS obligations. Double-dipping since she got home in lieu of pension.
	+ But **objective of SS: Account for economic disadvantages incurred during marriage – may persist past retirement.** Wife may still have financial need based on that disadvantage.
* **If the bulk of the MP distribution to a spouse is in the form of property that does not generate income (e.g. matrimonial home) then support payments from the same pension might be appropriate.** If payor spouse has the ability to pay and the receiving spouse continues to experience economic hardship, should likely be some ongoing obligation (could be reduced, but not wiped out entirely). (*Meiklejohn [2001] Ont CA)*

Notes:

* **Priority to CS** in both statutes *(DA s 15.3; FRA s 93.2)*
* **You can contract into (or out of) SS obligations *(****DA s 15.2(4)(c); FRA ss 89(1)(b), 121, 122)*
	+ Still a question of how well k to not be bound by DA will stand up if challenged… debate of freedom of contract v fair outcomes.
	+ Court can incorporation provision of an agreement in an order *(FRA s 11)*
	+ How well will k to not be bound by DA stand up if challenged? See *Miglin SCC 2003*

**IF MARRIED & APPLIED FOR DIVORCE *s. 15.2*** of the ***Divorce Act*.**

* ***s.15.2(1):*** A court may make an order requiring a spouse to secure or pay such **lump sum or periodic sums**, as the court thinks reasonable for the support of the other spouse.
	+ [Lump sum would not work for people w/out lots of extra money]
	+ [If important for payor to get TAX deduction, need to use periodic sums]
* ***s.15.2(4):*** In making a SS order (or interim order), the court shall take into account the **conditions, means, needs and other circumstances of each spouse**, including **[Factors]**
	+ (1) the length of time the spouses cohabited,
	+ (2) the functions performed by each spouse during cohabitation, and
	+ (3) an order, agreement or arrangement relating to support of either spouse.
* ***s.15.2(5):*** **Spousal misconduct** shall not be taken into account in determining spousal support
	+ **BUT** can consider **affect** of misconduct **on spouse’s ability to achieve self-sufficiency** (***Leskun***)
* ***s.15.2(6):* [Objectives of SS order]**
	1. Recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
		1. Did one spouse stay at home while other increased earning potential?
	2. Apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
		1. Distribution of responsibilities in marriage
	3. Relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
	4. In so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
		1. While ***Pelech*** focused on economic self-sufficiency; ***Moge*** focused more on recognizing economic disadvantages & patterns of dependency during marriage
		2. Note that **economic downturn** is not something that your former spouse is obligated to provide for - whether under the old ***Pelech*** test or the new, more liberal ***Moge*** test.

**IF COMMON LAW OR NOT YET APPLIED FOR DIVORCE *FRA, Part 7*** (**Maintenance and Support Orders).**

1. **EXAM: Say “SS principles applicable to CC couples are set out in Part 7 of *FRA,* but generally judicial interpretation of SS principles under *DA* has been applied to *FRA* provisions.**

***FRA***sections: [**very similar to** ***DA***]

* + ***s. 89(1)***: obligation to provide spousal support, based on following factors:
		- ***(a)*** role of each spouse in the family
		- ***(b)*** express or implied agreement b/t spouses re spousal support
		- ***(c)*** custodial obligations respecting a child
		- ***(d)*** ability & capacity of, and reasonable efforts made by, either or both spouses to support themselves
	+ ***s. 89(2)***: each spouse is required to be self-sufficient in relation to their former spouse
	+ ***s. 93(4)*** - mirrors ***DA, s.15.2(6)***: spousal support to be determined based on **needs, means, capacities and economic circumstances** of each spouse, including the following factors:
		- effect on earning capacity of spouse arising from responsibilities assumed by spouses during cohabitation
		- any other source of support or maintenance for applicant spouse
		- desirability of applicant spouse to achieve financial independence
		- whether payor spouse has any other financial obligations to support other people
		- capacity and reasonable prospects of spouse achieving education and training

**STEP 1: ENTITLEMENT TO APPLY FOR SS**

***DA:*** filed for divorce.

1(1): “spouse” = either of two persons who are married to each other. (opposite / same sex)

**Same-sex spouses:** Exclusion from statutory right to SS deemed unconstitutional ***(M v H [1999] SCR)***

* 1st goal of SS is equitable resolution of economic disputes when intimate relationships btw individuals who have been financially interdependent break down
* 2nd goal of SS is to ease strain on public purse

**CL spouses:**

***FRA, s 1(1):*** defines **“spouse”** as a **married person or a person**

* “who has lived w/ another person in marriage-like relationship for a period of at least 2 years
* **if the application under this Act is made within one year** after they ceased to live together
* and, for purposes of this Act, marriage-like relationship may be b/t persons of same gender”

**What is a marriage-like relationship?**

**2 main approaches:**

* **Intention** to live in marriage-like relationship is key ***Gostlin v. Kergin*** (1986) BCCA
* **Objective indicia** of living in marriage-like relationship ***Molodowich v. Penttinen*** (1980, Ont DistCt)

The situation in BC is unclear but the **approach must be flexible** to reflect variety of spousal relationships in modern society ***M v H*** **(1999) SCC**. Objective indicia are the focus but intention is still mentioned in some cases.

Facts: H argued they consciously avoided lifestyle modeled after heterosex’l relationships – “best friends”, not spouses

* Need to look at the facts of each case

***G(JJ) v A (KM)*** **(2009) BCSC**– To defeat H’s SS claim, argued for several years before cohabitation terminated, they had been living together as roommates only in a platonic relationship.

Application:Court runs through the **objective indicia**

 -Kept holding partner out as husband (in legal actions etc) until shortly before claim made

 -Facts around sharing domestic life together (socializing with families, sharing birthdays, etc.)

**Ratio: Must examine relationship as a whole and consider all the various objective criteria.** Presence or absence of one is not determinative. **Each relationship is unique and a flexible approach must be applied**

1. **CENTRAL INQUIRY:** **Did the parties intend to live together in a marriage-like relationship?**
2. \*Intention to live together in marriage-like relationship is important but not determinative. ***Gostlin v. Kergin*** (‘86) BCCA
3. Some level of financial dependence is not a necessary component ***Austin v Goerz*** (2007) BC
4. **Subjective intention may be overtaken by CONDUCT** such that while they may not say they were living in a marriage-like relationship, the reality is that the relationship has become such. ***Takacs v Gallo*** (1998) BCCA
5. Approach must be flexible to reflect variety of spousal relationships in modern society ***M v H*** **(1999) SCC** - H argued they consciously avoided lifestyle modeled after heterosex’l relationships – “best friends”, not spouses
6. **\*Consider the objective indicia** in ***Molodowich v. Penttinen***

***Molodowich v. Penttinen*** (1980, Ont DistCt) – **Widely applied and the preferred measure in majority judgments of SCC and ONCA in *M v H***

**Ratio:** Sets out 7 objective components that indicate a marriage-like relationship **[look at conduct of couple]**

1. **Shelter**
	1. Live under the same roof?
	2. Sleeping arrangements
	3. Did anyone else share the accommodation?
2. **Sexual and personal behaviour**
	1. Did they have sexual relations? If not, why not?
	2. Did they maintain an attitude of fidelity to each other?
	3. What were their feelings toward each other?
	4. Did they communicate on a personal level?
	5. Did they eat their meals together?
	6. What if anything did they do to assist each other with problems or during illness?
	7. Did they buy gifts for each other on special occasions?
3. **Domestic arrangements / Services**. Conduct in relation to:
	1. Preparation of meals
	2. Washing and mending clothes
	3. Shopping
	4. Household maintenance
	5. Any other domestic services
4. **Social activities**
	1. Did they participate together or separately in neighborhood and community activities?
	2. Relationship and conduct towards members of their respective families and how did such families behave towards the parties?
5. **How do they relate to wider society? Do they hold themselves out as a couple?**
	1. What was the attitude and conduct of the community towards each of them and as a couple
		1. There may be a possible exception for same-sex couples who don't hold themselves out as a couple for safety or family reasons.
6. **Financial arrangements**
	1. Financial arrangements regarding necessities of life
	2. Arrangements concerning acquisition and ownership of property
7. **Attitude & conduct towards any children** in the relationship

**STEP 2: ENTITLEMENT TO GET SS**

**3 conceptual grounds for entitlement to SS** – all three currently used

**EXAM:** Start with statutory framework… interpretation by cases… Based on the facts, I am applying the \_\_\_\_\_ model.

* + 1. **Contractual / “Clean break” *(Pelech Trilogy, Miglin) –* focus on self-sufficiency *s 15.2(6)(d)***
			1. **Finality in financial affairs of former spouses / encourage self-sufficiency**
			2. **Deference to the right and responsibility of indivs to make own decisions / Respect private ks**
			3. **Pelech trilogy (*Pelech; Richardson; Caron, [1987] SCR)***
				- Facts: All had negotiated separation agreements, 2 in an order and one in a negotiated settlement. After some time, wives experienced hardship and came back to ask for SS.
				- Holding: All wives failed
				- 2 possible approaches: Compensation for gender-based equality / Freedom of contract. **Freedom of k should be respected absent:** (TEST OVERRULED BY MIGLIN BUT PHILOSOPHY STANDS)
				- *1.* **Radical change in circs** of SS recipient b/t time agreement signed and variation app
				- *2.* **Causal connxn** b/t change in circumstance and the marriage (econ pattern of dependency)
				- No causal connection b/c job market bad, wife invested poorly, etc.
			4. ***Miglin v Miglin [2003] SCR – sep agmt then later initial application for SS, DA s 15.2 –*** rejects *Pelech* “radical change” + “causal connection” test – but **maintains high std for ct intervention to alter agmt**
		2. **Compensatory *(Moge)***
			1. Applies where a spouse has foregone opportunities or endured hardships as a result of the marriage (ie. left workforce to care for children)
			2. ***Moge v Moge [1992] SCR***  -
				- Facts: Court ordered support (no contract). Low income immigrant couple, came to Canada together, 18 year marriage. Traditional marriage. – H breadwinner, w kept house. When sep’d she got $150/month for both CS and SS, went up to $400 when she became unemployed. H later said shouldn’t have to pay anymore – should be clean break, she should be self-sufficient by now.
				- Analysis: W spent a lot of time out of the workforce. Length of marriage was a key factor. Rejects causal connection test in cases where there is no private agreement.
				- SCC: **Self-sufficiency *(Pelech)* is only one of 4 objectives and should not be prioritized.** On marriage breakdown, court must look at the effect of the marriage in either impairing / improving each party’s economic prospects, regardless of gender. **Purpose of SS is to relieve econ hardship that results from the breakdown of marriage.**

***MOGE:* CORRECT APPROACH**

**1. Consider the *s 15.2(6)* objectives** (look @ the facts!)

***s.15.2(6):* Objectives of SS order**

***(a)*** Recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; ***Moge***

-Did one spouse stay at home while other increased earning potential?

***(b)*** Apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

-Distribution of responsibilities in marriage

***(c)*** Relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

***(d)*** In so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.  ***Pelech***

**2. Apply the objectives to the *s 15.2(4)* factors**

***s.15.2(4):*** In making a SS order (or interim order), the court shall take into account the **conditions, means, needs and other circumstances of each spouse**, including

* + (1) the length of time the spouses cohabited,
	+ (2) the functions performed by each spouse during cohabitation, and
	+ (3) an order, agreement or arrangement relating to support of either spouse.

\*Note that **economic downturn** is not something that your former spouse is obligated to provide for - whether under the old ***Pelech*** test or the new, more liberal ***Moge*** test.

* + 1. **Non-compensatory *(Bracklow)*** – considers the **“means and needs”** of each spouse ***DA s 15.2(4)***
			1. Applies where the recipient spouse’s need exceeds the entitlement to be compensated. **Mutual obligation** due to the marriage itself. But **need not be indefinite period of payment or equal amount of need.**
			2. **Should pay if there is need.**
			3. Variables include length of relationship, need, ability to pay, new relationships, and other factors (15.2(4)

***Bracklow [1999] SCR***

 Facts: 2nd marriage, lived together 7 years, married for 3, no children of the marriage, wife has 2 kids from pervious marriage, W earns more than H, W was primary breadwinner for a while, W falls ill & never returns to work, H takes on primary responsibility for supporting family. Post-sep, H agrees to SS but never actually pays. CA terminates SS on basis of short, non-traditional marriage.

Holding: Allow W’s appeal. There are 3 basic conceptual bases for support: contractual, compensatory, & non-compensatory. First 2 reflect modern value of equality and independence. Last reflects some notion of basic marital obligations between spouses.

**Despite that the marriage did not generate economic disadvantages for either, he is required to pay SS based on notion of basic marital obligations between spouses.**

Impact: **There is no one conceptual basis for SS.** There are no fixed rules or guidelines for determining SS beyond those listed in s 15(2)

**MISCONDUCT & ACHIEVING SELF-SUFFICIENCY**

**Spousal misconduct is not to be taken into account in determining SS (*s.15.2(5))***

* + **BUT** can consider the **affect** of misconduct **on spouse’s ability to achieve self-sufficiency** (***Leskun***)

***Leskun v. Leskun*, 2004 BCCA 422 (2006, SCC)**

**Facts:** Long 20 yr marriage, 1 child, 2 ch from W’s previous marriage. W helped H advance his education during marriage. She also worked. Couple separates as result of husband's adultery. Left her at a very hard time – lost job, family members died, etc. Came back from a new job to tell her she wasn’t coming and he had a new family.

Analysis**:** Adultery / desertion = misconduct not supposed to be taken into account *(DA s 15.2(5)).*

**Holding:** Held for the wife. **Misconduct is not a relevant consideration for SS but the emotional consequences of misconduct can be relevant if the affect the other spouse’s ability to achieve self-sufficiency.**

**DEALING WITH SEPARATION AGREEMENTS THAT DEAL SPECIFICALLY WITH SS**

**MIGLIN TEST**

**1st Stage: WHEN THE AGREEMENT WAS CREATED**

* Look at the circumstances at the time of negotiation (condition of parties, oppression, pressure or other vulnerability, negotiations, legal advice)
	+ Do not presume imbalance of power or exploitation by the party in the stronger position
	+ Presence of vulnerabilities alone will not justify intervention
	+ If there is not full and honest disclosure at time of negotiations, or if one party exploits other party (ie at time of severe mental instability), may be able to challenge original agreement *(Rick v Brandsema [2009] SCR)*
* Determine whether agreement is in “substantial compliance” with factors and objectives listed in *DA* including *s 15.2* as well as provisions that encourage parties to order their own affairs
	+ Only a significant departure from the general objectives of the Act will warrant intervention
	+ If SS was part of a comprehensive settlement, consider the entire agreement

***s.15.2(4):*** In making a SS order (or interim order), the court shall take into account the **conditions, means, needs and other circumstances of each spouse**, including

* + (1) the length of time the spouses cohabited,
	+ (2) the functions performed by each spouse during cohabitation, and
	+ (3) an order, agreement or arrangement relating to support of either spouse.

***s.15.2(6):* Objectives of SS order**

***(a)*** Recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

-Did one spouse stay at home while other increased earning potential?

***(b)*** Apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

-Distribution of responsibilities in marriage

***(c)*** Relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

***(d)*** In so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

***s. 9(2):*** Duty of lawyers to discuss with their clients the advisability of negotiating matters and using mediation (staying out of courts)

**2nd Stage: AT THE TIME OF APPLICATION FOR SPOUSAL SUPPORT**

If the agreement survives stage 1, the court must consider the extent to which

1. Enforcement of the agreement still reflects the original interests of the parties (or has there been some change in circumstances that could not have been reasonably anticipating at the time of the agreement)
	1. The following kinds of changes are foreseeable and will likely not count as a change in circumstances:
		1. Changes in the job market
		2. Reality of onerous parenting obligations
		3. Challenging transition to the workforce
		4. Health of the parties
		5. Decline in the housing market
		6. Poor business environment
		7. Asset depreciation
	2. A change does not automatically entitle a court to jettison the agreement entirely. The court should be persuaded that both the intervention and the degree of intervention are warranted.
2. If the agreement is still in substantial compliance with the objectives under the ***DA***

***Miglin v Miglin [2003] SCR –***

* + - * + Facts: W makes original order for SS under *s 15.2* contrary to separation agreement made at time of divorce. H much wealthier than W. W has custody of 4 kids. She had been receiving $15,000 consulting fee but he stopped paying that. Quite significant child support $60,000 / year. MP division she got home, he got hotel. All fine. But then she sold home and converted to Judaism, and he began acting strangely – sitting behind kids in school etc.
				+ Wife went to court and argued there had been changes (but argued as initial application, not as variation order). H acting weirdly. Primary responsibility for 4 kids more onerous than expected. H doing well economically. All she had for income was a bit from investments.
				+ Holding: Mrs M did not successfully re-open agmt. Failed to show that anything had changed so substantially that the original intentions of the parties were not being met.
				+ Rejects “causal connection” & “radical change” tests (*Pelech* trilogy)
				+ **But maintains high standard for court intervention to alter agreement.**
				+ **Dissent:**
				+ The appropriate threshold for overriding a support agrmt in an application for corollary relief under s 15.2 is whether the agreement is **objectively fair at the time of the application**
				+ It is not enough that the agreement is intended to effect an equitable sharing of the economic consequences of the marriage and its breakdown; must in fact reasonably accomplish this end

**STEP 3: QUANTITY & DURATION OF SS**

Once it is found a spouse is entitled to SS, the *Spousal Support Advisory Guidelines (SSAGs)* assist in determining quantum & duration. They provide a **range of amounts & durations** to allow for judicial discretion.

* They are **not legally binding, but are widely used**.
* They can provide a useful crosscheck against the assessment made under existing law *(W v W [2005] BCSC)*
* If an award deviates substantially from the SSAG range, with no exceptional circumstances, appellate intervention may be appropriate *(Redpath, [2006] BCCA)*

*With* Child Formula

* Philosophy to prioritize CS and recognize impact of child care responsibilities

*Without* Child formula

* Philosophy of merger of spouses’ lives over time. Looks at gross income difference & length of marriage
* **Duration**: Ranges from .5 to 1 year for each year of marriage. But **indefinite** if marriage is 20+ years or, if the marriage is 5+ years, when the years of marriage and the age of the support recipient at sep added together total 65 or more.

**VARIATION OF ORDERS** – different from an appeal. Arguing that since last order, **circumstances have changed.**

***DA S 17(1)*** – a court may make an order varying, rescinding or suspending, prospectively or retroactively (a) a support order

***DA S 17(4.1)*** – **Factors:** Court shall satisfy itself that a **change in condition, means, needs or other circumstances of either former spouse** has occurred since the last order, and take that change into consideration.

***DA S 17(6)*** – Court not to consider conduct that under the *DA* could not be considered in making the original order

***DA S 17(7)*** – A variation order varying a SS order should [these are the objectives from *15.2(6))*

1. Recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown
2. Apportion btw the former spouses any financial consequences arising from the care of the child of the marriage over and above any obligation for the support of any child of the marriage
3. Relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
4. In so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

***DA S 17(10)*** – Where an order was for **time limited support**, the court may not make a variation order to resume support unless satisfied that:

* *(a)* necessary in order to relieve economic hardship arising from a change in condition, means, needs or other circumstances of either former spouse since the making of the S order or last variation *that is related to the marriage*; and
* *(b)* the changed circumstances, had they existed at the time of the last order, would likely have resulted in a different order.

**Where a separation agreement was incorporated into a court order,** the courts should take into account the ***Miglin test***on a variation application rather than using the more wide open discretion available under ***s 17(7).***

**White Paper**

* FRA be brought under same rules as DA
* New FLA: def of spouse will apply for both SS and property division. For SS only: “spouse” also includes a person who has a child with another person and have to have lived with them in a marriage like relationship, but no 2 year requirement.
* must not consider misconduct except misconduct that arbitrarily causes, prolongs or aggravates the need for spousal support or affects ability to provide SS