**PRELIMINARY MATTERS**

**The legal framework: family law in the federation**

1. *Which statute applies?* Does the federal Parliament or the provincial legislature have the power to legislate
   1. NB: the *Indian Act* (property problems)

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| **Federal:** | **91(26):** Marriage and divorce – essential elements of marriage | *Marriage (Prohibited Degrees) Act; Civil marriage Act* |
|  | **91(27)**: Criminal Law | *Criminal Code*: assault, homicide, necessities of life, corporal punishment |
|  | **91(29):** Residual clause: anything else in provincial hands | Federal power overriding but must take the field   * E.g., until feds legislated on divorce, provinces could |

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| **Provincial:** | **92(12)**: solemnization of marriage (formalities) | *Marriage Act BC* |
| After the *Adoptions Reference*, it has never been doubted that **adoption, legitimacy, custody, guardianship, child welfare, affiliation** and **maintenance of children** are within provincial power | **92(13):** Property & Civil Rights. The provinces , under the authority over property and civil rights (92(13)) had the exclusive competence to create legally recognized non-marital relationships (e.g., civil union) | *Family Law Act:* property, support, children  *Adoption Act:*  *Child Family and Community Services Act:* child welfare  *Law and Equity Act:* legitimacy  *Vital Stats Act:*parenthood, naming  *Estate Admin Act:*Succession |
|  | **92(16)**: Matters of purely local/private nature |  |

1. **Which court?**

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| **BC Superior Courts** | *Divorce Act* – BCSC & BCCA meet definition of “court” *s.2(1)*  *FLA s.6* – property matters  *Adoption Act* – *ss.1* definition of “court” | Can be venue for: marriage and divorce, property (BCSC), adoption (BCSC), all appeals can go to superior courts |
| **Provincial Courts** | *Child, Family, and Community Services Act* – Provincial courts meet definition of “court” *s.1* | Can legislate on: matters of child protection (generally, appeals can be litigated in Superior) |
| **Both** | *Family Law Act* – maintenance or custody issues | Both courts have the jurisdiction to hear matters of maintenance and custody |

**DIVORCE**

***Divorce Act*** (vol.3 p. 101-103) **BCSC ONLY**

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| **PRELIMINARY QUESTIONS:** |

1. ***Has the lawyer discharged their duties?***

***s.9(1)***: it is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding

***(a)*** to **draw the attention** of the spouse the provisions of this Act that have as their object the reconciliation of spouses, and

***(b)*** to discuss with the spouse the **possibility of the reconciliation** of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to him or her that might be able to assist the spouses to achieve a reconciliation.

***s.10(1)*** In a divorce proceeding, it is the duty of the court, before considering the evidence, to satisfy itself that there is **no possibility** of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would not be appropriate to do so. (**EMPHASIZE NO RECONSILIATION**)

**Alternative dispute resolution**

The majority of FL cases settle out of court via:

**Direct negotiation** parties need to be on somewhat ok terms; **Lawyer-assisted negotiation**

**Mediation** – mentioned in both the ***DA***and the *FLA*

* + - process by which 2 adults attempt, with the assistance of an **impartial** person, to reach a consensual settlement of issues related to their marriage, cohabitation, separation or divorce
    - mediator is not a decision maker, **they are a facilitator** (in contrast to arbitrator or judge)
    - mediation does not preclude later litigation
    - full disclosure/confidentiality req’ment (***FLA******s.5****)*: nothing said can be used later (***ss.11-13***)
    - **Pros**: cost-effective, potentially less adversarial, no court, more ownership over agreement
    - **Cons**: potentially unfair in relationships of power imbalance or where there has been domestic violence (***FLA******s.8***= a family dispute resolution specialist must say whether parties can come to a fair settlement, taking into account the presence of family violence: ***DA***doesn’t have this provision

1. *Are they a legitimate* ***‘spouse’?***

**s.2(1)**: “**Spouse**”: “either of two persons who are **married** (i.e., not common law) to each other”

* + Definition now includes same-sex couples (***Bill C-38***)

1. ***Either*** *spouse* ***ordinary resident****?**(lived in prov* ***for @ least 1 year*** *b4 proceedings)?*

***s.3(1)*** A court in a province has jurisdiction to hear and determine a divorce proceeding if **either spouse** has been **ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.**

* If only one spouse is a resident for 1 year, then you can commence divorce proceedings;

“**ordinary resident**” = Q of fact “normally lives in settled routine” ***Thomson v MNR* (SCC)**

***s.8(1)*** If **only one spouse wishes to divorce**, you can still bring an application

***OR…*** *is the couple a* ***“foreign” same sex couple*** *married in Canada and* ***cannot get a divorce in their home jurisdiction*** *(****s.6-7***)

* ***Civil Marriage Act***such marriages are valid ***s. 5(1)***

1. ***Jurisdictional conflict*** *with application?* ***Look @ days applications were filed***

***s.3(2)* Jurisdiction where two proceedings commenced on different days**

the court in which a corollary **relief proceeding was commenced 1st** **has exclusive jurisdiction** to hear & determine and corollary relief proceeding then pending between the former spouses in respect of that matter & second corollary relief proceeding shall be deemed to be discontinued.

***s.3(3)*** **Jurisdictions where two proceedings commenced on same day**

**Federal Court has exclusive jurisdiction** to hear and determine and corollary relief proceeding then pending between the former spouses in respect of that matter and the corollary relief proceedings in those courts shall be transferred to the Fed Court on direction of that court

NB: rules for **corollary relief disputes** (***ss. 4*** *&* ***5***) subject to same rules **BUT…**

**s.6(1)**: Proceedings can be transferred if there is a **custody dispute** and the **child is more substantially connected to another province**

Where an application for an order under ***s.16* (Custody Order)** is made in a divorce proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the order is sought is most substantially connected with another province, the court may, on application by a spouse or on its own motion, transfer divorce proceeding to court in other prov

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| **GROUNDS FOR DIVORCE:** |

1. *Was there a* ***breakdown of the marriage?***

***s.8(1)* :** a court of competent jurisdiction may, on the **application by** **either or both spouses**, grant a divorce to the spouse or spouses on the ground that there has been a **breakdown of the marriage**.

***s.8(2)*** *“****Breakdown of Marriage****”* is established **only if:**

1. ***“Living Separate and Apart”*?**

***s.8(2)(a)*** The spouses have lived separate & apart for **at least one year** immediately preceding determination of divorce proceeding & were living separate & apart at commencement of proceeding;

***s.8(3)(a)*** spouses shall be deemed to have lived separate & apart for **any period** during which they lived apart & **either** of them had the **intention** to live separate & apart from the other (NOT nec. consensual)

**AND…**

***s.8(3)(b)*** a period during which spouses have lived separate and apart shall **NOT** be considered to have been **interrupted or terminated. --** I.e., no reason to believe marriage was back on

1. ***Separation interrupted?* MENTAL CAPACITY OR COHABITATION**

**MENTAL CAPACITY?**

***s.8(3)(b)(i)*** by reason only that **either** spouse has become **incapable of forming or having an intention** to continue to live separate and apart or of continuing to live separate and apart of the spouse’s own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable,

***Wolfman-Stotland v. Stotland (2011 BCCA)***: “the minimum capacity required to form the intent to separate is the capacity to instruct counsel “; ***Calvert*** the capacity to form the intention to live separate and apart = equivalent capacity to enter into marriage and is sufficient for divorce

**OR… (OVER)**

**RESUMED COHABITATION?**

***s.8(3)(b)(ii)*** by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, **not more than ninety days** with **reconciliation as a primary purpose** (reset clock if they separate again; can do this so long as it doesn’t exceed 90 days)

***Oswell v. Oswell [OJ HC) -* Factors to consider re separation**:

1. Physical separation; ***Dupere v. Dupere (NBR)*** can be in same house for **economic necessity**
2. Withdrawal by one or both spouses from the matrimonial obligation with intent of destroying the marriage (matrimonial consortium)
3. The absence of sexual relations (NB: this is **not** **conclusive** but is considered)
4. Presence or absence of joint social activities
5. Performance of household tasks (more weight given to tasks of husband/wife relationship)

**Application of factors to *Oswell*:** Intention to separate; acted as if nothing happened at retirement dinner (thanked his wife); agreement to live together as friends while wife finished BA; vacation together, sex occurred (but no intercourse in matrimonial home); tasks done at home like laundry by husband; threatened to kill him; **taxes indicated married** until Jan 1988. **No separation until Jan 88**\*

1. ***“Adultery and/or Cruelty”?*** NB: you will need to see **(c)** for “bars to divorce”

***8(2)(b)***  the spouse against whom divorce proceeding is brought has, since celebration of marriage:

***(i)*** Committed **adultery** or...

“Voluntary sexual intercourse between a married person and another person of the opposite sex other than his/her spouse” ***Orford v. Orford* (ONT)**

BC (NB too) says common law def. of adultery includes same-sex spouses ***P.(S.E.) v. P(D.D.)***

Artificial insemination (w/o other spouses knowledge) can also amount to adultery (***Orford*) BUT** (***Maclennan***) says it has to be physical contact btw 2 parties, engaging in a sexual act = adultery

On its face, non-monogamy agreement still = adultery

***(ii)*** Treated the other spouse with **physical or mental** **cruelty** of such a kind as to render intolerable the continued cohabitation of the spouses

***Knoll v. Knoll (RFL)*** – grossly addicted to alcohol, verbally vicious = CRUELTY;

***Balasch v***. ***Balasch*** ***(Sask)***: it is **not** the **intention** to be cruel, but its **subjective impact**

* + “**Grave and weighty**” conduct going beyond incompatibility

1. ***Are there any bars to the divorce?***

***s.11(1)***: In a divorce proceeding, it is the duty of the court…

1. ***Collusion?*** Making up evidence to end marriage

***s.11(1)(a)*** to satisfy itself that there has been no collusion in relation to the application for a divorce and to dismiss the application if it finds that there was collusion in presenting it;

* ***Definition: s.11(4)***: “collusion” means an agreement or conspiracy to which an applicant for divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or deceive the court, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property or the custody of any child of the marriage.

1. ***Maintenance?*** Ensures reasonable arrangements for child

***s.11(1)(b)*** to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, **if such arrangements have not been made to stay the granting of the divorce until such arrangements are made**

1. ***Connivance and condonation?*** In context of cruelty and adultery only

***s.11(1)(c)*** where a divorce is sought in circumstances described in para. ***8(2)(b),*** to satisfy itself that there has been **no condonation** (**acting as if it didn’t happen**) or **connivance** (**trick someone into cheating**; may be non-monogamy agreement) on the part of spouse bringing proceeding, & to dismiss application for a divorce if that spouse has condoned or connived at the act/conduct complained of unless, in the opinion of the court, public interest would be better served by granting divorce

***s.11(3)*** – if **trying to reconcile for less than 90 days** 🡪 not condonation

* + “For the purposes of this section, a continuation or resumption of cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose shall **not** be conserved to constitute condonation”

***d) Religious barriers that can be removed?***

***s.21.1***spouse can ask for religious barriers to religious remarriage to be removed if they are within the power of the other spouse *(****Bruker v. Marcovitz (SCC)***)

1. ***When will the divorce take effect?***

***s.12(1)* 31 days after date of judgments**

* “Subject to this section, a divorce takes effect on the thirty-first day after the day on which the judgment granting the divorce is rendered”. **BUT…**
  + *Special Circumstances* ***– s.12(2)*** need ***(a)*** reason for special circumstance and ***(b)*** no appeal (i.e., consent from spouses)
  + *Spouse dies before the 31 day period* **–**

***s.13*** legal effect throughout Canada

***s.14*** dissolves marriage

1. ***Foreign divorce?***

***s.22(1)*** if **either** former spouse was **ordinarily resident** in that country for **at least one year** then the divorce granted & recognized in Can so long as it was done so by a competent jurisdiction or arbitrator

**DA CUSTODY AND ACCESS**

**WHEN CORROLLARY TO DIVORCE (MUST HAVE FILED) 🡪 *DA ss.16*** & ***17 BCSC***

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| **SEEKING CUSTODY OR ACCESS** |

Traditionally under the ***DA*** one parent is awarded custody and the other access 🡪 ***s.16(4)*** allows for custody to be awarded to “**one or more persons**” (**joint custody**)

***Custody:*** ***s.2(1)*** Includes care, upbringing and **any other incident of custody** (e.g., right to determine a child’s education, health care, religion) and physical care/control over a child (***BC FL Sourcebook***)

***Access:*** right to spend time with the child, usually per order or agreement

1. ***Who is applying for custody/access?***

***s.16(1)***: **either** or **both** **spouses** or **any other person** (see **(b)** below if this) may seek **custody** or **access** of **any** or **all** of the children of the marriage

**No primary custody presumption** that parent who = primary caregiver of children while in a relationship was presumed intact is presumed to be the parent receiving custody in contest, **unless proven unfit**

1. ***Spouse applying for custody/access?***

***s.2(1)* Spouse:** “either of two persons who are married to each other (**includes a former spouse**)

1. ***Non-spouse applying for custody/access?***

***s.16(3)***: a person, **other than a spouse,** may **NOT** make an application under subsection (1) or (2) **without leave of the court**

* On exam make sure to **mention you would need to request leave of the court**

***Bridgewater v. Lee (ACWS)*** where access order would **disrupt child’s nuclear family** (parents still together) courts must exercise **extreme caution** in evaluating the effects of access on BIC

***a) Interim order for custody/access?***

**REMEMBER:** if making an order under ***16(1)***, apply for this too

***s.16(2)***: “**interim order for custody/access**”

* Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of an access to, any or all children of the marriage pending determination of the application under subsection (1)

1. ***What are you applying for?***
2. ***Access***

***s.16(4)*** The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons

***s.16(5)*** Unless court orders otherwise, a spouse who is granted access to a child of the marriage has **right to make inquiries**, and to be **given information**, as to **health**, **education** and **welfare** of the child.

* Includes right to visit
* Orders for sole custody to one parent and access to other less popular
* Orders or agreements often specify details such as what time a child spends with parents, who makes what decisions etc.

***Young v. Young SCC*** custodial parent’s wishes are not the criterion for limitations on access – only BIC is

* Custodial parent (with right to determine religious upbringing of child) cannot interfere with the rights of an access parent to share his/her religious beliefs with the child

***Johnston-Steeves v. Lee QB*** right of access belongs to child and is not his mothers to give away

***Windle v. Windle*** ***BCSC*** courts may also take the views of the child into consideration

1. ***Are there allegations of violence?***

**IT IS EXTREMELY DIFFICULT TO DENY ACCESS TO A PARENT**

***Fullerton v. Fullerton*** children witness repeated spousal abuse, which continues at access handovers, do not want to see dad… **access may still be ordered even if the children themselves do not want it** (access was limited but not denied entirely due to max contact rule in young)

***Al-Maghazachi v. Dueck*** access not revoked despite claims of sex abuse & kids not wanting to see dad

***Baggs v. Jesso*** father given unsupervised access for short periods after acquittal in relation to assault charges 🡪 long periods of access deemed not in the child’s best interests

**INSTANCES WHERE ACCESS DUE TO VIOLENCE DENIED:**

***EH v. TG*** Access **terminated** on appeal due to sexual abuse – “**parental preference should not influence our consideration of best interests**”

***HK v. TJ*** father convicted of assault denied access: psychologically manipulative didn’t take responsibility

1. ***(Joint) Custody/Access?***

***s.16(4)***: the court may make an order under this section granting custody of, or access to, any/all children of the marriage to any **one or more persons**

**NO PRESUMPTION** OF JOINT CUSTODY

***Javid v. Kurytnik BCCA*** JC **NOT** in BIC parents inability to communicate sensibly & cooperate in caring for kids (father had continuing and real anger issues)

***Narayan BCCA*** JC **NOT** appropriate as dad had **assaulted**/animosity to mom, shows **lack of reliability**

***Kaplanis ONCA***: JC should **NOT** be awarded if there is no evidence that the parents are able to communicate effectively (esp. where child is extremely young & unable to communicate own needs)

***Windle v. Windle BCSC*** older kid (14) expressed he didn’t wish to live w/ dad: court supported his wishes

* JC inappropriate b/c of parties’ high conflict & inability to communicate - **invites future conflict**
* Significant value should be given to maintaining the current primary residence of the children (in this case, well established children lived in mothers’ home)
* **RULING**: sole custody and primary residence to mother, JC not appropriate – father may make requests when he would like to see the boys, mother must consent for younger sons, older son can decide for himself.

1. ***Agreement between the parties for joint custody?***

***Robinson v. Filyk BCCA*** no presumption that JC improper **UNLESS** parties in agreement

***Stewart v. Stewart BCCA*** JC should only be awarded where parties are in total agreement & do not need assistance from the court

1. ***Best interests of the child?***

***s.16(8)***: In making an order under this section, the 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.

***MMG v. GWS SKQB*** court prefers to maintain status quo (who they’re currently residing with)

***Young v. Young (SCC)*** courts must balance such considerations as **age, physical and emotional constitution and psychology** of both child & his/her parents & particular **milieu** in which child will live

* FACTS mom sole custody by consent dad had access. Mom didn’t want religious views put on children (JW – door to door thing). Children interviewed, said they didn’t like dads religion.
* ISSUE *can a custodial parent limit what goes on during access visit?*
* HELD 4-3 dad wins
* ANALYSIS significant weight to maximum contact. Limitations on access only granted if in the BIC. Custodial parent **CANNOT** impose restrictions on access parents
* DISSENT father was interfering with custody rights (right to make decisions re: religion), custodial parent has unfettered rights to limited access

***Parsons v. Parsons (ONSC)*** Parent placing own needs/vindication before child’s (e.g., demanding that parents accept homosexual relationship) was not in the best interests of the child

**Policy argument:** *M Schaffer* claim that it is the **quality**, not quantity of time spent w/ child

Studies are mixed, but most conclude that the key factors that correlate ot a child doing well after divorce are: **1)** a close, sensitive relationship with a well-adjusted custodial parent, **2)** diminution of conflict and reasonable cooperation between parents, and **3)** whether or not child comes to divorce with pre-existing psychological difficulties

1. ***Race?***

**NB:** RACE **NOT** legislated as BIC under DA, but CAN be **ONE** (NOT DETERMINATIVE) relevant factor in determining BIC depending on context

***JSB v. DLS ONSC*** race and sexuality not critical factors unless impact on ability to parent

**QUESTIONS TO CONSIDER**

***Van de Perre v. Edwards (SCC)*:**

1. Which parent will **facilitate contact** and **development** of racial identity in a manner that avoids conflict, discord, and disharmony? (does not necessarily have to be the parent who is same race)

There are tools that a bi-racial child needs to facilitate **identity** and **pride** in their race

1. Evidence of race relation in the **relevant communities** may be important to determine the context in which the child will function
2. ***Sexuality?***

***JSB v. DLS ONSC*** race and sexuality not critical factors unless impact on ability to parent

***N v. N (1992)*** Discreet homosexuality does NOT interfere with BIC, but parents who are **less discreet** in their homosexual relationships may have **less success** obtaining custody.

* If you use this argument, note that the tenants of the new ***FLA*** would not likely agree with this

***MMG v. GWS SKQB*** wife who leaves father for lesbian relationship gets joint legal custody, with residence to father and frequent access to mother

***c) Past conduct to be taken into consideration (e.g., adultery, violence)?***

***s.16(9)***: In making an order under this section, the court shall **NOT** take into consideration the past conduct of any person **UNLESS** conduct is relevant to ability of that person to act as a parent of a child

***Van der Peer v. Edwards (SCC)*** Conduct causing break-up is irrelevant but parties’ attitudes towards and views of each other are important

* Some consideration given to father’s (basketball) promiscuity in relation to stability of the child

***Carlson v. Carlson BCCA*** abuse/family violence relevant to decisions re: custody , but rarely = no access

***Fullerton v. Fullerton*** children witness repeated spousal abuse, which continues at access handovers, do not want to see dad… **access may still be ordered even if the children themselves do not want it** (access was limited but not denied entirely due to max contact rule in young)

***4) Maximum contact considered?* STRONG PRESUMPTION**

***s.16(10)*** In making an order under this section, the court **shall** give effect to **the principle that a child of the marriage should have as much contact with each spouse** as is consistent with the best interests of the child and, for that purpose, shall take into consideration **the willingness of the person for whom custody is sought to facilitate such contact** (i.e **FRIENDLY PARENT RULE**)

***Young v. Young (SCC)***

**FRIENDLY PARENT RULE** – court will take into consideration the willingness of the person for whom custody is sought to facilitate contact

**Absent of direct harm**, BIC is met by **maximum contact and access w/ both** parents. **BUT** in assessing all the considerations, courts must be careful that the ideals of parental sharing and equality do not overcome the lived reality of custody and access arrangements

***TS v. AVT*** ***(ABQB)*** if allegations of family violence are not proven or believed, it can work against the parent who made the allegations because they will likely prevent relationship w/ other parent

***Carlson v. Carlson BCCA*** abuse and family violence is relevant to decisions about custody order, but rarely results in “no access”

***JT v. SCT (ONCA)*** court orders joint legal and physical custody of child to lesbian couple due to focus on maximum contact (MAKE SURE TO NOTE IT CAN HELP WITH INTERPRETATION – SEPARATION)

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| **VARIATION RECISSION AND SUSPENSION ORDERS** |

1. ***Who is applying for the order?***
2. ***Spouse or other person?***

***s.2(1)* Spouse:** either of two persons who are married to each other (**includes a former spouse**)

***s.17(1)*** a court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

***s.17(1)(b)*** a custody order or any provision thereof on application by **either or both** former **spouses** or **by any other person**

***GES v. DLC*** Access rights can arise independently of being defined as a legal parent 🡪 non-biological relative/parent can apply for custody or access (in SK at least) if there is “some connection or **sufficient interest” in the child**

**NB:** this was overturned on appeal because he was “much less than a parent in that… he limited his commitment to the children” –**not sufficient to warrant access in the circ.**

1. ***Factors the court must consider for variation of custody order***

***s.17(5)*** Before the court makes a variation order in respect of a custody order, the 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… the court **shall** take into consideration only the **BIC** as determined by **reference to that change**

1. ***Terminal illness?***

***s.17(5.1)*** for the purposes of subsection (5), a former spouse’s terminal illness or critical condition shall be considered a change of circumstances of the child of the marriage, and the court **shall** make a variation order in respect of access that is in the **BIC**

1. ***Conduct?***

***s.17(6)*** In making a variation order, the court **shall not** take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought

***Leskun SCC 2006***: **BUT** can consider **effect** of misconduct on **spouse’s ability to achieve self-sufficiency**

**OR : “Courts cannot achieve indirectly what Parliament has said it should not do directly. Misconduct, as such, is off the table as a relevant consideration.”**

1. ***Maximum contact respected?***

***s.17(9)*** in making a variation order, court shall give effect to **max contact** principle & **friendly parent rule**

***Young v. Young (SCC)* FRIENDLY PARENT RULE** – court will take into consideration the willingness of the person for whom custody is sought to facilitate contact

**Absent of direct harm**, BIC is met by **maximum contact and access w/ both** parents

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| **DENIED OR FRUSTRATED ACCESS** |

**NO EXPLICIT REMEDY IN THE *DA*** **BUT…** Denying a parent access can be considered **contempt of court** and order one of the following:

***BL v. DR (ONSC)*** imprisonment;

***Cooper (ONSC***) fine ;

cancellation of drivers licence

***JKL v. (NCS OJSC)*** varying of custody order – father got primary custody of son but then turned him against his mother… mother then awarded primary custody and sent for ‘deprogramming’

***Ungerer v. Ungerer (BCCA)*** cancellation of spousal support

* + ***s.17(6)*** does not forbid court considering post-separation conduct 🡪
    - **TEST:** where “the misconduct is of such morally repugnant nature as would cause right thinking persons to say that the spouse is no longer entitled to 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

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| **RELOCATION/MOBILITY** |

The ***DA*** does **NOT** explicitly provide guidelines in relocation cases, thus CL dictates relocation matters.

***Gordon v. Goertz SCC*** Test (***McLachlin***)

1. **Threshold test** for variation: demonstrate a **material change** in the circumstances affecting the child (**NB:** this is almost always shown with a relocation)
2. **BIC analysis:** judge must determine the BIC taking into consideration several factors:

* **Existing custody relationship** & relationship between the child & custodial parent;
* **Existing** **access arrangement** and relationship between the child & access parent;
* Desirability of **maximizing contact** between the child and both parents;
  + Courts favour maximum contact w/ both parents (hate separation)
* **Views of the child**;
* Custodial parent’s **reason for moving** only in the exceptional case where it is relevant to that parent’s ability to meet the child’s needs;
* **Disruption** to the child of a change in custody; and
* **Disruption** to the child consequent on removal from family, schools and community.
* What is the **relationship between the child and extended family** (and cultural groups etc.)
* Custodial parent’s reasons for moving only to be taken into account in exceptional cases where it is relevant to that parent’s ability to meet child’s needs.

**NB:** relocation under **Goertz** can be unpredictable

***Karpondonis v. Kantas BCCA*** appeal dismissed for mother to relocate to Texas from Vancouver - distance from family and age of the child were major considerations for this. As noted in ***Ligate v. Richardson ONCA*** – a move for family reasons can conduce to the best interests of the child over a purely economic rationale.

***One v. One BCSC*** mother proposed move to Mexico to expose children to another culture 🡪denied, too disruptive to the children’s lives (father lived in lower mainland)

***Falvai v. Falvai BCCA*** example of a mother who successfully appealed her condition of sole custody order that required her to live in the same community as her father

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| **JURISDICTION AND CHILD ABDUCTION** |

***Hague Convention of the Civil Aspects of International Child Abduction***:

Removal/retention of a child is wrongful if it breaches the rights of custody under the law of the jurisdiction in which child was **habitually resident** immediately b4 removal/retention, & those custody rights were being exercised

***Article 3***: court **must** order return of the child **UNLESS** an exception under ***12, 13*** or ***20*** apply

***Article 12***: 1 + years elapsed btw removal/retention & application for return & child settled

***Article 13*** person seeking return was not actually exercising custody rights, or consented or acquiesced in the removal/retention, or if there is grave risk child’s return would expose him to physical/psychological harm or otherwise place the child in an intolerable situation, or mature child objects to being returned

***Article 20*** to protect human rights and fundamental freedoms

***Thompson v. Thompson SCC*** first time SCC interprets and applies ***Convention***

* Mom got interim custody in Scotland w/no removal clause, moved to Manitoba w/ kid, applied for custody; father granted custody in Scotland, applied in Manitoba for kid, judge ordered kid’s return to Scotland
* Judge used Manitoba “best interest” law to give mom temp custody in Scotland
* Held: Manitoba **courts don’t have jurisdiction to impose transitory measures** for return of kid

***Hoskins v. Boyd (BCCA)*** court is clear that **BIC is matter for the “home state”**

**FLA CUSTODY ACCESS & POST-SEPARATION PARENTING AGREEMENTS**

***Part 4 – Care and Time with Children BCSC OR BCPC***

**Trend:** eliminate legal categories of custody and access and replace them with terms such as ‘parenting orders’, ‘parenting time’, etc.

***s.251(1)*** If an agreement or order, made before the coming into force of this section, provides a party with :

**s.251(1)(a)** custody or guardianship of a child the party is a guardian of the child under this act and has parental responsibilities and parenting time with respect to the child under this Act, or

***s.251(1)(b)*** access to, but not custody or guardianship of, a child, the party has contact with the child under this act

***s.251(2)*** For the purposes of subsection (1), a party’s parental responsibilities, parenting time or contact with a child under this Act are as described in the agreement or order respecting custody, guardianship and access

***FLA*** **NOT** determinative of issues **NOT** previously adjudicated on (***P v. B***)

***JCP v. JB*** father was deemed a **guardian** under the ***FLA*** b/c there was an **ongoing joint custody and guardianship application** yet to be heard

***AJH v. LCH*** translating custody order made under the ***FRA*** to the ***FLA***– while the father had liberal access under the agreement this still translates to contact only under the ***FLA***. He could apply to vary the terms of the agreement under ***s.47*** to obtain guardianship, or apply directly for guardianship (***s.51)***

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| **PARENTAL RESPONSIBILITIES** |

***s.41*** parental responsibilities with respect to a child are as follows:

**(a)**making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;

**(b)** making decisions respecting where the child will **reside**;

**(c)**making decisions respecting with whom the **child will live and associate**;

**(d)**making decisions respecting the **child's education** and participation in extracurricular activities, including the nature, extent and location;

**(e)**making decisions respecting the child's **cultural**, **linguistic**, **religious** and **spiritual** upbringing and **heritage**, including, if the child is an aboriginal child, the child's aboriginal identity;

**(f)** subject to section 17 of the ***Infants Act***  giving, refusing or withdrawing **consent** to **medical**, **dental** and other **health-related treatments** for the child;

**(g)**applying for a **passport**, **license**, **permit**, **benefit**, **privilege** or other thing for the child;

**(h)**giving, refusing or withdrawing consent for the child, if consent is required;

**(i)**receiving and responding to any **notice** that a parent or guardian is entitled or required by law to receive;

**(j)**requesting and receiving from third parties health, education or other information respecting the child;

**(k)**subject to any applicable provincial legislation,

**(i)**  starting, defending, compromising or settling any proceeding relating to child, and

**(ii)**  identifying, advancing and protecting the child's legal and financial interests;

**(l)**exercising other responsibilities reasonably necessary to nurture child's development.

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| **PARENTING TIME** |

***s.42(1)*** parenting time is the time that a child is with a **guardian**, **as allocated** under an agreement or order

***s.42(2)*** during parenting time, a guardian may exercise, **subject to agreement/order**, the parental responsibilities of day-to-day care, control, supervision, and decision-making

**NB:** ***FLA*** moves to a system of allocating “parenting time”. No equivalent of “access”

“**Contact**” is for non-guardians

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| **ASSUMPTIONS (NO ORDER)** |

***s.40(2)*** **UNLESS** agreement or order varies, each guardian may exercise **ALL** **parental responsibilities** in **consultation w/ the other**, **UNLESS** **unreasonable or inappropriate**

***s.40(3)*** parental responsibilities **may be allocated by order/agreement**

**Prof**: Implication seems to be that **no order = sharing of relationship**

***s.40(4)*** the following should **NOT** be presumed:

**a)** that parental responsibilities should be allocated **equally** among guardians

**b)** that parenting time should be shared equally among guardians

**c)** that decision among guardians should be made separately or together

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| **MAKING ORDERS/AGREEMENTS** |

1. ***Are they a guardian?***

***s.39(1)*** while a child’s parents are **living together** and **after the child’s parents separate**, each parent of the child is the child’s guardian

**NEED TO THINK IF CHILD WAS BORN BEFORE SEPARATION:** When parents lived together before separation when their child was born**, *39*** establishes **presumption of guardianship** (***STH v. RMG***)

**BUT…**

***s.39(2)*** guardianship may be carried by agreement/order (**these can provide a parent is not a guardian**)

***s.39(3)*** a parent who has **never resided** with his/her child is **NOT** the child’s guardian (there may be exceptions to this (***p.26 course pack*** biological father did not know about child and challenged constitutionality of ***FLA*** – agreement was made between the parties)

***a) Are the guardians separated?***

***s.45(2)*** An order under ss.1 must **NOT** be made if child’s guardians are child’s parents & **NOT** **separated**

***b) Not a normal guardian?***

***s.45(4)*** despite ss.1, **a person** applying for guardianship may apply, at the same time, for order under this section

***s.51*** **a person** may apply for guardianship (if the child is over 12 years, the person must be a parent, unless the child provides written approval or the court finds the appointment is in the best interests of the child (***s.51(4)***)

***2) What are you trying to do?***

***Agreement***

***s.44(1)*** 2+ guardians may make agreement respecting **(a)** allocation of p. responsibilities; **(b)** p. time

**(2)** binding only if made **(a)** after separation, or **(b)** about to separate

**(4)** on application, if not in BIC 🡪 court can replace order

***s.48*** Informal parenting arrangements – normal routine 🡪 can be considered agreement

***a) Agreement for guardianship?***

***s.50*** a person **CANNOT** become a child’s guardian by agreement **EXCEPT**

***(a)*** if the person is the child’s parent, or

***(b)*** as provided under this Division, the ***Adoption Act*** or the ***Child, Fam and Comm Serv Act***

***Order***

***s.45(1)*** **only guardians** can make an application to the court re:

***(a)*** the allocation of parental responsibilities;

***(b)*** parenting time;

***(c)*** the implementation of an order made under this Division

***(d)*** the means for resolving disputes respecting an order made under this Division

***s.40(1)*** **ONLY** a guardian may have **parental responsibilities** and **parenting time**

***s.40(4)*** there is **no presumption** about what parenting arrangements are in the BIC

***GP v. MJRP*** decision making authority given to the party who did not spend the most parenting time with the children over the preceding year

***s.43(1)*** parental responsibilities **must** be exercised in the best interests of the child (below)

***Referral question***

***s.49*** a guardian can apply to court for directions re: the child, and the court may make an order giving the direction it considers appropriate

***Changing suspending or terminating orders respecting parenting arrangements***

***s.47*** on application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or the circumstances of the child, **including because of a change in circumstances of the other person**

**NB:** this does NOT include a denied relocation request as per ***s.71***

***3) Do you need to serve notice?***

***s.52(1)*** if an application is made the following persons must be given notice:

***(a)*** each parent or guardian of the child affected by the application

***(b)*** each adult person w/ whom child usually lives and who generally has care of the child;

***(c)*** any other person to whom the court considers it appropriate to serve notice

**BUT… *s.52(3)*** the court may grant an exception from a requirement to give notice under subsection (1) if the court considers it appropriate

1. ***Best interests of the child?***

***s.37(1)*** In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider **the best interests of the child only**.

***s.37(2)*** To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

***a) Health and emotional well being***

***s.37(2)*(a)** the child's **health and emotional well-being**;

***b) The child’s views***

***s.37(2)*(b)** the **child's views**, unless it would be inappropriate to consider them;

***Windle v. Windle BCSC*** older child (14) expressed he did not wish to live with his father – court supported his wishes

**RULING**: sole custody and primary residence to mother, JC not appropriate – father may make requests when he would like to see the boys, mother must consent for younger sons, older son can decide for himself.

***c) The nature and strength of the relationships?***

***s.37(2)* (c)** **nature and strength of the relationships** btw child & significant persons in child's life;

***Van de Perre v. Edwards (SCC)*:**

1. Which parent will **facilitate contact** and **development** of racial identity in a manner that avoids conflict, discord, and disharmony? (does not necessarily have to be the parent who is same race)

There are tools that a bi-racial child needs to facilitate **identity** and **pride** in their race

1. Evidence of race relation in the **relevant communities** may be important to determine the context in which the child will function

***d) The history of the child’s care?***

***s.37(2)* (d)** the **history of the child's care**;

***MMG v. GWS SKQB*** court prefers to maintain status quo (who they’re currently residing with)

***e) Need for stability?***

***s.37(2)* (e)** the **child's need for stability**, given the child's age and stage of development;

***f) Ability to exercise parental responsibilities?***

***s.37(2)* (f)** the **ability** of each person . . **. to exercise his or her responsibilities**;

***JSB v. DLS ONSC*** race and sexuality not critical factors unless impact on ability to parent

**Policy argument:** *M Schaffer* claim that it is the **quality**, not quantity of time spent w/ child that matters

***g) The impact of family violence?***

***s.37(2)* (g)** impact of **any family violence** on the child’s safety, security or well-being, whether directed toward the child or another family member

***s.37(2)* (h)** whether the actions of a person responsible for family violence indicate that the person may be impaired in ability to care for and meet child’s needs

***s.38*** for the purposes of ***37(2)(g)*** a court must consider all of the following:

***(a)*** the **nature and seriousness** of the family violence

***(b)*** how **recently** the violence occurred

***(c)*** **frequency** of family violence

***(d)*** where any psychological or emotional abuse is **evidence of coercive/controlling behavior**

***(e)*** whether family violence is **directed towards the child**

***(f)*** whether the child was **exposed to family violence** not directed toward the child

***(g)*** the harm to kid’s physical, psych, and emotional safety, security and well-being

***(h)*** any **steps the person responsible has taken to prevent** future violence

***(i)*** any other relevant matter

***h) Appropriate arrangement?***

***s.37(2)* (i)** the appropriateness of an **arrangement** that would require the child’s guardians to **cooperate** on issues affecting the child, including *whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members*;

***Van der Peer v. Edwards (SCC)*** Conduct causing break-up is irrelevant but parties’ attitudes towards and views of each other are important

***i) Civil or criminal proceeding?***

***s.37(2)* (j) civil or criminal proceeding** relevant the child’s safety, security or well-being

***4) Truly in the best interest of the child?***

***s.37(3)*** An agreement or order is not in the best interests of a child unless it **protects, to the greatest extent possible, the child’s physical, psychological and emotional safety, security and well-being**

***Young v. Young SCC*** courts must attempt to balance such consideration as the age, physical and emotional constitution and psychology of both the child and his/her parents and the particular milieu in which the child will live.

***Parsons v. Parsons (ONSC)*** Parent placing own needs/vindication before child’s (e.g., demanding that parents accept homosexual relationship) was not in the best interests of the child

**Policy argument:** social research *Schaffer* claim that it is quality, not quantity of time spent w/ child

***a) Past conduct?***

***s.37(4)*** In making an order under this Part, a court may consider a person’s conduct **only if it substantially affects a factor** set out in subsection (2), and **only to the extent it affects that factor**

***Van der Peer v. Edwards (SCC)*** Some consideration given to father’s (bball player’s) promiscuity in relation to stability of child

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| **THIRD PARTY ACCESS** |

1. ***Agreement for non-guardian contact?***

***s.58(1)*** a **child’s guardian** **AND** a person **who is not a child’s guardian** may make an agreement respecting contact with a child including describing the terms and form of contact

***s.58(2)*** an agreement respecting contact with a child is binding **only** if the agreement is made between **all of the child’s guardians** who make the decision with whom the child can associate

***s.58(3)*** A written agreement respecting contact with a child that is filed in the courts is enforceable under this act as if it were an order of the court

1. ***Application to replace a contact order agreement?***

***s.58(4)*** On application by **a party**, the court **must** set aside or replace with an order made under this Division all or part of an agreement respecting contact with a child if satisfied that the agreement is **not in the BIC**

1. ***Application for a contact ORDER?***

***s.59(1)*** on application, a court **may** make an order respecting contact with a child, including describing the terms and form of contact

**NB:** We do not know if this means “anyone” can make the order

**BUT…**

***GES v. DLC*** Access rights can arise independently of being defined as a legal parent 🡪 non-biological relative/parent can apply for custody or access (in SK at least) if there is “some connection or **sufficient interest” in the child**

**NB:** this was overturned on appeal because he was “much less than a parent in that… he limited his commitment to the children” –**not sufficient to warrant access in the circ.**

***s.59(2)*** A court may grant contact to **any** person who is not a guardian, including, to a **parent or grandparent**

***Bridgewater v. Lee (ACWS)*** where access order would disrupt child’s nuclear family (parents still together), courts must exercise **extreme caution** in evaluating the effects of access on BIC

1. ***Supervision for contact?***

***s.59(3)*** The court may make an order to require the parties to transfer the child under the supervision of, or require contact with the child to be supervised by, another person named in the order if the court is satisfied that supervision is in the **best interest of the child**

1. ***Changing, suspending, or terminating orders respecting contact?***

***s.60*** on application, a court may change, suspend or terminate an order respecting contact with a child if it is satisfied that, since the making of the order, there has been a **change in the needs or circumstances** of the child, including **because of a change in the circumstances of another person**

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| **DENIED OR FRUSTRATED ACCESS** |

1. ***Who is making the application?***

***s.61(1)*** an application under this section may be made **only**

***(a)*** by a person entitled under an agreement or order to parenting time or contact w/ a child and

***(b)* within 12 months** after the person was denied parenting time or contact w/ a child

1. ***Was the denial wrongful?***

***s.62(1)*** For the purposes of ***s.61*** a denial of parenting time or contact with a child is **NOT** wrongful in any of the following circumstances:

***(a)*** the guardian reasonably believed the child might suffer family violence if the parenting time/contact with the child were exercised

***(b)*** the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time/contact was to take place

***(c)*** the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement, by a medical practitioner, indicating that it was not appropriate that the parenting time/contact be exercised

***(d)*** in the 12-month period before denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child

***(e)*** the applicant

***(i)*** informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, **and**

***(ii)*** did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all

***(f)*** other circumstances the court considers to be sufficient justification for the denial

***s.62(2)*** If, on an application under ***s.61***, the court finds that parenting time or contact with a child was denied, but was not wrongfully denied, the court **may** make an order specifying a period of time during which the applicant may exercise **compensatory parenting time or contact** w/ the child

***3) Remedies for person wrongfully denied parenting time/contact with child?***

***s.61(2)*** if satisfied that an applicant has been wrongfully denied parenting time or contact with a chid by a child’s guardian, the court on application may make an order to do one or more of the following:

***a)*** require the parties to participate in family dispute resolution;

***b)*** require one or more of the parties or, to attend counselling, specified services or programs

***c)*** exercise compensatory parenting time or contact with the child

***d)*** require the guardian to reimburse the applicant for expenses reasonably/necessarily incurred

***e)*** require that the transfer of the child from one party to another be supervised

***f)*** if satisfied that the guardian may not comply with an order, order the guardian to

***i)*** give security in any form the court directs, or

***ii)*** report to the court, or to a person named by the court, at the time and in a manner specified by the court

***g)*** require the guardian to pay up to $5000

1. ***Manipulation/frustration of child against other parent?***

***JKL v. NCS (ONSC***) father had primary custody, but turned son against mother and all women in general… The court ruled that the mother was awarded primary custody and sent the boy for “deprograming”

***Ungerer v. Ungerer (BCCA)*** egregious enough actions can disallow spousal support. Court can consider post=separation conduct in determining spousal support, custody and access

**FACTS:** application by dad to have spousal and child support payments reduced because ex-wife is frustrating all attempts for him to exercise access. Previous contempt orders against wife had no effect, nor had a 21 days jail term

**HOLDING:** court finds that 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 discontinued. Child support continued

1. ***Failure to exercise access?***

***s.63(1)*** If a person fails repeatedly to exercise the parenting time or contact with the child to which the person is entitled under an agreement or order, whether or not reasonable notice was given the court on application may make an order to do one or more of the following:

***(a)*** require one or more of the things described in ***s.61(2)(a), (b),*** or ***(c)***

***(b)*** require the person to reimburse any other person for expenses reasonably and necessarily incurred by the other person as a result of the failure to exercise the parenting time or contact with the child, including travel expenses, lost wages and child care expenses

***(c)*** if the court is satisfied that the person who failed to exercise their time/contact may not comply with an order under this section, order that the person to do one or more of the following things described in ***s.61(2)(f)***

***s.63(2)*** in making an order under subsection (1) (a), the court may allocate among the parties, or require one party alone to pay, the fees relating to the family dispute resolution, counselling, service, program or transfer

1. ***Preventing removal of child?* NB: make sure this is not “Relocation”**

***s.64*** ***(1)*** On application, a court may make an order that a person not remove a child from a specified geographical area.

***s.64(2)*** on application, if satisfied that a person proposes to remove a child from, and is unlikely to return the child to, BC, the court may order the person who proposes to remove the child to do one or more of the following:

***(a)*** give security in any form the court directs;

***(b)*** surrender, to a person named by the court passports and other travel records of the person who proposes to remove the child or of the child, or of both;

***(c)*** transfer specific property to a trustee named by the court

***(d)*** if there is an agreement or order respecting child support, pay the child support to a trustee named by the court

***s.64(3)*** This section does not apply in relation to relocation of a child w/in meaning of Div.6 (relocation)

**i.e., this cannot be used to thwart a relocation order!**

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| **RELOCATION** |

***ss.65-71*** (see also ***s.46*** changes to residence if no order or agreement)

***s.69(1)*** “**relocating guardian”** means a guardian who plans to relocate the child

***s.71*** The fact that an order is made that prohibits a child’s relocation is not, in itself, a change in the child’s circumstances for purposes of ***47*** [*changing, suspending/terminating orders re parent arngnts*]

***1) Is there relocation?***

***s.65(1)*** “**Relocation**” means a change in the location of the residence of a child or child’s guardian that can reasonably be expected to have a significant impact on the child’s relationship with:

***(a)*** a guardian, or

***(b)*** one or more other persons having a **significant role** in the child’s life

***s.65(2)*** This Division applies if:

***(a)*** a child’s guardian plans to relocate himself/herself or the child, or both, **and**

***(b)*** a written agreement or an order respecting parenting arrangement or contact with the child applies to the child

1. ***Relocation order***

***s.69(2)*** on application by a guardian, a court may make an order **permitting or prohibiting** the relocation of a child by the relocating guardian

1. ***Notice of relocation given?***

***s.66(1)*** subject to subsection (2), a child’s guardian who plans to relocate him/herself or a child, or both, **must** give **ALL other guardians/persons having contact** w/ child **AT LEAST 60 days’ written notice** of

***(a)*** the **date** of the relocation, **and (*b)*** the **name** of the proposed location

1. ***Family violence present or lack or relationship?*** No notice needed

***s.66(2)*** court **may** grant an exception to requirement of notice if it is satisfied that

***(a)*** notice cannot be given without **incurring a risk of family violence** by another guardian or a person having contact with the child, or

***(b)*** there is **no ongoing relationship** btw the child and the other guardian or person having contact with the child

***s.66(3)*** an application for an exemption under (2) may be made in the absence of the other party

1. ***Cooperation after relocation notice?*** Suggest client make efforts to do this on exam

***s.67(1)*** if notice is required, after the notice is given and before the date of relocation, the child’s guardians and the persons having contact w/ the child **must** use their best efforts to cooperate w/ one another for the purpose of resolving any issues relating to the proposed relocation

***s.67(2)*** Nothing in subsection (1) prevents

***(a)*** A guardian from making an application under ***s.69*** [orders respecting relocation] **or**

***(b)*** A person having contact with the child from making an application under ***59***/***60***, as applicable, for purpose of maintaining relationship btw child & contact person w/ child if relocation occurs

**NB:** only **guardians** can ask the court to prevent a move (a person w/ contact must be given notice, but this is only so they can make alternative arrangements for contact – this is to reflect the fact that persons w/ contact do not have parental responsibilities

1. ***Application to prevent relocation made?***

***s.68***if a child’s guardian gives notice under ***s.66*** that the guardian plans to relocate the child, the relocation may occur on or after the date set out in the notice **UNLESS** **another guardian** of the child, **within 30 days after receiving the notices**, files an application for an order to prohibit the relocation

***s.69(2)*** on application by a guardian, a court may make an order **permitting or prohibiting** the relocation of a child by the relocating guardian

1. ***Is the move in the best interests of the child and the additional provisions?***

***s.69(3)*** Despite section ***s.37(1)*** the court, in making an order under this section, must consider, in addition to the factors set out in **s.37(2)**, the factors set out in subsection **(4)(a)** of this section

* DEPENDS ON PARENTING TIME

1. ***Unequal parenting time?***

***s.69(4)*** if an application is made under this section and the relocating guardian and another guardian do NOT have substantially equal parenting time with the child

***(a)*** the relocating guardian must satisfy the court that

***(i)*** the proposed relocation is **made in good faith *(s.69(6))*,** and

* + - Reasons for the move
    - Whether the move is likely to enhance the quality of life of the child/relo-parent including increasing emotional, well-being, financial or educational opportunities
    - Whether notice was given
    - Any restrictions on relocation in an existing written agreement

***(ii)*** the relocating guardian has proposed **reasonable** and **workable** arrangements to preserve the relationship btw child & child’s other guardians, persons who are entitled to contact w/ the child, & other persons who have a significant role in child’s life

***(b)*** on the court being satisfied of the factors referred to in paragraph ***(a)***, the relocation **must** be considered to be in the best interest of the child, **UNLESS** another guardian satisfies the court otherwise (**presumption of the BIC 🡪 onus shifts to other parent to show otherwise)**

1. ***Equal parenting time?* NO PRESUMPTION OF BIC**

***s.69(5)*** if an application is made under this section and the relocating guardian and another guardian have substantially equal parenting time w/ the child, the relocating guardian **must** satisfy the court:

***(a)*** of the factors described in subsection **(4)(a)** – above

***(b)*** that the relocation is in the best interests of the child

* If the guardians have substantially equal parenting time 🡪 **NO PRESUMPTION** that the move is in the **BIC** and **ONUS ON RELOCATING PARENT TO SHOW IT IS**

1. ***Best interests of the child?***

***s.37(2)*** To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

**(a)** the child's **health and emotional well-being**;

**(b)** the **child's views**, unless it would be inappropriate to consider them;

**(c)** the **nature and strength of the relationships** btw child & significant persons in the child's life;

**(d)** the **history of the child's care**;

**(e)** the **child's need for stability**, given the child's age and stage of development;

**(f)** the **ability** of each person . . **. to exercise his or her responsibilities**;

**(g)** impact of **any family violence** on the child’s safety, security or well-being, whether directed toward the child or another family member

**(h)** whether the actions of a person responsible for family violence indicate that the person may be impaired in ability to care for and meet child’s needs

**(i)** the appropriateness of an **arrangement** that would require the child’s guardians to **cooperate** on issues affecting the child, including *whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members*;

**(j) civil or criminal proceeding** relevant the child’s safety, security or well-being

***s.37(3)*** An agreement or order is not in the best interests of a child unless it **protects, to the greatest extent possible, the child’s physical, psychological and emotional safety, security and well-being**

***Young v. Young SCC*** courts must attempt to balance such consideration as the age, physical and emotional constitution and psychology of both the child and his/her parents and the particular milieu in which the child will live.

***Parsons v. Parsons (ONSC)*** Parent placing own needs/vindication before child’s (e.g., demanding that parents accept homosexual relationship) was not in the best interests of the child

**Policy argument:** *M Schaffer* claim that it is the quality, not quantity of time spent w/ child

1. ***Did the court consider whether relocating parent would move if denied application?***

Courts are prohibited under **s.*69(7)*** to consider whether the relocating guardian would move w/out the child (this is the same under ***46*** pertaining to relocation when no arrangement exists)

1. ***Will the court make additional orders to preserve current parenting agreements?***

**ADVISE CLIENT ON EXAM THAT THE COURT CAN MAKE ADDITIONAL ORDERS**

***s.70(1)*** if the court makes an order under ***s.69*** that permits relocation, the court may:

***(a)*** if the relocation affects a current agreement/order

***(b)*** any order necessary to ensure that the relocating guardian complies with the terms of the order permitting relocation, including an order to do one or more of the following

***(i)*** give security in any form the court directs;

***(ii)*** transfer specific property to a trustee named by the court

***s.70(2)*** the court must seek to preserve, to a reasonable extent, parenting arrangements under the original agreement or order

* Ensures no deterrence for application for relocation

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| **EXTRAPROVINCIAL MATTERS** |

**“extraprovincial order”** means an order of an extraprovincial tribunal that is similar in nature to an order respecting guardianship, parenting arrangements or contact with a child

***1) Does BC have jurisdiction?***

***s.72*(2)** assists court in determining which jurisdiction a child is considered **habitually resident** is the place where the child most recently resided

***(a)*** with his/her parents

***(b)*** if the parents are living separate and apart, with one parent

***(i)*** under an agreement

***(ii)*** with the implied consent of the other parent, or

***(iii)*** under an order of a court or tribunal, or

***(c)*** with a person other than a parent on a permanent basis for a significant period of time

***s.74(2)*** a court may make an order under this part respecting guardianship, parenting arrangements or contact with a child only if **ONE** of the following conditions are met:

***(a)*** child habitual resident of BC when application filed

***(b)*** this is satisfied if:

***(i)*** Physically present in BC

***(ii)*** Substantial evidence that BIC is available in BC

***(iii)*** No application for extraprovinical order is pending before an extraprovincial tribunal in a place where the child is habitually resident

***(iv)*** No extraprovincial order has been recognized by a court in BC

***(v)*** The child has a real and substantial connection w/ BC, **and**

***(vi)* On a balance of convenience** it is appropriate for jurisdiction to be exercised in BC

***a)*** ***Is the child in danger?* IF CHILD IN DANGER, CAN MAKE AN ORDER**

A court may make an order respecting guardianship, parenting arrangements or contact if ***s.74(2)(c)*** child is physically present in BC & court is **satisfied that the child would suffer serious harm if they**:

***(i)*** remain with, or be returned to, the child’s guardian, or

***(ii)*** be removed from BC

***2) Was there an application to return child?***

***s.72(3)*** the removal or withholding of a child w/out the consent of a guardian does not affect the child’s habitual residence **UNLESS** the guardian from whom the child is being removed or withheld **acquiesces** or **delays** in applying for an order of a court or an extraprovincial tribunal

1. ***Does the court recognize an extraprovincial order?***

***s.75(1)*** a court **must** recognize an extraprovincial order if **all of the following apply:**

***(a)*** the extraprovincial tribunal would have the jurisdiction (e.g., habitual residence)

***(b)*** each party to a proceeding in which the extraprovincial order was made had

***(i)*** reasonable notice that the order would be made, and

***(ii)*** a reasonable opportunity to be heard respecting that order

***(c)*** the extraprovincial tribunal was required by law to consider the BIC

***(d)*** it would not be contrary to public policy in BC to recognize the order

1. ***Can the court supersede the extraprovincial order?***

***s.76(1)*** can supersede an order if it is satisfied that

***(a)* the child would suffer serious harm** if it would remain with or be returned to the guardian or be removed from BC

***(b)*** change in circumstances affects, or is likely to affect, the BIC and they are a resident of BC

***a) Remedy***

***s.77*** court may stay a proceeding if a child has been wrongfully removed to, or is being wrongfully retained in BC, and order the party to return the child to an appropriate place

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| **JURISDICTION AND CHILD ABDUCTION** |

***Hague Convention of the Civil Aspects of International Child Abduction***:

Removal or retention of a child is wrongful if it breaches the rights of custody under the law of the jurisdiction in which the child was **habitually resident** immediately before the removal/retention, and those custody rights were being exercised

***Article 3***: court **must** order return of the child **UNLESS** an exception under ***12, 13*** or ***20*** apply

***Article 12***: 1 + years elapsed btw removal/retention & application for return & child settled

***Article 13*** person seeking return was not actually exercising custody rights, or consented or acquiesced in the removal/retention, or if there is grave risk child’s return would expose him to physical/psychological harm or otherwise place the child in an intolerable situation, or mature child objects to being returned

***Article 20*** to protect human rights and fundamental freedoms

***FLA s.80*** identifies the AG as the “Central Authority” for BC (the office that assists parents in locating their children in other jurisdictions

***Thompson v. Thompson SCC*** first time SCC interprets and applies ***Convention***

* Mom got interim custody in Scotland w/no removal clause, moved to Manitoba w/ kid, applied for custody; father granted custody in Scotland, applied in Manitoba for kid, judge ordered kid’s return to Scotland
* Judge used Manitoba “best interest” law to give mom temporary custody for time for custody application in Scotland
* Held: Manitoba courts don’t have jurisdiction to impose transitory measures for return of kid

***Hoskins v. Boyd (BCCA)*** court is clear that BIC is matter for the “home state”

**FLA PROPERTY DIVISION**

***BCSC EXCLUSIVELY PROVINCIAL POWER***

**USE CASES FOR DETERMINING WHAT CONSTITUTES PROPERTY**

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| **ECONOMIC CONSEQUENCES OF MARRIAGE BREAKDOWN** |

1. ***Who is a spouse FOR PROPERTY?***

**NB:** you cannot cut around these provisions, they are meant to be cut and dry – must meet criteria

***a) Are/were they married?***

***s.3(1)*** a person is a spouse if the person ***(a)*** is married to another person, or

***b) Marriage-like relationship for at least two years?***

***s.3(1)(b)*** has lived with another person in a marriage-like relationship, and ***(i)*** has done so for a continuous period for **at least 2 years**

***M v. H SCC*** approach to determine whether a relationship is conjugal must be **flexible**, objective indica are the focus but intention still mentioned in some cases

***G(JJ) v. A(KM)*** must consider the relationship as a whole in terms of the intention of the parties and the various objective indica, presence or absence of one is not determinative

***Gostlin v. Kergin*** based on **subjective intent**, is there an intention to live in a marriage-like relationship?

***Molodowich v. Penttinen*** based on **objective indicators** that the parties were living in a marriage-like relationship:

**Shelter**: under same roof? Sleeping arrangements? Roommates?

**Sexual and Personal Behaviour:** Sexual relations (why, why not)? Monogamous? Communicate on a personal level? Eat meals together? Assist each other with problems or illness? Gifts?

**Services:** what was the conduct/habit in relation to preparing meals, cleaning, shopping, etc.?

**Social:** did they participate in community activities? Met families/relationship w/ families? In other words, did people treat them as a couple?

**Support:** financial arrangements, ownership of property?

***Austin v. Goerz BCCA*** financial dependence not essential aspect of ML relationship

**Children**: what were the attitudes and conduct of the parties concerning children?

***c) When did the relationship begin?***

***s.3(3)*** relationship **begins** on the earlier of:

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

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

***2) Are the spouses separated?* TRIGGERING EVENT**

***s.83(1)*** For the purposes of this Part, spouses are not considered to have separated if, within **one year of separation**

***(a)*** they begin to live together again and the primary purpose for doing so is to reconcile, and

***(b)*** they continue to live together for one or more periods, **totalling at least 90 days**

***s.3(4)(a)*** spouses may be separated despite continuing to live in the same residence, and

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

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

***(ii)*** an **action**, taken by a spouse, demonstrating their intention to separate permanently

***DIVORCE ACT*** case law is of use here:

***Wolfman-Stotland v. Stotland (2011 BCCA)***: “the minimum capacity required to form the intent to separate is the capacity to instruct counsel “; ***Calvert*** the capacity to form the intention to live separate and apart = equivalent capacity to enter into marriage and is sufficient for divorce

***Oswell v. Oswell [1990 OJ HC) -* Factors to consider re separation**:

Physical separation; ***Dupere v. Dupere (NBR)*** can be in same house for **economic necessity**

Withdrawal by one or both spouses from the matrimonial obligation with intent of destroying the matrimonial consortium (agreement to be husband and wife)

The absence of sexual relations (NB: this is **not** **conclusive** but is considered)

Presence or absence of joint social activities

Performance of household tasks (more weight given to tasks of husband/wife relationship)

**Application of factors to *Oswell*:** Intention to separate; acted as if nothing happened at retirement dinner (thanked his wife); agreement to live together as friends while wife finished BA; vacation together, sex occurred (but no intercourse in matrimonial home); tasks done at home like laundry by husband; threatened to kill him; **taxes indicated married** until Jan 1988. **No separation until Jan 88**\*

**NB:** THIS CONSTITUTES THE **TRIGGERING EVENT** FOR THE FOLLOWING SECTIONS

1. ***General entitlements of spouses on marriage breakdown?***

***s.81(a)*** spouses **equally entitled** to family property & owe debt, **regardless of use or contribution**

***s.81(b)*** on separation, each spouse has a right to an undivided **half interest in all family property** as tenant in common and is **equally** **responsible** for family **debt**

A right to an undivided **half interest** in all family property as a tenant in common

Equal responsibility for family debt incurred during relationship (or after separation, if for the purpose of **maintaining family property *s.86***)

**NB:** the **date of separation** = **single trigger event**

1. ***How/What is the family property to be distributed?***

***s.84(1)*** subject to ***s.85***, family property is **all real** and **personal** property as follows:

***(a)*** **on the date** the spouses separate, property

***(i)*** that is **owned** by at least one spouse

***(ii)*** in which at least one spouse has a **beneficial interest**

***(b)*** **after separation**, property

***(i)*** acquired by at least one spouse, or

***(ii)*** in which at least one spouse acquires a beneficial interest that is derived from the property referred to in paragraph (a) or from disposition of that property

I.e., property derived from family assets or costs incurred from family assets

***s.84(2)*** family property **includes**:

***(a)*** a **share/interest in a corporation**;

***(b)***an interest in a partnership, association, organization, or business venture

***(c)*** **property** owing to a spouse

***(i)*** as a refund, including an income tax refund, or

***(ii)*** in return for the provision of a good or service

***(d)* money of a spouse** in an account with a financial institution

***(e)*** a spouse’s entitlement under an annuity, pension, RRSP, or income plan

***(f)*** property disposed of but still **retain power over it**

***(g)*** the **amount the value of excluded property has increased since the later of the date**

***(i)*** the relationship btw the spouses began, or

***(ii)*** the excluded property was acquired

1. ***Ventures and business assets?***

***FLA*** does not make a distinction btw ventures and business assets, both are expressly included as property under ***s. 84(2)(b)*** 🡪 NO NEED FOR NON-OWNING SPOUSE TO PROVE DIRECT/INDIRECT CONTRIBUTION

***Robertshaw BCSC*** paid work can constitute a direct contribution

***Samson BCCA*** professional qualifications not family assets (non-transferrable)

***De Beeld BCCA*** contributions towards another spouse’s university degree may be considered in SS

***Balic BCCA*** when dividing a business, **shares normally divided** rather than liquidate business

Fishing licences, transferrable (***Seymour***) milk quotas, transferable (***Verschuur***)

1. ***Exclusion of property?***

***s.85(2)*** **onus** on spouse **claiming that property is excluded**

***s.85(1)*** The following is excluded from family property:

***(a)*** property acquired by the spouse **before the relationship** began

***(b)*** **gifts or inheritance** to a particular spouse

***(c)*** **settlement** or award of damages (unless damages were for loss to both spouses ***(i)*** or lost income ***(ii)***)

***(d)*** Money under an **insurance policy**, other than property insurance (unless for loss to both spouses, or lost income)

***(e)*** property referred to in paras (a)-(d) that is held in **trust** for the benefit of the spouse

***(f)*** property held in **a discretionary trust** which one spouse didn’t’ contribute or is a beneficiary

***(g)*** property **derived from property or the disposition of property** in (a)-(f)

***Tratch v. Tratch BCSC*** “**tracing**” refers to assets not used for a family purpose but bought with the proceeds from the sale of a family asset – this applies to property aquired both before and after separation

***Kerr v. Baranow SCC* Joint Family Venture** (indicators):

Mutual effort: was there a pooling of efforts to reach common goals?

Economic integration: pooling of resources for all/part of common expenses?

Intent of the parties: actual intentions of the parties throughout their

Relationship, what did they do and say?

Priority of the family: how was priority given to family life in decision-making?

***Lye v. McVeigh BCCA*** clear intention on the part of the parties to keep finances separate, however, both contributed equally to joint expenses despite the wife making considerably less, court upheld that wife was not entitled to husband’s finances upon separation… under ***FLA***there would need to be an agreement that they wanted to keep the finances separate like this.

1. ***Excluded property that can still be divided?***

***s.96*** the Supreme Court must **NOT** order a division of excluded property unless

***(a)*** family property/debt located outside BC **cannot be practically divided**

***(b)*** it would be **significantly unfair** not to divide excluded property considering:

***(i)*** the **duration of the relationship between the spouses**, and

***(ii)*** a **spouse’s direct contribution to the preservation,, maintenance, improvement, operation or management of excluded property**

1. ***Family debt distribution?***

***s.81(a)*** spouses **equally …** responsible for family debt, **regardless of use or contribution**

***s.86*** family debt includes **all financial obligations incurred by a spouse**

***(a)*** during the relationship to date of separation, and

***(b)*** debts incurred after the date of separation to maintain family property

1. ***Value of property***

***s.87*** **unless** agreement or order provides otherwise & except in relation to benefit under a **pension plan** (just know that these are divisible)

***(a)*** the value of family property is based on **fair market value**

***(b)*** value of family property/debt **must be determined as of the date** of an **agreement** (***i***), or court hearing ***(ii)***

1. ***Pension Plan?***

***s.127(2)*** an **agreement** may provide that, despite the Canada Pension Plan, unadjusted pensionable earnings under that Act will not be divided between spouses

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| **AGREEMENTS WITH RESPECT TO PROPERTY/DEBT DIVISION** |

1. ***Making agreement with spouse for property/debt division?***

***s.92*** spouses may make agreements respecting the division of property and debt including:

***2) What is the agreement for?***

***s.92(a)*** **divide** family property or family debt, or both, and do so equally or unequally

***s.92 (b)*** **include** something as family debt or property (bypasses ***s.85***)

***s.92 (c)*** **exclude** something as family debt or property

***s.92 (d)*** place a **different value** on family debt or property

***2) Application to set aside an agreement?* With signature of spouse + witness\*\***

***s.93(1)*** this section applies if spouses have a written agreement respecting division of property and debt, with the **signature** of each spouse **witnessed by at least one person**

***3) Was the agreement “procedurally unfair”?***

***s.93(3)*** on application by a spouse, BCSC may set aside or replace with an order made under this Part all of part of an agreement descried in (1) **only if satisfied one or more of the following circumstances existed** when the parties made the agreement:

**NB:** ALL case law in this section is under the ***FRA***

***a) Failure to disclose?***

***s.93(3)(a)*** spouse **failed to disclose** **significant** property or debts or other info relevant to the negotiation of the agreement

***Asselin v. Roy BCSC FLA*** agreement set aside partly b/c disclosure was incomplete

***Rick v. Brandsema*** husband didn’t disclose relevant financial information

***b) Taking advantage?***

***s.93(3)(b)*** a spouse took **improper advantage** of the other spouse’s vulnerability, including the other spouses ignorance, needs, or distress

***Asselin v. Roy BCSC*** spouse in vulnerable position b/c they were trying to have a baby

***Rick v. Brandsema*** husband took advantage of wife’s mental instability

***c) Did the spouses understand the agreement?* LOOK FOR IND. LEGAL ADVICE**

***s.93(3)(c)*** a spouse **did not understand** the nature or consequence of the agreement

***Hartshorne v. Hartshorne SCC*** if independent legal advice, court should respect arrangement

***Johnstone v. Wright*** went against advice of lawyer (signed anyway), understood consequences

***Rick v. Brandsema*** wife had mental illness - unable to understand even though she had legal advice

***d) Reasons under contract law that would void a contract?***

***s.93(3)(d)*** other circumstances that would, **under common law**, cause all/part of a K to be voidable

***Rick v. Brandsema*** separation agreement deemed unconscionable due to wife’s mental instability (even though she had independent legal advice, her state did not allow her to utilize it)

1. ***Is the order making an agreement that is substantially different from previous one?***

***s.93(4)*** The Supreme Court may decline to act under (3) if, on consideration of all the evidence, the Supreme Court would not replace the agreement with an order that is **substantially different** from the terms set out in the agreement

1. ***Even if procedurally fair, is the agreement still significantly unfair?***

***s.93(5)*** despite **(3)** the Supreme Court may set aside or replace an order made under this Part, all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into agreement but that the agreement is **significantly unfair** (**high standard**) based on the following:

***(a)*** the **length of time that has passed** since the agreement was made

***(b)*** the **intention of the spouses**, in making the agreement, to achieve certainty

***Hartshorne v. Hartshorne SCC*** (***FRA***) SCC upheld MA b/c it reflected a clear intention to maintain independent financial lives

***(c)*** the degree to which the **spouses relied on the terms of the agreement**

***Asselin v. Roy BCSC*** agreement set aside for procedural unfairness, Asselin not given agreement in advance, did not receive independent legal advice, Roy’s financial disclosure was incomplete, terms were drafted by Roy’s lawyer and sprung on Asselin, no negotiation time of vulnerability as the parties were trying to conceive (**not FLA**)

***Hartshorne v. Hartshorne SCC*** (***FRA***) courts should respect private arrangements, particularly if negotiated with independent legal advice, and no duress, coercion, fraud, or undue influence

***a) Unwitnessed written agreement?***

***s.93(6)*** the court may apply this section ***(93(5))*** to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so.

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| **ORDERS RESPECTING PROPERTY DIVISION** |

1. ***Making an order***

***s.94(1)*** the supreme court may make an order under this Division on application by a spouse but may **NOT** make an order respecting the division of property/debt that is the subject of an agreement described in ***93*** unless it is set aside under that section (***(2)***)

**NB:** you cannot make an order on a replacement agreement under ***s.93***

1. ***What is your order for?***

***a) Determination of an ownership matter***

***s.97(1)*** the Supreme Court may ***(a)*** determine any matter respecting ownership, right of possession, or division of property/debt ***(2)*** to do one of the following: ***(a)*** declare ownership or right of possession; ***(b)*** transfer title, vest, etc. ***(c)*** require spouse to pay compensation ***(d)*** require sale of property ***(i)*** require sale of property for paying debt ***(j)*** transfer property to spouse

1. ***Unequal division by order* WOULD EQUAL DIVISION BE UNEQUAL?**

***s.95(1)*** the Supreme Court may order an unequal division of family property/debt, or both, if it would be significantly unfair to ***(a)*** equally divide family property

1. ***Considerations for unequal division order?***

***s.95(2)*** For the purposes of (1), the Supreme Court may consider **one or more** of the following:

***(a)*** the **duration** of the relationship

***(b)*** the **terms** of any agreement between the spouses

***(c)*** a spouse’s **contribution to the career or career potential of the other spouse**

***(d)*** whether family **debt was incurred in the normal course of the relationship** btw spouses

***(e)*** if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of debt

***(f)*** whether a spouse, after the date of separation, **caused a significant decrease or increase in the value of family property or family debt** beyond market trends

***(g)*** the fact that a spouse, other than a spouse acting in good faith,

***(i)*** substantially reduced the value of family property, or

***(ii)*** disposed of, transferred or converted property that is or would have been family property, or exchanged property into another form, causing the other spouse’s interest in the property or family property to be defeated or adversely affected

***(h)*** tax liability incurred by spouse as resulting from transfer/ sale of property or an order

***a) Significant unfairness?***

***s.95(2)(i)*** Any other factor, other than considerations in (3), that may lead to **significant unfairness**

***b) Spousal support consideration?***

***s.95(3)*** The Supreme Court may consider the extent to which the financial means/earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship btw the spouses if, on making a determination respecting spousal support, the **objectives of spousal support** under ***s.161*** [**PAGE 56**] **have not been met**

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| **INTERIM USE OF PROPERTY ORDERS** |

1. ***Interim distribution of property?***

***s.89*** if necessary and not causing harm to one spouse, court may distribute property to fund: dispute resolution, a proceeding, or obtaining of information or evidence the court

***s. 226*** Orders to require **party to pay rent, mortgage, etc**.; to not terminate utilities; or **supervised removal of belongings**

1. ***Exclusive occupation or possession of family residence?***

***s.90(2)*** SC can order to a spouse, for a specified period of time the exclusive **use of specified personal property** (owned or rented)

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| **PROPERTY PROTECTION ORDERS** |

***1) Does the property require protection?***

***s.91*** restraint on disposition of property or vesting property in applicant;

***(3)*** may do this before an application is served on the other spouse

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| **FIRST NATIONS PROPERTIES** |

1. ***Is your client first nations?***

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

* Provincial matrimonial property laws
  + - Interim occupancy order under (now) *s 90* *(****Derrickson; Paul****)*

🡪 Federal gov has exclusive jurisdiction over First Nations land, ***FLA***is **inapplicable**

**But can use:**

**Compensation (*s.89)*** 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 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*

*Family Homes on Reserves & Matrimonial Interests or Rights Act* passed May 2013, not in force

**DA CHILD SUPPORT**

**Jurisdiction: BCSC**

If **corollary to** **Divorce** 🡪 **Federal** (***DA*** *15.1, 15.3, 17(1), 17(4), 17(6.1), 17(6.3), 17(6.4), 25.1, 26.1)*

**CHILD SUPPORT TAKES PRIORITY OVER SPOUSAL SUPPORT** ***s.15.3(1)***

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| **NOTE ON CS AND TAXES** |

CS payments are **NOT** included in recipient’s income for tax purposes and **cannot be reduced by payor**

***Periodic Spousal Support Payments:*** **must** be included in recipient’s income, can be deducted

***Lump Sum Spousal Support Payments***: not included in recipients income, cannot be deducted

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| **CHILD SUPPORT IN THE CONTEXT OF DIVORCE** |

1. ***Who is responsible for child support?***

***s.15.1*** **spouses** (includes former spouses) are responsible for any “child of the marriage”

***s.1*** “child of the marriage” = **child of two spouses or former spouses** who, @ the material time,

***(a)*** is under the age of majority (18 years) and how has not withdrawn from their charge

1. ***Are the children withdrawn from the charge?***

***JMS v. FJM Ont Div Court****:*

**Facts**: son severely disabled. In order to get services he needed, parents obligated to accept the prov. would take custody. Mother still bringing son home for significant periods + paying expenses for him.

**Majority**: father **NOT** liable for CS b/c son was **now Crown ward & thus no longer in parent’s charge**

**Dissent**: “**Charge**” should be understood to **include financial context**. Mother continued to bear costs

***(b)*** 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 necessities of life

INCLUDES UNIVERSITY ATTENDANCE

1. ***Which children? Standing in the place of parent?***

***s.2(2)*** for purposes of the definition “**child of the marriage**”, **child of 2 spouses/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 other stands in the place of the parent

***Chartier SCC*** – **TEST FOR WHO IS A PARENT**

**Facts:** short relationship: CL for 2 years married 1. Wife brought child from previous relationship

**Held:** husband held to be ***in loco parentis*** (only father since she was a baby, treated her like daughter, talked about adoption, amend her birth registration to indicate falsely that he was natural father to change her surname)

**TEST: whether an individual stands in the place of a parent will take into account ALL RELEVANT FACTORS to the determination, viewed *objectively***

1. **Intention** is one factor – can be inferred from behavior
2. **Relevant factors** include (but are not limited to:
   1. Does the child participate in the extended family in same way as bio child?
   2. Does the person provide financially for the child?
   3. Do they discipline the child as a parent?
   4. Do they hold themselves out in the world as a parent to the child?
   5. What is the role of the absent biological parent (may be req. to pay CS too)

***CSG s.5*** where spouse found to stand in the place of a parent, judge is not required to order the Table amounts (amount of CS order will be **an amount as the court considers [judicial discretion]**appropriate

1. ***Contract out of parenthood?* NO!**

***Doe v. Alberta ABCA*** – **cannot contract out of standing in the place of a parent**

**Facts:** couple wants to stay together, she wants child, and he doesn’t. She found donor and used artificial insemination. Wrote up contract that he would not be viewed as standing in place of a parent

**Held**: Despite contract, he may later fall into the definition of ***in loco parentis***

1. ***Child support order***

***s.15.1(1)*** a court of competent jurisdiction may, on application by **either** or **both** **spouse(s)**, make an order requiring a spouse to pay child support of **any or all children of the marriage**

**NB:** cannot make application if you are the child!

1. ***Determination of child support?***

***s.15.1(3)*** court in making a CS order **shall** apply the Child Support Guidelines **EXCEPT:**

1. ***Special provisions order?***

***s.15.1(5)*** court may award amount different from the Table amount if:

***(a)*** special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of the child;

**AND**

***(b)*** that the application of the applicable guidelines would result in an amount of child support that is inequitable given those provisions

1. ***Reasonable arrangements made for child support?***

***s.15.1(7)*** court may award amount different from Table amount on **consent** if satisfied that **reasonable arrangements** have been made for the support of the child

***s.15.1(8)*** In determining whether **reasonable arrangements** have been made, court **shall** have regard to the Guidelines

However, not unreasonable solely b/c the amount of support is NOT the same as the amount applicable under the guidelines

1. ***Child Support Guidelines***

***CSG s.1*** **Objectives**

1. Fair standard of support; benefit from means of both spouses
2. Reduce conflict & tension by making calculation more objective
3. Improve efficiency and encourage settlement
4. Ensure consistent treatment in similar circumstances

***CSG*** ***s.3(1)*** **Presumptive rule [limits discretion]** the amount of child support owed is the table amount + and ***s. 7*** (extraordinary expenses)

1. ***Extraordinary expenses?***

***CSG s.7(1)*** court **may** award additional discretionary amount (+ Table amounts) for certain expenses

**ON EXAM:** EXTRAORDINARY expenses consider **necessity of expense in relation to BIC** & **reasonableness of expense vs. means of the spouse & family’s spending pattern** b4 separation

1. **Demonstrate** they are **NOT** already taken into account of in Table amounts
2. **Child care** related to custodial parent’s employment, illness, disability, or education for employment
3. **Child’s medical and dental insurance** premiums
4. **Health-related expenses** exceeding the insurance reimbursement by at least $100 annually, including orthotics, counselling, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses
5. **Extraordinary** expenses for **education**
6. Expenses for **post-secondary** education
7. **Extraordinary** expenses for **extracurricular activities**

**EXTRAORDINARY EXPENSES** (for (**d**) and (**f**)) means

***CSG s.7(1.1)(a)*** expenses 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 and number of educational programs and extracurricular activities
* Any special **needs and talents** of the children
* The overall cost of the programs and activities, and
* Any other similar factor that the court considers relevant

**2. Demonstrate** that the expenses are:

**NECESSARY** in relation to child’s best interest **and**

**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 families taken into account
* Family’s spending pattern prior: court will look at discussions parents had on the child’s future (***CSG s,7(1); McCrea***)

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**NB:** cite ***McCrea***for the proposition that there is **NO OBLIGATION TO ADD AN AMOUNT FOR EXTRAORDINARY EXPENSES**

1. ***Spouse in place of parent?***

***CSG s.5*** where a spouse “stands in the place of a parent” court **can** order CS it considers appropriate, having regard to Guidelines and any other parent’s legal duty to support

1. ***Splitting custody?***

***CSG s.8*** Amount of CS is the difference between the amount that each spouse would pay in CS if an order was sought against them

1. ***Shared Custody?***

***CSG s.9*** if a parent has physical custody of or exercises right of access to a child for **not less than 40%** of the time over the **course of a year**, the amount of CS must be determined taking into account:

1. Table amounts for each spouse
2. Increased cost of shared custody arrangements
3. The conditions, means, needs and other circumstances of each spouse and the child

***Green BCCA*** rejects strict methods for calculating CS under ***s.9***

Facts: dad increases access and requests 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 no impact on actual costs for either side.

***Contino v Contino-Leoncelli SCC*** = no guidelines 🡪 **Discretion is paramount / case-by-case basis**

**Facts**: Dad took child for an extra night each week so mom could attend school, sought decrease in CS

No presumption either way (use set off or modify) – **Js 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**.

**Held**: No change in CS. His **costs increased *marginally***. No evidence that mother’s costs increased. Remaining costs were fixed & unchanged.

1. ***Undue hardship?* NB:** either spouse could pay

***CSG s.10*** Courts may award amount **different** from that determined under ***CSG ss 3-5, 8, 9*** if it finds the requesting spouse or child would otherwise suffer undue hardship ***(10(1))*** or circumstances 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. ***Standards of living equal?***

**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))***

1. ***Payor parent income over $150,000***

***CSG s.4*** If the payor parent has an income over $150,000, court can determined the appropriate amount payable IF the table amount is considered inappropriate

***Francis v Baker SCC =*** “**Inappropriate”** means **“unsuitable” NOT** “inadequate”, so **court can either increase or decrease table amounts** above income of $150,000

**🡪** Presumption that table amount applicable to $150,000 is appropriate – **Onus is on the party arguing that the Table amounts should not apply**

(In this case, the husband failed to provide any evidence that he should be able to depart 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)

***Metzner v Metzner BCCA*** summarizes ***Francis*** (**clear & compelling evidence to depart from guidelines)**

1. ***Post-Secondary Education***

Parents **have no automatic duty to financially support their children after they turn 19**

* It’s 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

**CS order relates to child over 19, amount= *(a)*** *guidelines* amount OR ***(b)*** what’s appropriate ***CSG s 3(2)***

***WPN v BJN (aka Neufeld v Neufeld) BCCA*** **Factors to consider order to pay for university:**

* + Still a “**child of the marriage**” (under charge of parents)?
  + Enrolled **full-time or part-time**
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  + **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 child has unilaterally **terminated relationship** w/ parent from whom support is sought

***Haley Ont SC***= entitlement to CS can be revived following a hiatus in studies

1. ***Retroactive child support?***

**Where income of payor has ^ since CS order made (or there may have been no order to start with)**

***DBS v SRG SCC***  **Custodial parent has responsibility to give notice to the payor parent that the amount of support should go up** (pay attention to indicators that other parent’s income has gone up)

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***FLA s 152(1)*** CS orders under the ***FLA***can be varied prospectively or retroactively 🡪 also provides for variation when there is evidence that a party didn’t make full financial disclosure when order was made

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***Earle v Earle BCSC***  Before a judge can vary a CS order (cancellation or reduction of arrears is a form of variation), there must be a **material change that if known at the time of the original order, would have resulted in a different order**

🡪 there is a **heavy onus on the party asking for a reduction or cancellation of arrears**

🡪 remember that CS is **the right of the child** (and is based on earning capacity)

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Support orders can be enforced under *DA, FLA, Family Maintenance Enforcement Act, Family Orders and Agreements Enforcement Assistance Act*

🡪 BC’s ***Interjurisidictional Support Orders Act*** allows international enforcement

***Dickie v Dickie SCC*** **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** (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 & appealed, court refused to hear his appeal until he purged himself of contempt)

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* Requiring payor to submit regular T1 forms (CS recipient doesn’t need to contact payor)
* 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 Director of Maintenance Enforcement BCCA*** **Duty to pay CS separate from parent’s ability to see their children. Child has right to support even if problems with access.**(Dad sought to vary CS award on basis of material change in circumstances, which was that his 3 daughters refused to exercised access)

**FLA CHILD SUPPORT**

**Shared jurisdiction: BCPC or BCSC**

When **CL partners and no divorce** yet = **Provincial** (***FLA*** *Part 7, ss147-159*)

**CHILD SUPPORT TAKES PRIORITY OVER SPOUSAL SUPPORT** ***s.173***

|  |
| --- |
| **CHILD SUPPORT** |

1. ***Do the parties meet the requisite definitions?***

***s.146***:

*“****Child***” includes a person who is 19 years of age or older and unable, b/c of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of his/her parents/guardians

“***Guardian***” does **NOT** include a guardian **(a)** Who is a not a parent, and **(b)** Whose only parental responsibility is respecting the child’s legal and financial interests

*“****Parent***” includes a stepparent, if the stepparent has a duty to provide for the child under ***147***

“***Stepparent***” means a person who is a spouse of the child’s parent and lived with the child’s parent and the child during the child’s life

***CSG s.5*** where spouse found to stand in place of a parent, J not req’d to order the Table amounts (amount of CS order will be **an amount as the court considers [judicial discretion]** appropriate)

This is meant to be read into the definition of “parent” under ***s.1***

1. ***Duty to pay child support?***

***s.147(1)*** **each parent & guardian** of a child has a duty to provide support **UNLESS** the child

***(a)*** is a spouse, or

***(b)*** is under 19 years of age and has voluntarily withdrawn from his/her parents’ or guardians’ charge, **EXCEPT** if the child withdrew b/c of family violence or b/c the child’s circumstances were considered **objectively** intolerable

***(2)*** if the child returns 🡪 duty resumes

1. ***Guardian who is not a parent?***

***s.147(3)***: if a guardian who is not a parent has a duty to provide support, it is **secondary to the parents**

1. ***Stepparent?***

***s.147(4)*** a stepparent does **NOT** have a duty **UNLESS**

***(a)*** contributed to support of a child for at least **one year**, and

***(b)*** proceeding is started within 1 year after last contributed **AND**

***s.149(3)(b)*** if the **stepparent and parent are separated**

***s.147(5)*** The duty is **secondary** to that of the parents’ and guardians and ***(b)*** extends only as appropriate considering:

***(i)*** the standard of living experienced by the child during the relationship btw the stepparent and his/her spouse, and

***(ii)*** the length of time during which the child lived with the stepparent

1. ***Making agreement for child support* NB:** ONLY FOR SEPARATION

***s. 148(1)*** An agreement respecting child support is binding **only if** the agreement is made

***(a)*** after the separation, or

***(b)*** when the parties are about to separate, for the purpose of being effective on separation

***s.148(3)*** on application by a party, the court may set aside or replace with an order if the court would make a different determination

1. ***Making an order***

***s.149(1)*** on application by **a person** (CAN BE THE CHILD THEMSELVES) referred to in **(2)** (below), a court may make an order requiring a child’s parent or guardian to pay child support to a designated person.

1. ***Who is making the order?* CHILD CAN MAKE ORDER**

***s.149(2)*** application may be made by ***(a)*** **child’s parent/guardian *(b)*** **child** /person acting on their behalf

1. ***Determination of child support?***

***s.150(1)*** if a court makes an order respecting child support, the amount of child support **MUST** be determined **in accordance with child support guidelines**

1. ***Child support guidelines?***

***CSG s.1*** **Objectives**

* Fair standard of support; benefit from means of both spouses
* Reduce conflict & tension by making calculation more objective
* Improve efficiency and encourage settlement
* Ensure consistent treatment in similar circumstances

***CSG*** ***s.3(1)*** **Presumptive rule [limits discretion]** amount of child support owed is table amount + ***s. 7***

1. ***Special or extraordinary expenses?***

***CSG s.7(1)*** the court **may** award additional discretionary amount (+Table amounts for certain expenses)

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**DA SPOUSAL SUPPORT**

**BCSC or BCPC**

**THEMES:**

**Contractual**

**(Self-Sufficiency, Freedom of Contract) -- (Pelech trilogy)**

**Compensatory (Moge)**

**Non-Compensatory (Bracklow)**

**Economic hardship; mutual obligation**

1. ***Are they a spouse?***

***s.2(1)* Spouse:** “either of two persons who are married to each other (**includes a former spouse**)

|  |
| --- |
| **APPLICATION (What do you want?):** |

1. ***Application for spousal support order?***

**Spousal Support Order**

***s.15.2(1)***: A court of competent jurisdiction may, on application by **either** or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such **lump sum** OR **periodic sums**, or such lump sums or period sums, as the **court thinks reasonable** for the support of the other spouse.

1. ***Application for an interim SS order?*** (NB: suggest this if you apply for 15.2(1) - above)

**Interim Order**

***s.15.2(2)***: where an application is made under subsection (1), the court may, on application by **either** or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, **pending determination of the application under subsection (1)**.

|  |
| --- |
| **TERMS (To be set by the court depending on):** |

***1) What objectives of spousal support entitle your client to it?***

***s.15.2(6)***: An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

***Moge SCC 1992; Bracklow SCC 1999*** all the objectives must be **balanced**; **STARTING PRESUMPTION**: intra-marital mutual inderdependency – can be rebutted if one contributes more, etc. (***para 59***)

***a) Economic advantages or disadvantages arising from marriage breakdown?***

***15.2(6)(a)*** recognize any **economic advantages or disadvantages** to the spouses arising from the marriage or its breakdown;

***Moge SCC 1992*** Look @ relationship:did it allow one partner to excel ahead of the other? (***70***)

Factors may include **loss of seniority, missed promotions, and lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance** (***79***)

Recognition of value of work done in the home

***Bracklow SCC*** where economic loss can determined🡪 **compensatory factors paramount**

***b) Child care expenses to be considered?***

***15.2(6)(b)*** apportion btw. the spouses **any financial consequences** arisingfrom the **care of any child of the marriage** over and above any obligation for the support of any child of the marriage;

***Moge SCC 1992*** If disadvantages of childcare responsibilities continue or are exacerbated this should be considered as well (***81***)

***c) Economic hardship arising from marriage breakdown?***

***15.2(6)(c)*** **relieve any economic hardship** of the spouses arising from breakdown of marriage;

***Backlow SCC 1999 at 41*** expands this section to include **non-compensatory factors** that spawn as consequences post marriage breakdown (e.g., formerly enjoyed intraspousal entitlement to support now finds themselves without it)

***d) Self-sufficiency supported?***

***15.2(6)(d)*** in so far as practicable, **promote the economic self-sufficiency** of eachspouse within a **reasonable period of time**

At a certain point, if protecting the payer of spousal support argue ***Messier v. Delage (1983 SCC)*** – DISSENT – that after a certain point this is simply a societal problem and is the responsibility of the government 🡪 if they’re employable, but not employed… also, mention “luxuriate in idleness”

***Backlow 1999 SCC*:**, in cases where not possible to determine extent of economic loss, court will consider the **need & standard of living as the primary criteria,** taken together with **the ability of the other party to pay**

***Leskun*** ***SCC 2006:*** Can consider effect of misconduct on spouse’s ability to achieve self-sufficiency

***2) What are the factors to bring to the courts attention?***

***s.15.2(4)*:** In making an order under ss. (1) or an interim order under ss. (2), the court **shall** take into consideration the condition, means, needs & other circumstances of **each** spouse, including

***s.15.2(4)(a)*** the **length of time the spouses cohabited**;

***Moge SCC*** The longer the relationship the closer the economic union and greater the presumptive claim of equal standards upon its dissolution

***Bracklow SCC* 6 years did not** constitute a long enough time for illness to be attributed to breakdown of the relationship

***s.15.2(4)(b)*** the **functions performed by each spouse during cohabitation**; and

***s.15.2(4)(c)*** any order, agreement or **arrangement relating to support of either spouse**

***s 9(2)*** private ordering is encouraged

***Backlow SCC*** support agreements are important, but not necessarily decisive ***49***

1. ***Spousal Misconduct?***

**DOES NOT MATTER UNDER *DA*!!!**

***s.15.2(5):*** In making an order under subsection (1) or an interim order under subsection (2), the court shall **NOT** take into consideration any misconduct of a spouse in relation to the marriage

***Leskun SCC 2006***: **BUT** can consider **effect** of misconduct on **spouse’s ability to achieve self-sufficiency**

**OR : “Courts cannot achieve indirectly what Parliament has said it should not do directly. Misconduct, as such, is off the table as a relevant consideration.”**

1. ***What is the specified period of the order?*** NB: largely up to court but suggest one

**Terms and conditions**

***s.15.2(3)***: The court may make an order under subsection (1) or an interim order under subsection (2) for **a definite or indefinite period** or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

**VARIATIONS OF A SPOUSAL SUPPORT ORDERS**

***1) Is your variation modifying an agreement (contract)?* IF NO GO TO (3)**

***Miglin SCC:*** Separation agreement, then later initial application for spousal support, ***s.15.2*** is **NOT** a variation order (***s.17***) and **REJECTS** causal connection and radical change tests (***Pelech triology***); but **maintains high standard for court intervention (Miglin test below)**

***s.9(2)*** supports private ordering – **mention this IF YOU DON’T WANT IT CHANGED**

1. ***Milgin Test (Stage 1)***
2. **Circumstances** (conditions of parties oppression, pressure or other vulnerability, negotiations, legal advice)
   * **CANNOT** presume power imbalance or exploitation
   * presence of vulnerabilities alone will  **NOT** justify intervention
3. Is agreement in “**substantial compliance**” w/ factors & objectives in ***DA***, including ***s.15.2*** (above) and ***9.2*** (informing spouse of mediation options)

Only **“significant departure**” from general objectives of ***DA*** warrants intervention;

If spousal support is **part** of a comprehensive settlement, consider it in light of **entire agreement**

***ii) Milgin Test (Stage 2)*** (**At the time of application)**

Court must consider **the extent to which:**

1. Agreement still **reflects original intentions of parties** (or has there been some change in circumstances that could not have been reasonably anticipated ); and
2. Agreement is still in **substantial compliance** with the objectives of the ***DA***

**NB: DISSENT** appropriate threshold for override = whether agreement is objectively fair at time of application; it is not enough that agreement is intended to effect an equitable sharing of the economic consequences of marriage breakdown, **it must in fact reasonably accomplish this end**

1. ***Is the separation agreement invalid due to vulnerability of one party?***

***Rick v. Brandsema SCC:*** Failure to make **full and honest disclosure**, basing information on **fraudulent** information, **exploitation** of **vulnerabilities** can result in an invalid settlement

Special care must be taken to ensure assets are distributed through a process free from informational and psychological exploitation

Where exploitation results in agreement deviating substantially from statutory objectives, agreement MAY be found **unconscionable** and thus, **unenforceable**

Parties are generally free to decide for themselves, but decisions can only be authoritatively made if both parties come on equal grounds

**Duty on spouses to provide full and honest disclosure of all relevant financial information to help protect the integrity of the negotiating process**

1. ***Is your variation modifying an interim/final order?***

***s.17(7)*** a variation order varying a spousal support order **should**:

**EMBEDDED VARIATION IN AN AGREEMENT – S.17**

***a) Economic advantages/disadvantages from marriage breakdown?* COMPENSATORY**

***s.17(7)(a)*** recognize any **economic** **advantages**/**disadvantages** to former spouses arising from marriage or its breakdown;

***Moge SCC 1992* Look @ relationship**:did it allow one partner to excel ahead of the other? (***70***)

Factors may include **loss of seniority, missed promotions, and lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance** (***79***)

Recognition of value of work done in the home (**compensatory**)

**Continue until adequate compensation has been made**

***Bracklow SCC 1999*** where economic loss can determined🡪 compensatory factors paramount

***b) Child care expenses to be considered?***

***s.17(7)(b)*** apportion btw the former 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;

***Moge SCC 1992*** If disadvantages of childcare responsibilities continue or are exacerbated this should be considered as well (***81***)

***c) Economic hardship arising from marriage breakdown?***

***s.17(7)(c)*** relieve any **economic hardship of the former spouses** arising from the breakdown of the marriage; and (**NB:** requires **causation** of marriage breakdown – ***Moge v. Moge SCC***)

***Backlow SCC @ 41*** expands section to include non-compensatory factors that spawn as **consequences** post-marriage breakdown (e.g., formerly enjoyed intraspousal entitlement to support now w/out it)

**Expectations from relationship that give rise to an obligation**

***d) Self-sufficiency supported?***

***s.17(7)(d)*** in so far as practicable**, promote the economic self-sufficiency** of each former spouse within a reasonable period of time

If protecting the payer of spousal support if they’re employable, but not employed… - ***Messier v. Delage (SCC)*** – DISSENT –this is simply a societal problem and is the responsibility of the government 🡪 also, mention “**luxuriate in idleness**”

***Backlow SCC*:**, in cases where not possible to determine extent of economic loss, court will consider the **need & standard of living as the primary criteria,** taken together with **the ability of the other party to pay**

***Leskun*** ***SCC:*** Can consider effect of misconduct on spouse’s ability to achieve self-sufficiency

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| **RESUMING EXPIRED SPOUSAL SUPPORT** |

1. ***Does your order include time limited support?***

***s.17(10)*** notwithstanding **ss(1),** where a spousal support order provides for support for a definite period or until a specified event occurs, a court may not, on an application instituted after the expiration fo that period or the occurrence of the event, make a variation order for the purpose of resuming that support **unless** the court is satisfied that

***s.17(10)(a)*** a variation order **is necessary** **to relieve economic hardship** arising from condition, means, needs or other circumstances **related to the marriage**; and

***s.17(10)(b)* the changed circumstances**, had they existed at the time of the making of the last order made **would likely have resulted in a different order**.

**FLA SPOUSAL SUPPORT**

***BCSC or BCPC***

***Family Law Act*** vol. 3 129-208 **PART 7, DIVISION 4 ss.160-169 (page 174 vol.3)**

**THEMES:**

**Contractual**

**(Self-Sufficiency, Freedom of Contract) -- (Pelech trilogy)**

**Compensatory (Moge)**

**Non-Compensatory (Bracklow)**

**Economic hardship; mutual obligation**

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| **AGREEMENTS (CONTRACTS) RESPECTING SPOUSAL SUPPORT** |

Say that this is a **CONTRACTUAL CONCEPTUAL GROUND FOR ENTITLEMENT TO SPOUSAL SUPPORT**

1. ***Are they a spouse?***

***s.3(1)*** A person is a **spouse** for the purposes of this Act if the person

***s.3(1)(a)*** is married to another person, or

***s.3(1)(b)*** has lived with another person in a **marriage-like relationship**, and

***Gostlin v. Kergin BCCA***: look **at subjective intention** and commitment to the relationship

***Takacs v***. ***Gallo***: subjective intentions may be overtaken by **conduct**

***M v***. ***H SCC***: look at **objective facts** that are indica of both conjugal/spousal relationship and the parties objective intentions

***s.3(1)(b)(i)*** has done so for a continuous period of **at least 2 years** or,

***s.3(1)(b)(ii)*** except in Parts 5 [*Property Division*], **has a child** w/ the other person

1. ***Is the agreement valid?***

***s.163(1)*** An agreement respecting spousal support may provide for the circumstances under which spousal support will change or end, including if a spouse lives with another person or enters a relationship with another spouse, but a condition of spousal support that the spouse **abstain from sexual relations after separation is not binding**

***3) Does the agreement release the spouse from liability for spousal support?***

***s.163(2)*** Despite ***s.160*** [duty to provide support for entitled spouse], in making an agreement respecting spousal support, a spouse may agree to release the other spouse from liability for spousal support.

1. ***Mention such an agreement is enforceable***

***s.163(3)*** A written agreement respecting spousal support that is filed in the court is enforceable under this Act and the *Family Maintenance Enforcement Act* as if it were an order of the court

1. ***If agreement challenged by one of the parties in fact pattern***

(**See what’s left of contract) -- *s.7*** If an agreement changes a previous agreement ***(a)*** each part of the previous agreement changed is deemed to be revoked and ***(b)*** **the remainder of the previous agreement,** if any, **remains effective**

***Miglin SCC:*** Separation agreement, then later initial application for spousal support, ***s.15.2 DA*** is **NOT** a variation order (***DA s.17***) and **REJECTS** causal connection and radical change tests (***Pelech triology***); but **maintains high standard for court intervention**

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| **SETTING ASIDE AGREEMENTS** |

***1) Is this a written agreement (contract)?***

***s.164 (1)*** This section applies if spouses have a written agreement respecting spousal support, with the **signature of each spouse** witnessed by at least one person (can be same witness – ***(2)***)

***s.164(3)*** On application by a spouse, the court may set aside or replace with an order made under this Division (4) **all or part** of an agreement **only if** satisfied that **one or more** of the following circumstances existed when the parties entered into the agreement:

***(a)*** failure to disclose

***(b)*** took **improper advantage of vulnerability**

***(c)*** spouse did **not understand** nature or consequences of the agreement

***(d)*** other circumstances that would under the **common law cause** all or part of a contract to be voidable

* + If applying contract law: uncertainty , duress, unconscionability, etc.

**FOR INTERPRETATION *Rick v. Brandsema SCC:*** Failure to make **full and honest disclosure**, basing information on **fraudulent** information, **exploitation** of **vulnerabilities** can result in an invalid settlement

**BUT…**

1. ***Would the order substantially differ from another agreement made by the court?***

***s.164(4)*** The court may decline to act under subsection (3) if, on consideration of all the evidence, the court would **NOT replace** the agreement with an order that is **substantially different** from that set out in the agreement

***2) Is the agreement “SIGNIFICANTLY UNFAIR”?***

***s.164(5)*** **despite ss.(3),** the court may set aside or replace an order **all** or **part** of an agreement if satisfied that the agreement **is significantly unfair** on consideration of the following:

***s.164(5)(a)*** the length of time that has past since the agreement was made

* E.g., if they’ve been getting ripped off for a long time

***s.164(5)(b)*** any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;

***s.164(5)(c)*** the intention of the spouses, in making the agreement to achieve certainty;

***s.164(5)(d)*** the degree to which the spouses **relied on the terms of the agreement**;

* This will likely be one you can try to argue if it comes up

***s.164(5)(e)*** the degree to which the agreement meets the objectives set out in ***s.161***

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| **APPLICATION FOR SPOUSAL SUPPORT (ORDERS)** |

**REMEMBER: PRIORITY OF CHILD SUPPORT OVER SPOUSAL SUPPORT (*s.173)***

1. ***Are they a spouse?***

***s.3(1)*** A person is a **spouse** for the purposes of this Act if the person

***s.3(1)(a)*** is married to another person, or

***s.3(1)(b)*** has lived with another person in a **marriage-like relationship**, and

***Gostlin v. Kergin BCCA***: look at subjective intention and commitment to the relationship

***Takacs v***. ***Gallo***: subjective intentions may be overtaken by conduct

***M v***. ***H SCC***: look at objective facts that are indica of both conjugal/spousal relationship and the parties objective intentions

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

***(ii)*** except in Parts 5 [*Property Division*], **has a child** w/ the other person

1. ***What objectives entitle your client to spousal support?***

**“Objectives of spousal support**”

***s.161*** In determining entitlement to spousal support, the parties to an agreement or the court **must** consider the following objectives:

***(a)*** to recognize any **economic advantages** or **disadvantages** to the spouses arising from the relationship between the spouses or the breakdown of that relationship

***(b)*** to apportion btw the spouses any financial consequences arising from the **care** **of their child**, beyond the duty to provide support for the child;

***(c)*** relieve any economic hardship of spouses arising from breakdown of relationship btw spouses;

***Bracklow SCC***: supplicant must show need for support that respondent is able to support; it is not the marriage but the relationship & expectations from it that give rise to obligation

***s.161(d)*** as far as practicable, promote economic self-sufficiency of each spouse w/in a reasonable period of time

***Messier v. Delage (SCC 1983)*** – **DISSENT** – the divorce terminates the marriage and there should be a termination of all relations btw parties – a divorced citizen who is employable who doesn’t have a job is in the same position as any other citizen in the country who doesn’t have a job. Responsibility is on the gov & they should apply for welfare.

**NB:** remember **“luxuriating in idleness”** – they should/could be working but aren’t

1. ***Duty to provide spousal support?***

***s.160*** If, after considering the objectives set out in ***s.161*** (above), a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with ***162*** (below).

**Mention this after above analysis**

1. ***Conditions, means, needs and other circ. to consider for spousal support?***

***s.162*** The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

***(a)*** the length of **time** the spouses **lived together**;

***(b)*** the **functions** **performed** by **each** spouse during the **period they lived together**;

***(c)*** an **agreement** btw the spouses, or an order, relating to the support of either spouse

Mention importance of freedom to contract

***Redpath BCCA*** – mention that if award deviates substantially form the **SSAG** guidelines appellate intervention may be appropriate

1. ***Mention SSAG guidelines***

**SSAG guidelines** – economic disadvantage and length of relationships; priority to children

1. ***Misconduct?*** Can matter under the FLA

***s.166*** In making an order respecting spousal support, the court must not consider any misconduct of a spouse, **EXCEPT** conduct that **arbitrarily** or **unreasonably**

***(a)*** causes, **prolongs** or **aggravates** the need for spousal support, or

***(b)*** affects the ability to provide spousal support

***Peterson v Lebovitz 2013 BCSC:*** Mr P’s difficulty in finding employment partly self-imposed; he arbitrarily and unreasonably hid his financial circumstances. **Ms L got SS and costs*.***

***Leskun SCC 2006***: interpretation help – consider effect of misconduct on self-sufficiency effect

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| **CHANGING TERMINATING OR SUSPENDING SPOUSAL SUPPORT** |

1. ***Grounds to suspend, change or terminate the order?***

***s.167(2)*** Before making an order under subsection (1) (**below @ a)**), the court must be satisfied that at least one of the following exists, and take into consideration:

***(a)*** a change in the condition means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;

***(b)*** evidence of a substantial nature not able during the previous hearing has become available;

***(c)*** evidence of a lack of financial disclosure by either spouse discovered after an order was made

***Story v. Story (BCCA):*** *Pelech, Richardson, Caron* **causation test** (below) applies to variation orders where the order was **intended to be FINAL**.

***Pelech, Richardson, Caron SCC*** : have to show that there is a **causal relationship** between the marriage and the change in the financial situation

***a) Has one of the above been satisfied? 🡪 Mention this; or say not applicable if not***

Based on the above re: ***s.167(1)*** a court may (may not) change, suspend or terminate an order respecting spousal support, and may do so **prospectively** or **retrospectively**

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| **RESUMING EXPIRED SPOUSAL SUPPORT** |

1. ***Have the spousal support payments expired?***

***s.167(3)*** Despite subsection (2), if an order requires payment of a spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may **not** make an order under subsection (1) for the purpose of resuming spousal support **unless** satisfied that

***(a)*** the order is **necessary to relieve economic hardship** that

***(i)*** arises forma **change in the condition**, **means**, needs or other circumstances of either spouse has occurred since the order was made

***(ii)*** is related to the relationship btw the spouses, and

***(b)*** the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order

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| **UNQEUAL PROPERTY DIVISION AND SPOUSAL SUPPORT** |

1. ***Is there an unequal division of property causing the agreement to be unfair?***

***s.95(3)*** The Supreme Court may consider also the extent to which **the financial means and earning capacity of a spouse have been affected** **by the responsibilities and other circumstances of the relationship** btw the spouses if, on making a determination respecting spousal support, the objectives of spousal support under ***s.161*** have not been met

***Meiklejon (ONCA)*** if bulk of property distribution to a spouse is in the form of property that **does not generate income** (e.g., the home) then support payments from the pension might be appropriate

* That is, if the payor spouse has ability to pay and the receiving spouse continues to experience economic hardship