FAMILY LAW

Table of Contents:

Class 12: Family Breakdown: Divorce, Separation and Corollary Issues

Divorce

- Grounds (s.8 of the *Divorce Act*)
  - Adultery
  - Physical or mental cruelty
  - Living separate and apart for one year
- The section gives no preference to one factor over another, although in practice the court may grant a divorce on the basis of the spouses having lived separate and apart for one year, even though other indicia of marriage breakdown are present
  - *McPhail v McPhail 2001 BCCA:* Divorce granted on one year separate and apart even though a party alleged cruelty. The Court held that where the one-year-separate-and-apart ground exists but a party insists on pursuing another ground, costs may be awarded

The Court's Inherent Jurisdiction

- The court does maintain inherent jurisdiction to postpone the granting of a divorce, even if grounds for divorce exist, if it were prejudice the rights of one of the parties (*Bhullar v Bhullar 1997 BCSC) (Darbyshire-Joseph v Darbyshire-Joseph, 1998, QL SC)*

Bars to Divorce

- Collusion between the parties (s.11 (1)(a) and s.11 (4) *Divorce Act*)
- Failure to make reasonable arrangements to support the children (s. 11(1)(b) *Divorce Act*)
- Where an applicant has condoned an act of adultery, when the act is the basis for applying for divorce (s.11 (1)(c) *Divorce Act*)

Duties of Legal Advisors

- Lawyer's Certificate (s.9 *Divorce Act*)

Capacity to Separate

- *Wolfman-Stotland v Stotland 2011 BCCA*
  - The minimum capacity required to form the intent to separate is the capacity to instruct counsel

Same-Sex Divorce

- *Civil Marriage of Non-Residents Act:* Certified that spouse now means either of two persons who are married to each other

Same-Sex Adultery

- *P(SE) v P(DD) 2005 BCSC*
  - Common law defence of adultery includes same-sex spouses

Corollary Issues

- Custody and access, spousal support, child support, division of property/debt

Alternative Dispute Resolution in Family Law Matters

- Potentially less expensive
- Less adversarial
- Encourage parents to put their children's needs ahead of their own

Collaborative Family Law

- Key Features:
  - Not go to court, or even threaten to go to court
  - Communicate with honesty and respect
  - Make a sincere effort to understand each other's needs and concerns
  - Promptly disclose all relevant information
  - Work together towards and agreement that is in everyone's best interests

  - Each party has their own lawyer; instead of working against each other, your lawyers meet together and the two of you create a settlement that is right for both of you
  - Usually also involved divorce coaches, child specialists, financial specialists and lawyers all on the same team
- Participation Agreement
  - Stay out of court
  - Communicate openly and with respect
  - Disclose all relevant information promptly
  - Keep negotiations confidential
  - Hire new lawyers and start over if you decide to go to court
  - Not use any disclosed information against each other if you go to court
- Who can be a collaborative Lawyer?
  - Lawyers must be members of Collaborative Divorce Vancouver Society

Mediation

- Judicial Case Conferences
  - Goal: streamline costs and time, on all or a portion of contentious issues, by identifying and narrowing the issues and encouraging settlement

Classes 13 & 14: Custody, Guardianship, Access, Parenting Responsibilities, Parenting Time, Contact

De Kova v De Kova 2013 BCSC

- Second, both parties in this matter were without legal representation and while they did the best they could, the evidence is not satisfactory either with respect to the claims made by Ms. De Kova or the counterclaim and defence offered by Mr. De Kova. Consequently, I have done the best I could to sort out the parties' claims and to determine the evidence which is relevant and probative so that I can come to a conclusion (para 13)
- The case points out the difficulty in which parties who are "middle class" but do not have substantial earnings find themselves when they must rely on the courts to resolve their problems. They do not qualify for the almost non-existent legal aid available and yet they cannot afford to use lawyers. This means they come before the court with little idea of what they need to do, what documents they ought t produce and what evidence they should place before the court. With all the good will in the world, the court cannot lead their cases for them, cross-examine for them, argue for them and thus ensure their cases have been properly put forward (para 14)
- It is shameful that in our wealthy province we no longer have resources available which would give real help to parties in this situation. In my view, a case like this demonstrates a failure to improve access to justice (para 15)

Vilardell v Dunham 2014 SCC

- Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe on the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to litigant who seeks the adjudication of the superior court

Terms

- Custody, Guardianship, Parenting Responsibilities, Joint Custody/Shared Custody/Split Custody, Full Custody, Access/Contact, Parenting Time

Legislation

- *Divorce Act* ss. 16, 17
- *Family Law Act* Part 4

Divorce Act

- Check Definitions:
  - Child of the marriage means a child of two spouses, or form spouses who, at the material time,
    (a) Is under the age of majority and who has not withdrawn from their charge, or
    (b) Is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life

- Spouse – either of two persons who are married to each other, including *former spouses*
- Custody – care, upbringing and any other incident of custody [Guardianship not mentioned]

- S.16 Custody and Access Orders
- When making an order the court shall
  - (8) Consider only the best interests of the child by reference to the condition, means, needs and other circumstances of the child
  - (9) Not consider past conduct unless it is relevant to ability of person to act as a parent of the child
  - (10) Maximum contact principle
- S.17 Variation of Orders
  - Court can make and order varying a custody order or any provisions thereof
    (5) Change in circumstances since making the order
    (9) Maximum contact

Family Relations Act

- S.24 best interests of the child are paramount
  - Factors:
    - Health and emotional well being
    - If appropriate views of child
    - Love and affection and similar ties between the child and other persons
    - Education and training for the child
    - Capacity of person to exercise rights and duties adequately
- Joint Custody and Guardianship Master Joyce Model
  - Joint guardians of the child's estate
  - Either dies the other will be sole guardian of person and estate of the child
  - Custodial parent must inform the other parent of any significant matters affecting the child
  - The custodial parent must discuss with other any significant decisions including significant decisions about the child's health (except emergency decisions), education, religious instruction, and general welfare
  - The parent who doesn't have custody must discuss with the custodial parent and try to agree on those major decisions
  - If can't agree, custodial parent has the right to make the decision
  - Other parent believes not in the child's best interests, has the right, under s.32 of the *FRA,* to ask the court to review the decision
  - Each parent has right to get info about the child directly from 3rd parties

Family Law Act

- Look at definitions:
  - Child except in Parts 3 and 7 and s.247, means a person who is under 19 years of age
  - Guardian means a guardian under s.39 and Division 3 of Part 4
  - Parent means a parent under Part 3
  - Family violence
- Who is a Guardian?
  - Parents are presumptively guardians while living together and after separation, unless agreement or order to contrary (s.39 (1))
  - Parent who never resided with child is not a guardian unless agreement or regular care of child (s.39 (3))
  - A person who has custody of a child under ss.54.01 (5) or 54.1 of the *CFCSA* is deemed to be a guardian under the *FLA* (s.51 (5))
- No more *de factor* Custody and Guardianship
  - Under *FRA,* if the parties are living separate and apart:
    - S.27 provides that the parent who has care and control of the child is the sole guardian, unless a court orders otherwise
    - S.34 provides that the parent with whom the child usually resides may exercise custody over the child
  - Implications for single mothers where ex has been out of the picture for many years
- Guardian of Child's Estate (Part 8)
  - A child's guardian is not, by reason only of being a guardian, a trustee of the child's property or entitled to discharge property received on behalf of the child (s.176)

  - The exception is in relation to property the trustee has authority to hold for the child, or property within a prescribed value or a prescribed class of property (s.178)
- The Court May Appoint a Guardian (s.51)
  - S.51 applies to non-parents and to parents who have not lived with a child and have not had regular care of the child
  - The court may appoint a person as the child's guardian, or terminate a person's guardianship of a child (s.51 (1)(a))
  - The court may also terminate a person's guardianship of the child, except when director is guardian under the *Adoption Act* of the *CFCSA* (s.51 (1)(b))
  - The test is the best interests of the child (s.51 (2))
  - If a child is 12 years of age or older, the court must not appoint a person as guardian without the child's written approval (s. 51(4))
  - In case of Nisga'a and treaty First Nations children, the applicable First Nations government must be served and has standing (ss.208 and 209) (Example: Maa-nulth and Tsawwassen First Nations)
- Evidence for Appointment of Guardian
  - Orders in Council were delivered February 4, 2013 which brought in changes to the *Provincial Court Family Rules* and the *Supreme Court Family Rules* setting out evidence requirements for the appointment of a non-parent or parent without regular case as the guardian child under s.51 of the *FLA*
  - *Provincial Court Family Rules,* Rule 18.1
  - *Supreme Court Family Rules,* Rule 15-2.1
    - The Affidavit must be prepared for guardianship applications, to which must be attached criminal records check (CPIC), and record checks from MCFD and the Protection Order Registry
    - The Affidavit must set out the Applicant's relationship with the child; any incident of family violence affecting the children; any involvement in court proceedings under the *CFCSA,* the *FRA,* the *FLA* or the *Divorce Act* concerning children in the applicants care; and any history of criminal convictions and the existence of any current criminal charges
    - There are prescribed forms
- Parenting Arrangements
  - Defined as arrangements for parental responsibilities and parenting time (s.1)
    - Only a guardian can have parenting responsibilities and parenting time
  - Informal parenting arrangements: If "normal" part of child's routine, cannot be changed without consulting other guardians (s.48), unless unreasonable or inappropriate to consult
    - Court may make orders for the allocation of parental responsibilities or parenting time, that parties participate in dispute resolution, for the implementation of a parenting order, ex. Re-exchanges or supervised access (s.45)
- Parental Responsibilities (s.41)
  - Parental responsibilities concern the following:
    - Day-to-day decisions affecting the child
    - Where child will reside
    - With whom child will live with and associate
    - Child's education and extra-curricular activities
    - Child's cultural, linguistic and spiritual upbringing and heritage
    - Child's medical, dental and other health-related and heritage
    - Applying for passport, licence, permit, benefit or privilege for child
    - Giving or refusing consent
    - Receiving notice entitled to by law
    - Requesting information from a third party
    - Starting or defending a proceeding involving the child
    - Exercising any other responsibilities reasonably necessary to nurture the child's development
- Allocation of Parental Responsibilities
  - A guardian must exercise parental responsibilities in the best interests of the child (ss. 40 and 43)
  - Guardians must exercise parental responsibilities in consultation with all other guardians
    - Unless there is agreement or order to contrary, or
    - Unless consultation would be unreasonable or inappropriate
  - Parental responsibilities may be allocated among guardians by agreement (s.44 (1)(a)) or by order (s.45 (1)(a)). That is, parental responsibilities need not be shared.

- Note: An agreement is only binding and an order can only be made in respect of parenting arrangements if the guardians (parents) are separated: ss.44 (2) and 45(2)

- Parenting Time (s.42)
  - Parenting time is time that a child is with a guardian, as allocated under an agreement or order
  - During parenting time, a guardian may exercise day-to-day decisions affecting the child, unless an agreement or order says otherwise
- No Presumptions (s.40 (4))
  - No particular arrangement is to be presumed to be in child's best interests
  - In particular, there is no presumption that:
    - Responsibilities should be allocated equally
    - Parenting Time should be shared equally
    - Decisions should be made separately or together
  - But… the *FLA* essentially sets up a "joint" guardianship regime as each guardian is entitled to exercise parenting responsibilities unless and agreement or order provides otherwise
- Assigning Guardianship
  - S.53: A guardian may appoint a person to act as guardian in event of guardian's death, and that person has the same responsibilities (not more, not less) as the guardian. That is, the surviving guardian does not automatically become the "sole" guardian of the child (Testamentary Guardian)
  - S.55: A guardian may appoint a person to be a standby guardian, by execution of a prescribed form, to act in case of terminal illness or permanent mental incapacity on the party of the guardian (Standby Guardian)
    - The person must accept the appointment as guardian: s.57
    - Regulations were made under *FLA* setting out prescribed forms to be used for the appointments of a testamentary or standby guardian
  - S.43 (2): If a guardian is unable to exercise any parental responsibilities, the guardian may authorize, in writing, a person to exercise, in the best interests of the child, one or more of the guardian's parental responsibilities (Temporary Guardian)
  - Note: A guardian cannot assign to a temporary guardian her/his responsibility in relation to where child will reside, the child's cultural, linguistic, religious and spiritual upbringing and heritage, or starting, defending or settling a proceeding
- Contact
  - Contact is time someone who is not a guardian has with a child, including people other than parents (ss.1 and 58)
  - Agreements for contact are only binding if made with all guardians having parental responsibility for contact (s.58)
  - Orders for contact may include terms and conditions, such as supervision requirements (s.59)
- Best Interest of the Child – Overview
  - 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 (s.37 (3))
  - Agreements must be set aside by the court if satisfied that they are not in the best interests of the child re parenting arrangements (s. 44 (4)) and re contact (s.58 (4))
  - Factors that must be considered
    - S.37 (2): All of the child's needs and circumstances must be considered including:
      (a) The child's health and emotional well-being
      (b) Child's views, unless inappropriate to consider them
      (c) Nature and strength of relationships between child and significant persons
      (d) The history of the child's care
      (e) Child's need for stability
      (f) The ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities

      <u>Family Violence Factors:</u>

      (g) The impact of any family violence on the child's safety, security or well-being, whether the family violence is 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 his or her ability to care for the child and meet the 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 risks to the safety, security or well-being of the child or other family members
(j) Any civil or criminal proceeding relevant to the child's safety, security or well-being

- Family Violence is broadly defined to include (s.1)
  (a) Physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm
  (b) Sexual abuse of a family member
  (c) Attempts to physically or sexually abuse a family member
  (d) Psychological or emotional abuse of a family member including
    (i) Intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property
    (ii) Unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy
    (iii) Stalking or following of the family member, and
    (iv) Intentional damage to property
  (e) In the case of a child, direct or indirect exposure to family violence
- Family Member (s.1)
  - Family member, in relation to a person, is broadly defined as:
    (a) The person's spouse or formed spouse
    (b) A person with whom the person is living or has lived in a marriage-like relationship
    (c) A parent or guardian of the person's child
    (d) A person who lives with, or is related to, the person or a person referred to in paragraphs (a) to (c)
    (e) The person's child
    And includes a child who is living with, or whose parent or guardian is, a person referred to in paragraphs (a) to (e)
- Assessing Violence (s.38)
  - For the purposes of s.37 (2)(g) and (h) – family violence – a court must consider all of:
    (a) The nature and seriousness of the family violence
    (b) How recently the family violence occurred
    (c) The frequency of the family violence
    (d) Whether any psychological or emotional abuse constitutes or is evidence of a pattern of coercive and controlling behaviour directed at a family member
    (e) Whether the family violence was directed toward the child
    (f) Whether the child was exposed to family violence that was not directed toward the child
    (g) The harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence
    (h) Any steps the person responsible for the family violence has taken to prevent further family violence from occurring
    (i) Any other relevant matter
- Existing Agreements and Orders (s.251 – transition provision)
  - If a party has custody or guardianship of a child, then that party is a "guardian" under the *FLA* and has parental responsibilities and parental time
  - If a party has access to a child, then that party has "contact" under the *FLA*
  - The party's parenting responsibilities, parenting time or contact are as described under the existing agreement or order
- Varying Order and Giving Directions (ss.47 and 49)
  - On application, the 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 circumstances of the child, including because of a change in the circumstance of another person (s.47)
  - A child's guardian may apply to the court for directions respecting an issue affecting the child, and the court may make an order giving the directions it considers appropriate (s.49)
    - This sections carries over s.32 of the *FRA*
- Relocation – No Agreement or Order (s.46 (1))
  - Applies if:

        - No written agreement or order respecting parenting arrangements;
        - Application is made for an order (under s.45); and
        - A guardian plans to change the child's residence an that change can reasonably be expected to have a significant impact on that child's relationship with another guardian
- Informal Parenting Arrangements (s.48)
    - Applies if:
        - No agreement or order respecting parenting arrangements; and
        - Guardians have had an informal parenting arrangement in place for a period of time, establishing a normal routine for the child
    - Guardians must not change the informal parenting arrangements without consultation with the other guardians, unless consultation would be unreasonable or inappropriate in the circumstances
- Notice of Application (s.52)
    - Notice of the application must be given to:
        - Each parent or guardian of the child affected by the application
        - Each adult person with whom the child usually lives and who generally has care of the child
        - Any other person to whom the court considers it appropriate to serve with notice
    - The exception is if there are *CFCSA* orders
    - The court can grant an exemption from the notice requirement if the court considers it appropriate (eg. Where there is family violence or other parent/guardian cannot be located)
- Yes or No to Change of Residence (s.46 (2))
    - Determined along with Parenting Arrangements
    - Factors:
        - Best interests of the child: s.37 (2)
        - Reasons for the change in location of the child's residence, and
        - Must not consider whether the moving guardian would do so without the child (double-bind)
- *FLA* Division 5
    - Compliance with parenting time or contact with a child
        - S.61 deals with denial of parenting time or contact
        - S.62 when denial is not wrongful
        - S.63 failure to exercise parenting time of conduct
        - S.64 orders to prevent removal

Class 13: Terminating Guardianship – *JWK v EK 2014 BCSC*

Facts: Father appeals, pursuant to *FLA* s.233, order respecting the issue of guardianship, parenting time, child support and retroactive child support. Mother terminated access of parent due to his addiction (pursuant to s.51(1)(b) of the *FLA*).
Issue: Did the trial judge err in law by terminating his status as a guardian of the parties' two children, and by retroactively imputing a full-time income to him for the purposes of child support?
Law:

- The separation in the *FLA* between guardianship and parenting rights permits a parent to remain a guardian even when the circumstances indicate that it would not be in the child's best interest for that parent to exercise parenting responsibilities (para 35)
- Termination of guardianship should be a final recourse only and then only where no other means of protecting the best interests of the children is available (para 41)
- There is no indication in the *FLA* that allocating all responsibilities to one parent would automatically terminate the other parent's guardianship; hence, doing so is not inconsistent with guardian status. (para 32)

Holding: The appeal should be allowed.

Para 18: The concept "guardianship" in the *FLA* is a new one: it replaces both the concept of custody and the concept of guardianship as they existed in the *FRA.* The *FLA* presumes that parents are generally guardians as per

Para 21: The *FLA* sets up a presumptive approach to guardianship: parents who have lived with their children prior to separation remain guardians after separation (s. 39(1)). However, that presumptive status is not necessarily permanent, as the court may intervene: s. 39(2) states that "an order made after separation … may provide that a parent is not the child's guardian", while s.

51(1)(b) provides that upon application a court may "terminate a person's guardianship of a child." The application for termination in this case was heard under s. 51(1)(b).

Para 34: Also consistent with this view is the fact that a guardian who has no parental responsibilities still has legal rights under the *FLA* that confirm and promote their involvement in their child's life. As the trial judge noted, only a guardian can challenge an application to relocate. This is not an insignificant right. In addition if a child's guardian dies and the surviving parent is not a guardian, they do not automatically become a guardian but must apply for an appointment. Also, s. 49 of the *FLA* allows a guardian to apply to a court for directions respecting an issue affecting a child. Only a guardian can make such an application. A parent who is not a guardian but with contact has no legal right to challenge the other parent's actions in court. As a result I conclude that even without parental responsibilities, guardianship still has a meaningful legal status. Additionally, as noted earlier, it has a symbolic status: a guardian is seen as playing a "parental" role in a child's life, even when not exercising parental responsibilities.

Para 35: The separation in the *FLA* between guardianship and parenting rights permits a parent to remain a guardian even when the circumstances indicate that it would not be in the child's best interest for that parent to exercise parenting responsibilities.

S.39 and permits the court to allocate parenting responsibilities and parenting between the guardians.

See section 40 of the *FLA*

Class 14: Best Interests of the Child – *Kimberly Van de Perre v Theodore Edwards 1999 BCSC*

Race:

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 the same race)
    a. There are tools that bi-racial children need to facilitate identity and pride in their race
2) Evidence of race relation in the relevant communities may be important to determine the context in which the child will function

Past Conduct

- Conduct that causes break-up is irrelevant but parties' attitudes towards and views of each other are important
- Some consideration is given to the father's promiscuity in relation to stability of the child

Class 15: Access, Parenting Time, Contact

What is access?

- Only defined in the French version of the *Divorce Act* as "the right to visit"
- S.16(5) of the *Divorce Act* states that unless a court otherwise orders, the access parent has the right to make inquiries, and to be given information as to the health, education and welfare of the child
- *Young v Young* – The meaning of access
    - What is McLachlin's view of the best interests of the child test?
    - What does the majority do with the Charter questions?
    - What does the majority do with the harm principle?
    - What does the majority see as the most important issue in the case?
    - What is the basis of disagreement between L'Heureux-Dube and McLachlin?
- *Young v Young:*
    - Courts must attempt to balance such considerations 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
        - Facts: Mom sole custody by consent, dad had access. Mom didn't want religious views put on children. Children interviewed, said they didn't like dad's 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 to access parents
        - Dissent: Father was interfering with custody rights (right to make decisions re: religion), custodial parent has unfettered rights to limited access

- 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
- 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 with 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

Family Law Act

- Concept of "access" does not have an exact parallel in the *FLA*
- Guardians have "parenting time"
- Non-guardians have "contact"
- Who gets contact? Any person who is not a guardian, explicitly including non-guardian parents and grandparents (s.59 *FLA*)
- S.59 also authorizes the court to order supervised contact and clarifies that an access order under the *CFCSA* is a contact order for the purposes of the *FLA*
- A person with "contact" is not a guardian and therefore does not have parental responsibilities under s.44 or parenting time under s.42

Supervised Access

- Access/contact may be restricted when there is a concern that the visits may result in harm to the child
- In general, supervised access is intended to be a short-term solution
- Note: It is up to the spouse who says someone's access should be supervised to prove why it should be supervised
- Who supervises?
  - Various private programs or MCFD
  - Example of costs: $50/hour and there is a charge for intake visit with each parent which may be from $50-$100
  - Grandparent, friend, another relative
- In what type of situations might access/contact be supervised?
  - There has been a history of child abduction or attempts to abduct
  - History of abuse
  - Attempted alienation
  - Concerns about the parent's ability to properly care for the child, which may include mental and physical illness

Conditional Access

- A spouse's contact/access to their child can also be conditioned on them doing or not doing something
- In general, the court must have some fairly serious concerns about a parent to order conditional access
- Examples of some conditions:
  - A parent was a heavy smoker (don't expose the child to second hand smoke)
  - A parent uses drugs and alcohol (can't use it while with the child and for a 24 hour period before access)

Johnson-Steeves v Lee

- How are Nigel's best interests with respect to access assessed by the trial judge?
- Right of access belongs to child and is not his mothers to give away

Access/Parenting/Contact and Allegations of Violence

- *Fullerton v Fullerton 1994*
  - 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 maximum contact rule in *Young*)
  - It is extremely difficult to deny access to a parent
- *EH v TG 1995 NSCA:* Instance where access due to violence denied
  - Access terminated on appeal due to sexual abuse – parental preferences should not influence oru consideration of best interests
- *Baggs v Jesso 2007 NLUFC:* Instance where access due to violence denied

- A father who had faced charges of sexual assault (of his daughter and her mother) was granted on month of unsupervised access, as well as regular access for shorter time periods. The judge noted though the father was acquitted of assaulting his daughter, his acquittal did not mean he was necessarily innocent; his violent pattern of behaviour was such that leaving the child with him for extended periods of time was not in her best interests
- 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

Remedies for Denial or Frustration of Access

- *Divorce Act* offers no explicit remedy for access parents who are denied access to child
- *Frame v Smith 1987 SCC*
  - No cause of action in tort of breach of fiduciary dity if access rights are interfered with
  - Two remedies available: Contempt of court and termination of spousal suppot
- *Ungerer v Ungerer 1998 BCCA:* Cancellation of spousal support
  - S.17(6) of *DA* 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
  - 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 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 day 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.
- *B(L) v D(R) 1998 OSC*
  - Issue: Denial of access
  - Decision: Mom imprisoned for contempt
  - Test: Any valid reason for denial?
  - Special Consideration: Point was to send a message about contempt, violating court orders has costs
- *Family Law Act:* Does not provide a remedial framework for failure to comply with orders and agreements regarding parenting time or contact (ss.61-64)

Grandparent's Access

- *Divorce Act:* s.16 (1)(4) permit an order of access in favour of third party
- *FLA:* ss. 58, 59 permit agreements and orders granting contact to both guardians and non-guardians
- Onus is on the third party applicant to show that the access is in the best interests of the child
- *Bridgewater v Lee 1998*
  - If access order would disrupt child's nuclear family, courts must exercise extreme caution
- *Parsons v Parsons 2002*
  - 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
- *Chapman v Chapman 2001*
  - Not in child's best interests to be forced to visit grandmother with bad relationship regularly

Relocation Under the *FLA* (Part 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 guardian or one or more other persons having a significant role in the child's life" (s.65)
- Division 6: applies when a guardianship seeks to move after parenting arrangements are in place under either a written agreement or Court Order (s.65 (2)). If Division 6 applies, applications respecting relocation are governed by s.69
- Section 46: applies in the following circumstances:
  - (i) There is no written agreement or Court order respecting parenting arrangements
  - (ii) An application is made under s.45 (1)(a) or (b) including an application for parenting time; and
  - (iii) One guardian plans to change the location of the children's residence change can reasonably be expected to have a significant impact on the children's relationship with the other guardian

- When s.46 applies, the Court is required to determine the parenting arrangements that are in the best interests of the children by taking into account the factors set out in s.37 (2) as well as the reasons for the change in the location of the children's residence
- Note: s.46 states that the court must not consider whether the guardian who is planning to move would do so without the child

Class 16: Mobility – Relocation

Legal Overview

- *Divorce Act*
  - *Gordon v Goertz 1996 SCC*
  - No new law from SCC; leave to appeal denied 16 times (eg. *Stav*)
- *Family Law Act*
  - S.46 and Division 6 (Part 4)

Gordon v Goertz

- Two part test:
  1. Threshold requirement of demonstrating a material change of circumstances affecting the child (a change, which materially affects the child, and was unforeseen or not reasonably contemplated at time of previous order)
  2. The applicant must establish that the proposed move is in the best interests of the child, given all the relevant circumstances, the child's need and the ability of the respective parents to satisfy those needs
- The law can be summarized as follows:
  - Parent applying for move must meet the threshold requirement of material change
  - Fresh inquiry on best interests of child
  - Evidence of new circumstances
  - No presumption of legal presumption, although custodial parent's views entitled to great respect

Best Interests of the Child (*Gordon v Goertz*)

- Factors the Courts should consider:
  - Existing custody arrangement
  - Existing access arrangement
  - Desirability of maximizing contact
  - View of the child
  - Reason for moving, only in exceptional case where relevant to that parent's ability to meet the needs of the child
  - Disruption to child of change in custody
  - Disruption to child consequent on removal from family, schools and community

***FLA* – The Goal**

- The [Relocation] Division's goal is to introduce some certainty to this area of law by mandating notice of a proposed move, defining what constitutes relocation and directing courts about both circumstances that should be considered and those that should not.
- The introduction of certainty will reduce the need for lengthy litigation and, thus, reduce the costs associated with disputes over relocation

What law applies?

- Depends…
  - Are the parties married?
  - Is the proceeding in the Supreme Court or the Provincial Court?

Divorce Act v FLA

- Can parties choose? (*MM v CJ 2014 BCSC*)
  - NOFC seeking relocation under *FLA;* neither relied on the *Divorce Act*
  - Court did not need to decide the paramountcy issue and undertook analysis solely under the *FLA*
- Paramountcy? (*TK v RJHA 2013 BCSC*)

- "In my view, the relocation provisions under the *FLA* are inconsistent with the *Divorce Act,* and it is therefore appropriate to analyze the issue of relocation (mobility) under the *Divorce Act* and not the *FLA.* …In my view the *FLA* may well require the court to weigh relevant factors in a different manner than it would under the *Divorce Act."*

***FLA* – Guardianship is Key**

- S.40: Only guardians may have parental responsibilities
- S.41: Parental responsibilities includes decisions about where a child resides or with whom the child lives or associates
- S.69: Only guardians have the right to challenge a relocation

Changing a Child's Residence (S.46 (1))

- Applies if:
  - No written agreement or order or order respecting parenting arrangements;
  - Application is made for an order (under s.45); and
  - A guardian plans to change the child's residence and that change can reasonably be expected to have a significant impact on that child's relationship with another guardian

Informal Parenting Arrangements (S.48)

- Applies if:
  - No agreement or order respecting parenting arrangements; and
  - Guardians have had an informal parenting arrangement in place for a period of time, establishing a normal routine for the child
- Guardian must not change the informal parenting arrangements without consultation with the other guardians, unless consultation would be unreasonable or inappropriate in the circumstances

Notice of Application (S.52)

- Notice of the application must be given to:
  - Each parent or guardian of the child affected by the application;
  - Each adult person with whom the child usually lives and who generally has care of the child; and
  - Any other person to whom the court considers it appropriate to serve with notice
- The exception is there are CFCSA (child protection) orders
- The court can grant an exemption from the notice requirement if the court considers it appropriate

Yes or No to Change of Residence (S.46 (2))

- Determined along with parental arrangements (parenting responsibilities and parenting time) and contact
- Factors:
  - Best interests of the child (s.37 (2));
  - Reasons for the change in location of the child's residence; and
  - Must not consider whether the moving guardian would do so without the child (the improper double-bind question)

Part 4, Division 6 – Relocation (ss.65-71)

- Applies if: (S.65 (2)) *LJR v SWR 2013 BCSC; SJR v RMN 2013 BCSC; AJD v EAE 2013 BCSC*
  - Written agreement or order respecting parenting arrangements or contact; and
  - Guardian plans to relocate himself or herself or the child, or both

Definition of 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 guardian, or
  - One or more other persons having a significant role in the child's life

Significant Impact

- Change of residence within a metropolitan centre (i.e. the Lower Mainland) does not qualify as a "relocation" (*Berry v Berry 2013 BCSC)*

- What moves would result in significant impact triggering Division 6?

Notice of Relocation (S.66)

- Requirements:
  - To all other guardians and persons having contact with the child;
  - At least 60 days in advance; and
  - In writing, with the date of the relocation and the name of the proposed location
- Court can grant exemption if
  - Notice cannot be given without incurring a risk of family violence; or
  - No ongoing relationship between the child and other guardian or contact person
- Application for exemption can be brought ex parte

Resolving Relocation Issues (S.67)

- After notice is given:
  - Guardians and contact persons must use best efforts to cooperate in resolving any issues relating to the proposed relocation
- However, nothing prohibits:
  - A guardian from brining an application for an order respecting relocation (under s.69); or
  - A person with contact from bringing a application for an order respecting contact (under ss.59 or 60)

Objecting to Relocation (S.68)

- If the other guardian objects to the relocation of a child, that guardian must
  - File an application for an order to prohibit the relocation (under s.69)
  - Within 30 days after receiving notice of the plan to relocate the child
- Kicker:
  - If the other guardian does not initiate an application in court objecting to the relocation within 30 days of being given notice, then the relocation may occur on or after the date stated in the written notice

Orders Respecting Relocation (S.69)

- Court can make an order permitting or prohibiting the relocation
- Test:
  - Best interests of the child: s. 37(2);
  - Good faith; and
  - Reasonable and workable arrangements to preserve the relationship between the child and the other guardians, persons entitled to contact, and other persons who have a significant role in the child's life
- Onus depends on whether or not there is substantially equal parenting time

Reasonable and Workable Arrangements (*MN v CJ 2014 BCSC*)

- Father had not proposed reasonable and workable arrangements to preserve relationship between mother and son (8 year old)
- This did not defeat relocation application; rather court imposed such arrangements

Not Substantially Equal Parenting Time (s.69 (4))

- Relocating guardian must satisfy the court that
  - The proposed relocation is made in good faith; and
  - She/he has proposed reasonable and workable arrangements to preserve the relationships
- If court is satisfied of the above, then relocation must be considered to be in the best interests of the child unless other guardian satisfies the court otherwise
- Onus is on the guardian
- Each guardian exercised equal parenting time from separation to February 2013; then mother had five of 14 days. Jenkins J. found this was "a significant amount of parenting time" and held that each parent has substantially equal parenting time (*MM v CJ 2014 BCSC*)

Factor Not to be Considered (s.69 (7))

- The court must not consider whether a guardian would still relocate if the child's relocation were not permitted (the improper double-bind question)

Four Possible Scenarios (*JP v JB 2013 BCPC; HNM v SCJK 2014 BCSC*)

- Relocation allowed; other parent stays
- Relocation allowed; other parent moves
- Relocation denied; moving parent moves
- Relocation denied; moving parent stays

Other Orders (s.70)

- If the relocation is permitted, the court can make other orders
    - Allocating parenting arrangements between the guardians; and
    - If necessary, requiring the relocating guardian to post security in any form the Court directs, or transfer specific property to a trustee
- In making such an order, the court must seek to preserve, to a reasonable extent, parenting arrangements under the original agreement of order
- But, if the relocation is not permitted, that does not constitute a change of circumstance for the purpose of applying to vary the parenting arrangements: s.71

Good Faith (s.69 (6))

- In determining "good faith" the court must consider all of the relevant factors, including:
    - The reasons for the proposed relocation;
    - Whether the proposed relocation is likely to enhance the general equality of the child's life and of the relocating guardian's life, including increasing emotional well-being or financial or educational opportunities;
    - Whether proper notice was given; and
    - If there are any restrictions on relocation in the written agreement or order

Evidence

- S.37 (2) of the *FLA*
- *Gordon v Goertz*
- *One v One*
    - Move denied because of uncertainty and disruption to education and relationships with extended family, friends
    - 12 factors to consider for best interests of the child: parenting capabilities of and kid's relationship with parents and new partners, employment security and prospects of parents and new partners if appropriate, access to and support of extended family, difficulty of exercising and quality of proposed access, effect on education, kid's psychological and emotional well-being, disruption of kid's existing social and community support and routines, desirability of proposed new family unit for kid, relative parenting capabilities of each parent and ability to discharge those responsibilities, separation of siblings, retraining or educational opportunities for the moving parent
        - Do not replace *Goertz* factors but act as a helpful guideline
- *Stav v Stav*

Best Interests of the Child (S.37 (2))

- To determine "best interests of a child," the court must consider all of the child's needs and circumstances, 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 between the child and 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 who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
    (g) The impact of any family violence on the child's safety, security or well-being, whether the family violence is 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 his or her ability to care for the child and meet the 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) Any civil or criminal proceeding relevant to the child's safety, security or well-being

Evidence

- Economic Factors
  - "Child deserves the opportunity not to live in poverty" (*JP v JB*)
  - Mother could work as teacher in Peace Region; parties combined income would be higher than if mother stayed in Kelowna (*HNM v SCJK*)
  - Health and well-being of guardian

Unchartered Waters

- Guardian moving without child: s.65 (2)
- Best efforts to cooperate in resolving any issues relating to the proposed relocation: s.67 (1)
- Preserving, to a reasonable extent, the parenting arrangements in an original order on agreement: s.70 (2)

Must I Stay or Can I Go Now?

- Relocation issues will remain among the most difficult problems for parties, lawyers and courts to sort through. They are often tough cases
- There is often no clear cut answer: The court will still be left with the task/responsibility of weighing compelling, and generally, competing factors, and coming up with what it thinks is in the best interests of the child
- There will need to be much more thinking about the parenting arrangements/parenting time, if a move is likely to be contemplated at some point

Karpodinis v Kantas 2006 BCSC

- Appeal dismissed for mother to relocate to Texas from Vancouver – distance from family and age of the child were major considerations
- Mother has to move to Houston or lose her job, prepares for move, applies for variation to bring kid with her
- Distance between kid and access parent/extended family is significant, esp. when kid is too young to travel alone
- A move for financial or family reasons can conduce to the best interests of the child
- Children in tender years: age where bonding w/extended family and access parent is a prime consideration
- Mother's interest in moving was legitimate but deference to trial judge is important and he considered all factors

Class 17 & 18: Economic Consequences of Family Breakdown

Different Types of Property Regimes

- Community of Property
  - Traditional Community of Property
  - Full and Immediate Community of Property
  - Deferred Community Property (Canada)

Who is a Spouse?

- Defined in s.3 of the *FLA* but what does "marriage like relationship mean?"
- *Gostlin v Kergin*
  - Look at substantive intention and commitment to the relationship
  - Based on subjective intent, is there an intention to live in a marriage-like relationship?
- *Takacas v Gallo*
  - Subjective intentions may be overtaken by conduct
- *Molodowich v Penttinen*
  - Based on objective indicators that the parties were living in a marriage-like relationship:
    - Shelter: Under the 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 relations to preparing meals, cleaning, shopping, etc?
        - Social: Did they participate in community activities? Met families/relationship with families? In other words, did people treat them as a couple?
        - Support: Financial arrangements, ownership of property?
        - Children: What were the attitudes and conduct of the parties concerning the children?
- *Austin v Goerz*
    - Financial dependence is not an essential aspect of a marriage-like relationship
- *G(JJ) v A(KM)*
    - Must consider the relationship as a whole in terms of the intention of the parties and the various objective indicia, presence or absence of one is not determinative

When can a spouse bring a claim?

- S.198 of the *FLA* provides that a proceeding for division of property or allocation od debt between spouses must be brought:
    - For married spouses – within two years of the date of divorce or declaration the marriage is nullity; and
    - For unmarried spouses – within two years of the date of separation
- Under s.252, unmarried spouses can elect to amend their pleadings to advance claims under *FLA,* provided that:
    - They are spouses under s.3
    - They have met the time limit imposed by s.198; and
- Married spouses must continue an action under the *FRA* unless they otherwise agree
- *Meservy v Field 2013 BCSC*
    - The parties were unmarried spouses, whose marriage-like relationship had lasted longer than two years. The parties separated before the *FLA* came into force. The parties were separated for less than two years when the action was commenced
    - Mr. Field amended his counterclaim to include a claim under the *FLA* for division of property owned by Ms. Meservy. Ms. Meservy argued that because the parties had separated before the *FLA* came into force, the *FLA* did not apply
    - The court held that the *FLA* has a retroactive effect, in that parties who meet the definition of spouse in s.3 and bring their claim within 2 years of their separation (as required by s.198) obtain the status of spouses (or former spouses) under the *FLA* on the date of the coming into force of the *FLA* and are entitled to bring claims for property division under the *FLA*
    - This results even if the facts giving rise to parties' status of spouses (or former spouses) under the *FLA* occurred prior to the coming into force of the *FLA*
    - If the parties separated before the coming into force of the *FLA,* Part 5 of the *FLA* will apply provided that they separated within two years of the *FLA* coming into force (i.e. at some point after March 18, 2011)

What if you are not a "spouse"?

- If you are not a "spouse" you cannot make a claim for the division of property through the *FLA*
- Jointly Owned Asset: Presumed to each be entitled to half of the value of that property
- One Person Owns the Asset: The other person will have to prove an entitlement to that asset through the principles of the common law

Jointly Owned Assets

- What happens when one party refuses to give the other his or her share of the asset?
    - Seek an order for the sale of the asset and the division of the proceeds for sale, or
    - An order for payment in compensation for his or her interest in the asset
- Note: Where real property is jointly owned, it is possible to make a claim under the *Partition of Property Act* – i.e. apply to court for an order that the property be sold and the proceeds of sale split equally

Individually Owned Assets

- Three types of trust claims that can be made:
    - Constructive trust
    - Express trust

- Resulting trust

Unjust Enrichment and Constructive Trusts

- *Pettkus v Becker*
  - Common law couple has beekeeping business, is together for 20 years, woman asks for ½ interest in land/business
  - Unjust enrichment lies at the heart of a constructive trust
  - 3 requirements for unjust enrichment: (1) enrichment, (2) corresponding deprivation, (3) absence of a juristic reason
  - Not enough that one spouse benefits at hands of the other → retention of the benefit must be unjust in circumstances
  - Factor: wife believed she had some interest in the farm and that expectation was reasonable in the circumstances
  - If one person in relationship prejudices herself in reasonable expectation of receiving an interest in property and other person in relationship freely accepts the benefits when he knew or ought to have known that there was that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it
  - Causal connection: must have a clear link between the contribution and the disputed assets
    - Includes enabling or assisting in enabling the other person to acquire the assets
    - To be unjust, must be some connection between acquisition of property and corresponding deprivation
  - Not every contribution will entitle spouse to ½ interest → must be proportionate to contribution (direct or indirect)
- *Sorochan v Sorochan*
  - Constructive trust imposed because of preservation/maintenance/improvement of property even though spouse's work did not contribute to the acquisition of the property
- *Peter v Beblow*
  - Constructive trust: household/childcare duties w/o compensation enhanced value of the property
- *Kerr v Branow*
  - Common intention resulting trusts should not be used in domestic property and financial disputes
  - Unjust enrichment: restoring a benefit which justice does not permit one to retain
    - Pf must give something that df receives and retains without juristic reason
  - Absence of juristic reason: no reason in law/justice for retention of benefit, making retention unjust in circumstances
    - E.g. intention to make a gift, contract, statute prevents recovery
    - Provides consideration for autonomy of parties, including legitimate expectations of parties and right of parties to order their affairs by contract
    - 2 step analysis: (1) look at established categories of juristic reasons, (2) consideration reasonable expectations of the parties and public policy considerations to assess if recovery should be denied
  - Quantum meruit: monetary remedy is determined by proportionate contribution to the accumulated wealth
    - However, it is not a fee-for-services approach or an accounting exercise
  - Factors: mutual effort (pooling of effort/resources, teamwork, decision to have/raise kids, length of relationship, one spouse taking on all domestic labour), economic integration/interdependence (joint bank account, shared expenses, common savings), actual intent (not what reasonable parties *ought* to have intended, can be inferred if parties accepted relationship as equivalent to marriage, stability of relationship, title to property, distribution of property in will), priority of the family (detrimental reliance on relationship, financial sacrifices, career sacrifices)
  - Claimant must show (a) there was a joint family venture (q of fact), and (b) link between contributions and wealth
  - Mutual benefits: can be considered at juristic reason stage if relevant, if not, consider at defence and/or remedy stage

***FLA* and Property Division**

- Part 5 of the *FLA*
- Spouses are entitled to an undivided half interest in "family property" regardless of use or contribution (s.81)
- Excluded property is defined in s.85
- Family property is defined in s.84
- Triggering event = the date of separation (s.81)
- Valuing family property and family debt (s.87)
- Unequal division by order and division of excluded property (ss.95 and 96)

What is "Excluded Property"?

- *Asselin v Roy 2013 BCSC*
  - Parties were not married and separated after a 24 year relationship
  - Mr. Roy had a home and other property before the relationship began. He sold the home during the relationship and used the proceeds to buy another family home, registered in his name. He also bought rental properties, which were registered in his name. The parties also bought properties registered in joint names
  - Both parties received inheritances during the relationship. Mr. Roy used his inheritance to pay the mortgage on the family home and as a down payment on one of his rental properties. Ms. Asselin used her inheritance to renovate the family home and as a down payment on a jointly owned property. Some of her inheritance remained in her separate bank account and her RRSP at separation
  - Ms. Asselin sought to exclude the accounts that arose from her inheritance and funds traceable into other properties. Mr. Roy sought to exclude property owned before the relationship, the property bought with his inheritance, and the equity in the family home traceable to his inheritance
  - The court shed some light on the types of evidence that will be required to prove an exclusion:
    - A proposed "broad brush" approach to the parties' competing claims for exclusions was rejected as being inconsistent with the approach mandated by the *FLA* (para 192)
    - Instead, the court's reasons indicate that historical appraisals and other evidence as to the value of excluded property at the date of cohabitation or the date of acquisition are normally required to assess claims for exclusions (e.g. paras 196, 201, 213-214)
  - The court commented at paras 105-106 on the types of evidence future litigants advancing claims for exclusions:
    - Where an exclusion of property is sought, documents showing the value of the property as at the time cohabitation commenced and at the date of separation will be critical
    - Where excluded property has changed character into another asset, documents should be provided to allow the court to trace the transaction back to the property said to be excluded
    - Where inheritances are said to come into play, estate documents should be produced
  - Failure to disclose: Agreement set aside partly because disclosure was incomplete

Review: Division of Family Property

- Under s.81 of the *FLA,* subject to an agreement or court order that provides otherwise, on the date of separation, each spouse is presumptively
  - Entitled to an undivided half interest in all family property as a tenant in common; and
  - Equally responsible for family debt

Valuation

- S.87 (a) of the *FLA* provides that the value of family property is the fair market value unless an agreement or court order provides otherwise and except in relation to a benefit under a pension plan
- S.87 (a) provides that the valuation date is either the date of an agreement or the date of trial or the hearing before the court respecting the division of family property and family debt
- *Asselin v Roy 2013 BCSC*
  - The valuation of assets which are family property consisting of accounts and financial institutions subject to day to day use, such as checking accounts, should be taken as at the date of separation (para 171).
  - However, "for those accounts representing long-term investments, specifically the RRSPs of each party found to be family property; those are to be divided in *specie* at the time of division unless it can be shown contributions were made post-separation. In such case, the amount of such contribution should be subtracted from the divisible portion of the asset" (para 172).
  - Spouse in vulnerable position because they were trying to have a baby

Protecting Property

- Financial Restraining Orders
  - S.91 of the *FLA:* provides authority for orders restraining a spouse from disposing of property
    - "The Respondent shall be and is hereby restrained from disposing or encumbering, or attempting to dispose of or encumber, the family property and other property at issue without the express written agreement of the claimant or further order of this honourable court"
  - Note: The provincial court does not have the power to make orders affecting property, including restraining orders about property

- S.91 of the *FLA:* the order must be granted on a party's application, unless the other party can show that there are enough assets that the applicant's claim to the property won't be frustrated if he or she happens to sell some of the assets
  - The order can be made without the other party being given notice of the application
  - The order includes just family property but all "property at issue," which might include excluded property

- Rules of Court
  - Rule 12-4 of the Supreme Court Family Rules gives the court authority to make a general restraining order, also called an injunction, to make someone to do something or not do something
- The Law and Equity Act s.39 – also deals with an injunction

Failure to Comply with a Property Restraining Order

- Section 230 of the FLA – provides for the enforcement of orders made under the Act
  - S. 230 (1) Subject to section 188 *[enforcing orders respecting protection]*, an order under this section may be made only if no other provision of this Act applies for the purposes of enforcing an order made under this Act.
    (2) For the purposes of enforcing an order made under this Act, the court on application by a party may make an order to do one or more of the following:
    (a) require a party to give security in any form the court directs;
    (b) require a party to pay
    (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, including fees and expenses related to family dispute resolution,
    (ii) an amount not exceeding $5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party's actions, or
    (iii) a fine not exceeding $5 000.

Unequal Division

- Under s. 95 of the *FLA*, the Court may divide family property and family debts unequally if it would be significantly unfair to equally divide family property or family debt or both, having regard to specified criteria.
- The criteria include:
  (a)Length of the relationship;
  (b) The terms of any agreement between the spouses, other than a written agreement described in s. 93(1);
  (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;
  (e) If the amount of family debt exceeds the value of family property, the ability of each spouse to pay the family debt;
  (f) Whether a spouse has, post-separation, caused a significant;
  (g) Where a spouse, other than in good faith:
  (i) Substantially reduced the value of family property
  (ii) Disposed of the property, or changed property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected
  (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or any order of the court; and
  (i) any other factor that may lead to significant unfairness
- Under s.95 (3) of the *FLA,* the court may consider the extent to which financial means and earning capacity of a spouse have been adversely affected by the responsibilities and other circumstances of the relationship, provided spousal support objectives (in s.161) are not met
- The change from "unfair" to "substantially unfair" is presumably meant to create a higher threshold and make the test for reapportionment stricter
- *Asselin v Roy 2013 BCSC*
  - Involved unmarried spouses whose claims were decided under the *FLA*.
  - The Court found that there was no significant unfairness in an equal division of the family property (paras 253-254).
  - The Court notes that the parties' relationship was long, and the division of property under the *FLA* would leave each party in a position of economic well-being and self-sufficiency, despite the fact that Mr. Roy was not working (para 255).
  - "'I know it when I see it' and this … is not 'it'" (para 254).

- 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

- *Karreman v Karreman 2014 BCSC*
  - Involved unmarried spouses whose claims were decided under the *FLA*. Both parties were self-represented and the Court did not have the benefit of submissions on the meaning of "significantly unfair."
  - The Court considered s. 95 and found that there were "elements to this case that clearly militate against dividing up the proceeds of sale [of the family home] equally between the parties" (para 15). If the proceeds were divided equally, the result would have been that the husband received a double benefit – giving the wife the family home in *lieu* of child support and then effectively clawing half of it back, while retaining the benefit of his equipment and vehicles (para 6, 16).
  - In the result, the Court concluded that it would be significantly unfair to award Mr. Karreman any of the proceeds from the matrimonial home.
- *Thomson v Young 2014 BCSC*
  - Involved unmarried spouses. The parties resided in the home owned Mr. Thomson. During the relationship, a line of credit secured by the home was obtained in both parties' names.
  - After separation, Ms. Young withdrew $100,000 from the line of credit. The parties orally agreed that she would only have to repay $25,000 and they would give up all claims for any further division of family property or debt.
  - In the result, there was an unequal division of family property & family debt in favour of Ms. Young. Mr. Thomson then brought an action for division of family property under the *FLA,* and that the oral agreement should be set aside.
  - The Court held that s. 93 of the *FLA* applies only to written agreements, and did not apply (para 45).
  - The Court held that because Mr. Thomson sought an equal division of family property & family debt in his Notice of Family Claim and in his Notice of Application for Summary Trial, he cannot rely on s. 95 (para 45).
  - In the result, Mr. Thomson must establish that the terms of the agreement are significantly unfair to him on the basis of the common law. In the result, the issue of whether the agreement should be varied or set aside was decided under common law principles, not under the *FLA*.
  - Under the common law, if the Court finds that married spouses entered into a binding agreement and one spouse challenges the agreement on the ground that it would be unfair to enforce it, the Court will review (and may set aside or vary) the agreement, if it is found to be unfair (para 47)
  - The court notes that ss. 92-94 of the *FLA* enact rules similar to the common law, and states that under the common law, the Court "will only set aside an agreement made between spouses respecting the division of property and debt, if the division agreed to would be 'substantially different' from the division that the Court would order and 'significantly' unfair to one of the spouses" (paras 48-49).
  - The Court held that the agreement was not significantly unfair to Mr. Thomson with respect to the division of family property, but was significantly unfair to him with respect to the division of family debt (paras 55, 58). The Court varied the agreement and ordered that Ms. Young pay $20,000 to Mr. Thomson as her share of the family debt.
- *LG v RG 2013 BCSC*
  - Involved married spouses whose claims were determined under the *FRA*.
  - The Court commented on the interpretation of significantly unfair in *obiter* (para 71):
    - The term "significantly unfair" in s. 95(1) of the *FLA* essentially is a caution against a departure from the default of equal division in an attempt to achieve "perfect fairness." Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.
  - The Court noted that its conclusions with respect to the division of assets would have been the same under the *FRA* and the *FLA*.
- *Cabezas v Maxim 2014 BCSC*
  - Involved unmarried spouses whose claims were decided under the *FLA*. Ms. Cabezas sought an unequal division of the value of the family home in her favour. Mr. Maxim or his company provided the down payment for the home, but the parties agreed that Ms. Cabezas would repay . of the down payment. The property was registered in joint names.
  - When applying s. 95, the Court considered the parties' contributions to the down payment for the home (para 46). The Court ordered an equal division.
- *LGP v CFB* 2014 *BCSC*

- Involved unmarried spouses whose claims were decided under the *FLA*. Ms. B. was sole owner of family home and made all payments for the home (down payment and mortgage payments).
- The Court determined that it would be "most unjust" to allow Mr. P. any share of the family home, under either the *FLA* or the principles of unjust enrichment (para 33).

- *Remmen v Remmen 2014 BCSC*
  - "The legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s.95 (2)" (para 44)

Division of Excluded Property

- Generally, the court cannot divide excluded property. However, the parties may rely on s.96 which allows the court to divide otherwise excluded property in limited circumstances, namely:
  - Family property or family debt located outside BC cannot practically be divided;
  - It would be significantly unfair not to divide excluded property on consideration of:
    - The duration of the relationship between the spouses; and
    - A spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property

Marriage Contracts

Class 19: Debt Division – *Bilawchuk v Bilawchuk 2014 BCSC*

Issue: How should the family debts be divided?
Law:

- S.87 of the *FLA* provides that debts, like assets, are to be valued at the time of trial
- This general rule cannot be applied rigidly, considering the paying back of debts before trial by individual claimants
- Evidentiary record of post-separation payments of family debts should be carefully considered
- Under the *FLA,* it is no longer necessary to prove that property and debt were acquired for a family purpose (*Asselin v Roy*) (S.86 *FLA*)

Analysis:

- Should family debt be divided equally?
  - Para 56: I turn now to the question of whether family debt should be divided equally. I conclude the answer to that question is generally "yes", with one exception. The parties had few assets on separation. They each kept one car and their own pension which they did not quantify but assumed were roughly equal in value. Beyond that, they had the quad recreational vehicle and household furnishings. The quad was relatively new and worth at least $6,500 at the time of separation. Mr. Bilawchuk retained the quad. I therefore find that this debt should be removed from his side of the ledger since it is offset by his retention of the vehicle.
  - Para 57: Ms. Bilawchuk argues in a similar vein that Mr. Bilawchuk should alone be responsible for the Brick credit card debt of $7,000 since that debt was incurred to purchase household furnishings which Mr. Bilawchuk retained.
  - Para 58: I have no evidence about the value of those furnishings but I take judicial notice of the fact that used furniture is unlikely to be valued at or close to its purchase price. Further, when the house sold the adult children received much of the contents of the home so that they could set up their own apartments. In the circumstances, while recognizing that Mr. Bilawchuk had control over those furnishings, I conclude that the Brick credit card debt remains a family debt which should be taken into account and divided between the parties

Class 20 & 21: Spousal Support

What is it?

- A payment made by one spouse, the payor, to the other spouse, the recipient, to help with his or her day-to-day living expenses or to compensate the recipient for the financial choices the spouses made during the relationship
- There is no automatic right to receive support just because of the relationship
- Whether spousal support will be paid, and if so, how much, depends on the particular circumstances of each couple

Who is responsible for support and why?

- *Messier v Delage 1983 SCC*

- Sets stage for debate about clean break, removed termination date for wife's spousal support
- "That does not mean that the obligation of support between ex-spouses should continue indefinitely when the marriage bond is dissolved, or that one spouse can continue to be a drag on the other indefinitely or acquire a lifetime pension as a result of the marriage, or to luxuriate in idleness at the expense of the other…"
- "The current economic situation, the difficulty in finding work and the resulting high rate of unemployment" and whether "a divorced spouse who is working should bear the consequences of this and provide the needs of his unemployed former spouse, or is it for the government, if it cannot remedy at least to alleviate the effects and to what extent?"
- At a certain point, if protecting the payor of spousal support, argue *Messier* – dissent: that after a certain point there is simply a societal problem and is the responsibility of the government, if they're employable, but not employed, mention luxuriate in idleness.

Spousal Support, Same Sex Spouses and Objectives of Spousal Support

- *M v H 1999 SCC*
  - Declared unconstitutional the exclusion of same-sex spouses from the statutory right and obligation of spousal support
  - Lesbian challenges definition of "spouse" in Ontario act in application for spousal support
  - Purpose of spousal support is need/actual dependence, objective of shifting obligation from public to individuals
  - Act requires fair and equitable distribution of resources to alleviate economic consequences, regardless of gender

The Legislation

- S.15.2 of the *Divorce Act*
- S.161 of the *Family Law Act*

Section 161 of the *FLA* and 15.2 of the *DA*

- The objectives of spousal support are:
  (a) To recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of the relationship;
  (b) To apportion between the spouses any financial consequences arising from the care of the child, beyond the duty to provide support for the child;
  (c) To relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
  (d) As far as practicable, to promote the economic self-sufficiency of each spouses within a reasonable period of time

The Three Conceptual Grounds

- Contractual (*Miglin*)
- Compensatory (*Moge*)
- Non-Compensatory (*Bracklow*)

Contractual (the *Pelech* Trilogy and *Miglin v Miglin*)

- Applies in situations where the parties have entered into a marriage or separation agreement, or a contractual obligation is implied
- Until *Miglin*, the authority on how much weight a court should attach to an agreement, was the trilogy of cases, "*Pelech v Pelech; Caron v Caron* and *Richardson v Richardson* (the "Trilogy"). These cases held that, subject to limited exceptions the parties should be bound by their agreement. The discretion to depart from the spousal support provisions of an agreement on the application of the supported spouse was limited to cases in which the applicant could show a radical change of circumstances flowing from a pattern of economic dependence caused by the marriage.
- *Miglin v Miglin*
  - In *Miglin*, the SCC ruled that the threshold established by the trilogy is no longer appropriate under the current, broader support objectives under the Divorce Act. The court held that the grounds for ordering support in an amount that differs from an agreement are broader; however, agreements on support are still entitled to deference.
  - Two-stage test for approaching an originating application for support where there is an existing agreement on support. The court assess the agreement from two points in time- the time the agreement was made and the

current circumstances
- Stage 1: Court must look at
  - An agreement
    (1) The circumstances in which the agreement was made to determine whether the agreement was obtained fairly; and
    (2) Whether the agreement substantially complied with the objectives of the *Divorce Act*
  - An agreement that was not obtained fairly that departed substantially from the objectives of the *Act* will be given little weight
  - Note: In *N(DK) v O(MJ) 2003 BCCA,* support was awarded notwithstanding an agreement waiving support because the agreement did not adequately meet the objectives of the *Divorce Act*
- Stage 2:
  - If the agreement satisfies the first stage, then the court must consider whether the agreement still reflects the original intentions of the parties and remains in substantial compliance with the objectives of the Act
  - If there has been a material change of circumstances not reasonably anticipated by the parties that has led to a situation which cannot be condoned, the court may give little weight to the agreement
  - "It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight" (para 91)

Variation of Support Order (*FLA*)

- Changing, suspending or terminating orders of spousal support
- S.167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively
  (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
  (3) Despite subsection (2), if an order requires payment of 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 from a change described in subsection (2)(a) and
  (ii) Is related to the relationship between 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

Family Law Act

- S.164: provides for when a court can make an order that replaces all or part of an existing agreement for spousal support
- The court cannot make an order for spousal support in the face of an agreement unless all or part of the agreement is set aside (s.165 (3))
- There are two tests in s.164 that, if met, will allow the court to set aside or replace an agreement with an order
- Test 1:
  - The first test concerns procedural fairness in making the agreement. If any of the following circumstances existed when the parties entered into the agreement the court may set it aside
    (a) A spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
    (b) A spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
    (c) A spouse did not understand the nature or consequence of the agreement;
    (d) Other circumstances that would under the common law cause all or part of a contract to be voidable
- Test 2: "Significant Unfairness"
  - The court may set aside an agreement if it is satisfied that the agreement is significantly unfair. In determining significant unfairness, the court may consider the following factors:
    (a) The length of time that has passed since the agreement was made
    (b) Any change, since the agreement was made, in the condition, means, needs, or other circumstances of a spouse;

(c) The intention of the spouses, in making the agreement to achieve certainty;
(d) The degree to which the spouses relied on the terms of the agreement;
(e) The degree to which the agreement meets the objectives set out in section 161

Compensatory (*Moge v Moge*)

- Applies where a spouse has forgone opportunities or endured hardships as a result of the marriage
- Relied upon most frequently in situations where one spouse, more often the woman, has left the workforce to care for the children but even in childless marriages, couples may also decide that one spouse will remain at home and any economic disadvantage to that spouse flowing from that shared decision should be regarded as compensable
- A spouse may also be compensated if they decline a promotion, refuses a transfer, leaves a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities and incurs economic loss (para 82)
- The financial consequences of the end of the marriage include things like the loss of future earning power, loss of seniority, missed promotions and lack of access to fringe benefits such as pension plans, life, disability, dental, and health insurance. Persons who are not in the work force also can't take advantage of job retaining and the upgrading of skills provided by employers (para 79)
- You aren't guaranteed the same standard of living but the longer the relationship, the close the economic union, the greater will be the presumptive claim to equal standards of living (para 84)

Purpose of Spousal Support

- "To relieve economic hardship that results from marriage or its breakdown. Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party's economic prospects" (para 43 *Moge v Moge*)

"Traditional" vs "Modern" Dichotomy

- "It would appear that the courts have recognized a substantial change in the nature of marriages and the roles played by the parties. At the one end of the scale we have the traditional marriage where one spouse is the breadwinner and the other the child-rearer, often entitled to be supported for life. At the other end we have the type of marriage where both spouses participate in the economic advancement of the family unit and although one may be disadvantaged for a period of time during the marriage by deserting career opportunities, this can be balanced upon dissolution by provisions promoting the self-sufficiency of that spouse and thereafter both parties go their own ways. In between these two extremes we still find a variety of marital arrangements that must be fairly dealt with upon dissolution…
- In my opinion, a judge today in approaching a maintenance order should continue to recognize the distinction between the traditional and the modern marriage. Upon dissolution of a modern marriage the goal should be the placing of both parties in a position of economic self-sufficiency at the earliest possible time…Temporal limits on maintenance should be utilized to accomplish this end, and illness and other factors not related to the marriage should not be used to justify the continuation of maintenance which otherwise should cease" (*Heinemann v. Heinemann 1989 NSSC*)

Moge v Moge

- "It would be perverse in the extreme to assume that Parliament's intention in enacting the act was to financially penalize women in this country." (para. 63)
- "A division of functions between marriage partners, where one is a wage-earner and the other remains at home will almost invariably create an economic need in one spouse during marriage. The spouse who stops working in order to care for the children and manage a household usually requires financial provision form the other. On divorce, the law should ascertain the extent to which the withdrawal form the labour force by the dependent spouse during the marriage (including loss of skills, seniority, work experience, continuity and so on) has adversely affected that spouse's ability to maintain himself or herself. The need upon which the right to maintenance is based therefore follows from the loss incurred by the maintained spouse in contributing to the marriage partnership..
- If the functions of financial provision, household management and child care are divided in any particular way between a husband and wife, the law should characterize this an an arrangement between the spouses for accomplishing shared requirements of the marriage partnership according to their preferences, cultural beliefs, religious imperatives, or similar motivating factors. A spouse who does one of these things should be seen as freeing the other spouse to perform the remaining functions." [para. 65]
- "However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant

market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one." [para. 70]

Divorce – Women and Children

- "For most women and children, divorce means precipitous downward mobility – both economically and socially. The reduction in income brings residential moves and inferior housing, drastically diminished or nonexistent funds for recreation and leisure, and intense pressures due to inadequate time and money. Financial hardships in turn cause social dislocation and a loss of familiar networks for emotional support and social services, and intensify the psychological stress for women and children alike. On a societal level, divorce increases female and child poverty and creates an ever-widening gap between the economic well-being of divorced men, on the one hand, and their children and former wives on the other." (L.J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America)
- "The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home had undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative." [para 73] (*Moge v Moge*)
- "To recognize that each spouse is an equal economic and social partner in marriage, regardless of function, is a monumental revision of assumptions. It means, among other things, that caring for children is just as valuable as paying for their food and clothing. It means that organizing a household is just as important as the career that subsidizes the domestic enterprise. It means that the economics of marriage must be viewed qualitatively rather than quantitatively." (para 73) (*Moge v Moge*)

Judicial Discretion

- Requires an examination of all the objectives
- Broad approach
- Not all elements will be equally important

Non-Compensatory Model (Basic Social Obligation)

- *Bracklow v Bracklow 1999 SCC*
- Issue: "May a spouse have an obligation to support a former spouse over and above what is required to compensate the spouse for loss incurred as a result of the marriage and its breakdown (or to fulfill contractual support agreements)?

Non-Compensatory

- Applies in situations where the recipient spouse's need exceeds the entitlement to be compensated. In such situation, the obligation to provide support derives from the "basic social obligation" of the marital relationship
- *Bracklow v Bracklow*
    - "In cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other hand, in cases where it is not possible to determine the extent of the economic loss of a disadvantaged spouse…the court will consider need and standard of living as the primary criteria together with the ability to pay of the other party" (*Ross v Ross 1995 NBCA*) (para 36)
    - "…where compensation is not indicated and self-sufficiency is not possible, a support obligation may nonetheless arise from the marriage relationship itself." [para. 37]
    - "The "ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves"(Family Relations Act, s. 89(1)9d)), suggests a concern with need that transcends compensation or contract. Even if a spouse has foregone no career opportunities or has not otherwise been handicapped by the marriage, the court is required to consider that spouse's actual ability to fend for himself or herself and the effort that has been made to do so, including efforts after the marriage breakdown. Similarly, "economic circumstances' (s. 89(1)(e)) invites broad consideration of all factors relating to the parties' financial positions, not just those related to compensation." [para. 40]
    - "[E]conomic hardship…arising from the breakdown of the marriage" is capable of encompassing not only health or career disadvantages arising form the marriage breakdown properly the subject of compensation…, but the mere fact that a person who formerly enjoyed intra-spousal entitlement to support now finds herself or himself without

it" [para. 41]
- "A spouse's lack of self-sufficiency may be related to foregoing career and educational opportunities because of the marriage. But it may also arise from completely different sources, like the disappearance of the kind of work the spouse was trained to do (a career shift having nothing to do with the marriage or its breakdown), or, as in this case, ill health." [para. 42]
- Re Quantum: "[T]he same factors that go to entitlement have an impact on quantum" [para. 50]
- "For practical purposes, however, it may be useful to proceed by establishing entitlement first and then effecting necessary adjustments through quantum." [para. 50]
- "The quantum awarded, in the sense of both amount and duration, will vary with the circumstances and the practical and policy considerations affecting particular cases." [para. 53].

Variation of Support Order

- S.17 (4.1) of the *Divorce Act:* Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and in making the variation order, the court shall take that change consideration

Spousal Misconduct

- *Divorce Act*
  - s.11: Directed the court to have "regard to the conduct of the parties and the condition, means, and other circumstances of each of them" in exercising its discretion in making an award of spousal support.
  - 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 sum and periodic sums, as the court thinks reasonable for the support of the other spouse
  - Spousal misconduct: (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
- *Family Law Act*
  - Misconduct of spouse: 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
  - Also note section 167(1)(c) which allows a court to change a support order in certain circumstances, including lack of financial disclosure
    (a) Causes, prolongs or aggravates the need for spousal support, or
    (b) Affects the ability to provide spousal support
  - Also note section 167(1)(c) which allows a court to change a support order in certain circumstances, including lack of financial disclosure
- *Leskun v Leskun*
  - What does the case tell you about no fault divorce?
  - What were the differences in Professor Cossman and Rogerson's views on the case?
  - Whose perspective do you find more persuasive on the case – Professor Cossman or Rogerson?
  - Attribution of fault to one spouse is irrelevant to spousal support (i.e. no-fault basis regime)
  - Self-sufficiency is a goal in s. 15.2(6) of *DA* "in so far as practicable… within a reasonable period of time"
  - S. 15.2(5) of *DA* states that court shall not take misconduct into consideration of spouse in relation to marriage
  - Distinction between emotional consequences of misconduct and the misconduct itself
  - S. 15.2(4) says court must take condition, means, needs and other circumstances of spouses into consideration
    - Includes capacity to become self-sufficient → also considered under 15.2(6)(d)
  - Self-sufficiency is a goal, not a duty, and failure to do so is just one factor in the analysis

***FLA* Cases on Spousal Misconduct and Support**

- *Peterson v Lebovitz 2013 BCSC:* A payor's failure to take meaningful steps toward employment and repeated applications to terminate support are arbitrary actions adversely affecting the ability to pay
- *Bateman v Bateman 2013 BCSC:* The cause of the failure of relationship is not a factor to be considered

Spousal Support Advisory Guidelines (SSAG)

- With funding from the Department of Justice, two family law professors, Rollie Thompson and Carol Rogerson, developed

guidelines in an effort to make spousal support more predictable and consistent.

- The SSAG suggest appropriate ranges of support in a variety of situations for spouses entitled to support. The guidelines do not provide advice on whether a spouse is entitled to support.
- Originally introduced in draft form in 2005 and released in 2008
- Not legally binding but are intended as informal guidelines operating on an advisory basis only
- Do not deal with entitlement
- With and without child formulas
- Ceiling and Floors

Yemchuck v Yemchuk

- According to Justice Prowse the Guidelines are intended to reflect the current law rather than to change it and build upon the law as it exists. The guidelines are not official law, but neither do they constitute evidence or even expert evidence that needs to be in court
- SSAG not legally binding and should not replace individualized analysis, but can be considered as a compilation of precedent

Without Child Formula

- Two crucial factors:
    - The Gross Income difference between the spouses; and
    - The length of the relationship
- The amount and duration increases incrementally with the length of the relationship
- Step 1: Determine the gross income difference between the parties
- Step2: Determine the applicable percentage by multiplying the length of the marriage by 1.5-2 percent per year
- Step 3: Apply the applicable percentage to the income difference
- Example Problem:
    1. What grounds of entitlement would you argue apply and why?
        a. Contractual, compensatory, non-compensatory
    2. What is the answer to the amount of support under the without child support formula?
       Step 1: [X income] – [Y income] = Z
       Step 2: 1.5 x [years married] = A percent to 2 x [years married] = B percent
       Step 3: A percent x [Z] = X/year (X/month) to B percent c [Z] = X/year (X/month)

With Child Formula

- Raises different considerations
- Priority must be given to child support
- What drives support in these cases is not the length of the marriage, or marital interdependency, or merger over time, but the presence of dependent children and the need to provide care and support for those children

Differences between the formulas

- The with child formula:
    - Uses the net incomes of the spouses, not their gross incomes
    - Divides the pool of combined net incomes between the spouses not the gross income difference
    - The upper and lower percentage limits of net income division do not change with the length of the relationship

Steps

- Step 1: Determine the individual net disposable income (INDI) of each spouses – how?
    - Guideline Income minus child support minus taxes and deductions – Payor's INDI
    - Guideline Income minus notional child support minus taxes and deductions plus government benefits and credits = Recipient's INDI
- Step 2: Add together the individual net disposable incomes. By iteration, determine the range of spousal support amounts that would be required to leave the lower income recipient spouse with between 40 and 46 percent of the combined INDI

W v W 2005

- Says the SSAGs are consistent with the law in British Columbia (para 25)
- Notes that the SSAGs are just guidelines and advisory and an example of one useful tool to lawyers (para 27)

Redpath v Redpath 2006 BCCA

- If a particular award deviated substantially from the guidelines with no exceptional circumstances to explain it could mean grounds for appeal. The court increased an award of $3500 a month to $5000 per month even though the trial judge considered all of the factors and did not misapprehend the evidence

The Intersection of Matrimonial Property and Spousal Support

- *Family Relations Act*
  - S.65 (1)(e) allows the court to consider whether division of property was unfair having regard to the needs of each spouse to become or remain economically independent and self-sufficient
- *Family Law Act*
  - S.95 permits the court to order an unequal division of family property or debt, or both, if it would be significantly unfair to equally divide them. One of the factors that the court can consider is:
    (3) The extent to which the financial means and earning capacity of a spouse has been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objective of spousal support under section 161 have not been met

Lodge v Lodge

- The BCCA overturned a lower court decision dividing family property equally between husband and wife
- The parties had been married for almost 20 years. Except for the occasional part time work she had been home caring for the kids
- After separation, she obtained secretarial work for $100/month
- At trial, the parties had assets of $440,000 that were divided equally
- The BCCA reapportioned one property in her favour 75% The court added that Mr. Lodge had the means to remain economically self-sufficient whereas she was significantly handicapped in this regard
- *Moge* principles used to reapportion a rental property under s. 65(e) by having "regard to needs of each spouse to become or remain economically independent and self-sufficient"

Double Recovery? *Boston v Boston:* A Case Comment

1. What were the facts in Boston and what did the SCC decide?
2. What is the author's critique regarding constructing the problem in Boston v Boston as "Double Dipping?"
3. What was the majority's view on how to avoid double recovery?
4. Summarize Justice Lebel and LHD's construction of the issue in *Boston v Boston* as articulated by the author?

- Law: If pension equalized in property division, support can only be ordered based on the remaining portion of the pension in order to avoid "double dipping"
- This has since been criticized as ignoring the goals of spousal support which is meant to ensure spouses don't experience economic hardship. Should consider the relative positions of the parties at the time of retirement

Class 22: Child Support

Legislation

- *Family Law Act* Part 7 ss.147-159
- *Divorce Act* ss.15.1, 15.3, 17(1)(4)(6.1)(6.3)(6.4), 25.1, 26.1
- Federal Child Support Guidelines
- *Family Relations Act,* ss.88, 93, 93.1, 93.2, 94, 95, 96

Entitlement to Child Support

- Three fundamental principles apply to all child support applications
  - Parents have a joint and ongoing legal obligation to support their children
  - Support is the right of the child
  - Support payments are based on earning capacity, that is, not only one what the parent does earn, but also what the parent can earn

Federal Child Support Guidelines

- Based on recommendations from the federal/provincial/territorial "Family Law Committee"
- Before the Guidelines, judicial discretion was used to determine levels of support
- The Child Support Guidelines Regulations, B.C. Reg 61/98 came into effect April 14, 1998 and makes the Guidelines applicable in BC
- Section 150(1) of the *FLA* incorporates the guidelines, requiring courts to determine support in accordance with them
- Section 150(2) of the *FLA* provides that a court may order a different amount of support in cases where the parties consent and the amount of support is reasonable
- Section 150(4) *FLA* allows the court to order an amount of support that differs from the guidelines where an agreement reached by the parents benefits the child directly or indirectly and the guidelines would produce an inequitable result in light of this agreement. Example à _where one parent may give up their right to compensation for their portion of the family home so the other parent and child can remain there with the child with the understanding that this would be compensated for through a reduction in child support
- Objectives of the Guidelines are to establish fairness, to reduce conflict and tension, to improve the efficiency of the legal process, and to ensure consistent treatment of parents and children in similar circumstances in the determination of child support (s. 1)

Divorce Proceedings

- It is the duty of the court to ensure that reasonable arrangements have been made for child support, "having regard to the applicable guidelines" If reasonable arrangements have not been made, the court must stay granting the divorce until such arrangements have been made (s.11 (1)(b) of the *Divorce Act*)
- *Hansen v Hansen 1997:* A desk order divorce application was stayed because the child support payable under the separation agreement was not satisfactory in light of the child support guidelines. The agreement stipulated he would pay $350/month for the support of two children, but the guidelines dictated it should be $564/month for two children

Step-Parents and Child Support

- Section 5 of the Federal Child Support Guidelines:
    - "Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these guidelines and any other parent's legal duty to support the child."

***Divorce Act* and Step-Parents**

- S.2 (2): For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes
    (a) Any child for whom they both stand in the place of parents; and
    (b) Any child whom one is the parent and for whom the other stands in the place of a parent

Chartier v Chartier

- In what circumstances, if any, can an adult who is or has been in the place of a parent pursuant to s.2 of the *Divorce Act,* withdraw from that position?
- Test:
    - Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively (para 39)
    - The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent (para 39)
    - Once it is shown that the child is to be considered, in fact, a "child of the marriage," the obligations of the step-parent towards him or her are the same as those relative to a child born of the marriage with regard to the application of the *Divorce Act.* The step-parent, at this point, does not only incur obligations, he or she also acquires certain rights, such as the right to apply eventually for custody or access under s.16 (1) of the *Divorce Act*
- The contribution to be paid by the biological parent should be assessed independently of the obligations of the step-parent (para 42)

- If parent seeks contribution from another parent, he or she must, in the meantime, pay support for the child regardless of the obligations of the other parent (para 42)
- *Chartier* does indicate that a step-parent cannot unilaterally withdraw from the relationship, thereby relieving themselves of the obligation to pay child support. However, a few BCSC cases have held that it is appropriate to take into account the step-parents ongoing (or lack thereof) involvement with the child post-separation
    - Example: *Elliot v Elliot 2001 BCSC*

Step-Parents and Child Support Under the *FLA*

- S.1: "step-parent" 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
- S.147 of the *FLA:* Introduces changes to the duty of step-parents to pay child support by imposing limits on the scope of that duty and framing the court's exercise of discretion in determining the appropriate amount of child support
- Two conditions under the *FLA:*
    - The step-parent contributed to the children's support for at least one year; and
    - The application for child support is made within one year of the step-parent's last contribution to the children's support
- S.147 (1): Provides that the duty to provide support extends until the child (a) is a spouse, or (b) is under 19 years of age and has voluntarily withdrawn from his or her parents or guardian's charge, except if the child withdrew because of family violence or because of the child's circumstances were, considered objectively, intolerable
- S.147 (3): Makes a duty of a guardian who is not the child's parent second to the duty of the child's parents
- S.149 (3): Addresses step-parent obligations directly, codifying the obligation on a separated step-parent of support, but expressly makes the obligation secondary to that of a child's parents. The section overall gives discretion on judges to set an amount that is appropriate given all of the circumstances
- S.149 (5): States that the stepparent's obligation is secondary to that of the child's parents and guardians and extends only as appropriate on consideration of the standard of living experienced by the child during the relationship between the step-parent and his or her spouse, and the length of time during which the child lived with the step-parent

Some *FLA* Case Law

- *CLP v ND 2014 BCPC:* Purpose is to ensure children have a consistent and reasonable standard of living; primary responsibility lies on parents and if parents can adequately provide step-parents are exempt, if parents cannot provide step-parent may be ordered to contribute. However, it is possible that the step-parent will no have to pay support and it is also possible that the step-parent will have to pay the full amount.
- S.147: Voluntary Withdrawal
    - *DZM v SM 2014 BCPC:* Removal of children by state is not "voluntary withdrawal" intended by the *FLA*
    - *Henderson v Bal 2014 BCSC:* Child's refusal to visit does not amount to "voluntary withdrawal"
    - *MA v FA 2013 BCPC:* Child who is incarcerated for more than one year has voluntarily withdrawn
- *Doe v Alberta 2007 ABCA:* You cannot override the provisions of the *Act* pertaining to "standing in place of parent" even by contract
- *JMS v FJM 2005:* Court found that a Crown ward is no longer in the charge of his parents, even though he remains their child in law. As such, the parent was not in a position to claim support for him under the guidelines.

The court says no to imputing income based on the payor's criminal activity – *SAB v CDB 2004 BCSC*

- The defendant is a drug trafficker. He has a long criminal record (including living off the avails of prostitution), having earned virtually all his income during the marriage from trafficking (his "work" as it was referred to during the trial). He says that he has not trafficked since about when this action was started. He faces an enormous assessment of income tax arrears—between $200,000-$300,000—which he is contesting. The plaintiff has been an exotic dancer since before she met the defendant. She now has a cleaning job in a hospital in Victoria although she supplements her income a bit by some dancing. (para 4)
- Maintenance – Child and Spousal:
    - In this case I have to "impute" income to the defendant for the purpose of child maintenance pursuant to s. 19 of the *Federal Child Support Guidelines*. Needless to say I hesitate to impute it on the basis of what I might determine (if I could) that he can earn as a drug trafficker. I am concerned that the court would appear to be encouraging or requiring him to continue his criminal activity. I will calculate and impute it the best I can on the basis of his legal earning power. At trial, the defendant insisted and his friends, the A.s., agreed that he is quite capable of earning a good income legally. How he has been making money since the separation is somewhat mysterious although he

> talks of doing so by "buying and selling things". Counsel pointed out that at one point, he professed to have earned $40,000 in a year from a small service company he was associated with. The Guideline amount for that income for two children is $566. However, s. 5 of the Guidelines mandates that in the case of a person standing in loco parentis, the amount of any child support payment is what the court considers appropriate having regard to any other parents' legal duty to support the child. The plaintiff still receives from T.'s natural father, S.P., support of $400 per month. I order that the defendant pay child support to the defendant of $400 per month for B. and $200 per month for T. on the first day of every month as of March 1, 2004. (para 30)

Class 23: Collaborative Law, Parenting Coordination & Mediation

What is Collaborative Law?

- A non-adversarial approach to family law problems
- Inter-disciplinary way of resolving conflict
- Team-based approach
    - Lawyers
    - Divorce coaches
    - Child specialists
    - Financial advisors
- Interest based negotiations

How is it different?

- Agreement not t go to court
- Open communication and transparent negotiations
- Four-way meetings
- Team approach
- Each party is represented

How is collaborative law the same as litigation?

- Each party has legal advice, and is aware of their rights and obligations
- Full financial disclosure required
- At the conclusion of the process, the parties will have their dispute fully and finally resolved

Benefits of Collaborative Divorce

- No certainty in court; retain control over outcomes
- Maintain goodwill
- Preserve privacy
- Enhanced participation
- Timely, more cost-effective than litigation
- Parties develop their own solutions
- Emotional support and legal guidance
- Protects dignity, integrity, long term interests of families

Suitability of the Process

- When it works:
    - When all parties are committed to the process
    - Open and communication
    - Full disclosure made promptly
- When it doesn't:
    - History of fraudulent behaviour
    - Personality disorders/mental illness
    - Client misrepresents information

Lawyers: Who Can Practice?

- Minimum of 3 years of practice

- 40 hours mediation training
- Collaborative training
- Each group has their own governing body
- You are still practicing law – so the rules of the law society ally to you

Participation Agreement

- Communication
- No threats to go to court
- The children
- Will not take advantage
- Full disclosure
- No court action
- Disqualification of lawyers
- Provision for hiring joint experts
- Without prejudice
- Lawyer must withdraw if…
- Obligations pending settlement

How does the file start collaboratively?

- Both spouses decide they want to proceed collaboratively;
- One spouse decides they want to use the process and informs the other that he/she wants to use the process;
- Counsellors recommend the process

How does it work?

- Most of the work is done in four way meetings – meetings are structured with an agenda
- Rarely write letters
- Divorce coaches assist the parties if necessary
- Team approach
- Most files are completed within 2-5 meetings
- 90 percent of all files resolve

What is Parenting Coordination?

- Parenting coordination is a child-focused dispute resolution process for separated families
- Parenting coordinators are experienced family law lawyers or mental health professionals who have special training in mediating and arbitrating parenting disputes

When is a Parenting Coordinator Appointed?

- After an order or agreement has been made for custody and guardianship, and a parenting plan has been either agreed to or ordered by the court
- Parenting coordination is meant to help implement and work with final parenting plans
- Parents sign an agreement that outlines the role, objectives and scope of the PC's services, as well as the rights and obligations of each parent
- The PC will usually be retained for a fixed period of one to two years

Components

- The work of the parenting coordinator is divided into three components:
    - Education
    - Consensus building
    - Determination making

Consensus Building

- The PC facilitates and participates in collaborative and interest-based interaction
- Try to resolve differences together and improve the communication
- The parents resolve the issue by consent

- The PC should then confirm the agreement in writing (this is often done in email)

Move from Consensus Building

- There is a clear distinction between the consensus building phase and the determination making phase and a distinct shift is necessary before moving from one phase to the next
- Be very clear when you are moving from the consensus building phase to the determination making phase

Determination Making Phase

- The parenting coordinator is required to be the decision maker and neutral observer
- Decisions are based on the evidence and submission presented by the parents
- The issue is resolved by the PC
- This phase is not as flexible as the consensus building phase because the decision of the PC has to be made pursuant to the law and the PC must follow the rules of natural justice
- The procedure followed in the determination making phase need not be as formal as litigation process

Mediation

- Mediation is a conflict resolution process where 2 (or more) persons voluntarily attempt, with the assistance of an impartial and neutral person, to negotiate and formulate their own consensual resolution to matters in issue between them.
- It is 'assisted negotiation'. Co-operative bargaining.
- A mechanism by which a neutral person assists people to systematically isolate disputed issues, develop options, consider alternatives and reach a consensual settlement to accommodate *their* needs.
- Mediation is 'interest based negotiation'. To get at the needs, desires, concerns, fears and aspirations of the Parties. These interests can be:
  (1) substantive (the 'what' of negotiation);
  (2) psychological/emotional (the 'why' of negotiation); or
  (3) procedural (the 'how' and 'why' of negotiation). \
- Mediation is a less adversarial, less formal process, with focused issues. It is entered into without conditions and an agreement to remain involved, in good faith, in the process. The Parties acknowledge that the mediator will remain objective and impartial.
- At the same time, it is not the place, or role, of the mediator to provide legal advice, *per se*, but the mediator can inform 'of' the law, the 'consequences' of legal positions, and general legal 'information', all to provide a baseline of legal knowledge to help Parties assess the merits of future actions.
    - The bottom line:
        - Mediation is *not* about who is right or who is wrong.
        - It is *not* about who wins or who loses.
        - It is about finding a workable solution that meets the participant's needs and concerns, in good faith and with less conflict.
        - It is a win-win process towards a consensual agreement.

Objectives of Mediator

- Be an effective listener
- Identify the feelings in issue (assess the intensity; rephrase/paraphrase; provide feedback)
- Provide helpful and sensitive direction
- Build trust, facilitate communication, (clarify perceptions, unmask assumptions)
- Help articulate interests, (summarize and categorize contents of each Party's point of view)
- Move disputants from 'positions' to exploring and developing underlying 'interests' by:
    - Listening to the position;
    - Guess/figure out the underlying motivating interest;
- Try to separate emotional content from informational content

The 5 Stages of Mediation

1. Pre-Mediation Meeting
    - Meet with each separately, but equally, preferably in person.
    - Do a 'conflict check' ('appropriateness' check), to see if mediation is right for the couple.

- Get some background (AKA the 'story'; watching for alcohol/drug issues, mental health/treatment issues, abuse and power imbalance issues.(e.g. how does couple deal with conflict, what/who are their emotional/psychological supports; what are their triggers and their partner's; how do they see safety/violence issues)
- Provide information about the process, appropriateness, communication, guidelines
- Provide a draft of Agreement to Mediate
- Deal with logistics (where, how, room layout, refreshments, breakout rooms, etc)
- Discuss confidentiality and limits on it (e.g. MCFD)

2. Opening – Once together
   - Welcome Parties, address seating, initial questions, offer refreshments
   - Explain to the Parties: What is mediation; mediator's role; the goals; procedures; caucusing (how, when & why); the process; how each will describe issues/dispute; there will be time for questions and breaks; needs will be identified and explained; solutions will be ones that work for everyone.
   - Discuss and agree upon guidelines for conduct (e.g. talking to each other with respect, no put downs, no blame, but getting the Parties themselves to decide what they like as guidelines.
   - Explained the role of counsel, if present, and also if not
   - Address questions to ensure understanding of process
   - Obtain their commitment to process
   - And if all okay…. review and sign the "Agreement to Mediate" (A necessity)
3. The Issues
   - Invite each to tell story; what they need to settle at mediation ("what brings you here today?")
   - Watch/ensure who goes first, get other's agreement
   - Ensure each is listening, not interrupting and understanding
   - Ensure equality of time, perspective and attention
   - Summarize, restate, rephrase, etc., using language of impartiality (us, we, you)
   - Collect facts related to the dispute and link issues that are inseparable
   - Fractionalize issues that are too complex
   - Frame issues in a neutral and consensual way, to identify agenda (KEY)
   - Determine which issues to explore first
   - Watch for common ground, manifest vs. hidden agendas, assumptions, positional orientations, clues from behaviour
   - Maintain ground rules/guidelines
4. Interests
   - Use open questions to uncover, probe and explore interests
   - Encourage exchange of information to find common interest
   - Identify the needs and interests, separated from positions ("tell me about…")
   - Explore and develop identified interests (KEY)
   - Acknowledge and keep track of proposals, or areas of settlement, and note them for future reference (to avoid premature shift to solution)
   - If appropriate, formulate goal statement, summarize commonalities to shift to option generating (in a neutral way)

   Note: Work back and forth between stages 3 and 4, developing more issues, getting at interest, going back to explore more sub-issues to those interests, and so on.
5. Reaching Agreement
   - Summarize areas of agreement (bring issues out)
   - Generate options with brainstorming, hypothetical questions, etc.
   - Caucus if needed
   - Seek solutions and evaluate options
   - Focus on one at a time, make note of alternatives (shift back to interests if needed)
   - Have parties decide what issues to deal with at a time
   - Reality test solutions with examples and hypothetical scenarios
   - Convert consensus in to written format
   - Have agreement reviewed with ILA
   - Closure – acknowledge good work done, next steps, plan of action

Options During Mediation

- Short adjournment; Listening and validating; Educate; Apology; Caucus (for impasse, suspicion of secrets, misbehavior,

clarifying questions, coaching, high emotion/cooling off); Explore interests, BATNA (Best Alternative to Negotiated Agreement); WATNA (Worst Alternative to Negotiated Agreement); Move laterally (to what is agreed to what is not agreed); Hinting the way, for areas of potential agreement (if raised).

Terminate Mediation When

- When a Party does not fully understand process
- When a Party is unwilling to honour mediation/mediator's basic guidelines
- When a Party does not have ability to identify or express interests
- When a Party is so deficient in information/knowledge that agreement is not based on informed consent
- When Party indicates agreement is under duress or fear, as opposed to free will
- When one or both say they want to end the process
- Or if you feel agreement is: illegal, grossly inequitable, based on false information, resulted from bad faith bargaining, impossible to enforce or clearly will not hold over time