**FAMILY CANs**

**Applicable Legislation and Issues in Family Law**

* *Divorce Act* – applies only to MARRIED people, old Act
	+ Custody and access
	+ Divorces under this Act heard in Supreme Court
* *Family Law Act*
	+ Division of property except Reserve Lands
	+ Nations can bring in own land Acts
	+ Provincial Supreme Court hears issues relating to division of property/debt under this Act
* **Concurrent jurisdiction**
	+ Custody/support under *FLA* can be brought in SC and PC
* Division of Powers *Con Act 1867*
	+ s. 92(13) – property division (provincial)
	+ s. 91(26) – marriage and divorce (federal)
* United Family Courts – don’t exist in BC
	+ Courts that deal with all issues “family”, judges designated to that court, hope they are familiar with and have practiced family law
* **Customary Law** – customary marriages/divorces in Aboriginal communities – cases have recognized
* **Prov Family Law and *Indian Act***
	+ Prov leg applies to status Indians if does not conflict with *Indian Act*. s. 68 *IA* deals with maintenance, but no conflict with *FLA* provisions on support/maintenance.
	+ Prov leg cannot apply to right of possession on reserve lands – court can order compensation for purpose of adjusting division of family assets bw spouses – *Derrickson v Derrickson*
* *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA)
	+ Deals with accessing on-reserve matrimonial property through matrimonial property laws
* Prov law applies to status Indians re adoption
* ISSUES re status Indian children and child welfare
* *Charter* – s. 15 equality rights (re gov’t action – s. 32)
	+ Sexual orientation – analogous ground *Vriend*
* **Convention on the Rights of the Child**
	+ Several important ppls relevant to CAD family law enshrined in Convention. **Article 2** – right to non-discrimination is set out
	+ Applies equally to girls/boys “irrespective of child’s or his/her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origina, property, disability, birth or other status”
	+ **Article 1** – child is “every human being below age 18” unless age of majority is attained earlier according to national laws.
	+ **Article 3** – Convention emphasizes BIOC has to be primary consideration when state authorities, including courts, are making decisions that affect children
		- **1)** in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, BIOC primary consideration
		- **2)** States parties undertake to ensure child such protection/care as necessary for his/her well-being, taking into acct rights/duties of his/her parents/legal guardians/other individuals legally responsible for him/her, and to this end shall take all appropriate legislative and administrative measures
		- **3)** state parties ensure that institutions/services/facilities responsible for care/protection of children shall conform with stds established by competent authorities, particularly in areas of safety, health, in number/suitability of staff, as well as competent supervision
	+ **Articles 5, 10, 18** – family basic unit of society, natural environment for growth/well-being of members, particularly children
		- **Concerns** from civil rights groups on these issues
	+ **Article 6** – child’s inherent right to life, req’s States Parties to ensure “to maximum extent possible” the child’s survival and dev’t, but also mental, emotional, social and cultural dev’t. This article contentious. Fundamentalist religious groups have repeatedly argued that language implied that right to life could/should be extended to fetuses.
	+ **Articles 7, 9** – issues of child custody and access
		- **7** – child has right to name and nationality from birth, and to know/be cared for by his/her parents
		- **9** – ensures right of child not to be separated from parents, except when in BIOC (authorities may take away if abuse/neglect)
	+ **Article 11** – state parties to “combat the illicit transfer and non-return of children abroad”
	+ **Article 12** – gives capable child right to freely express her/his views on matters that affect her/him. Includes right of participation to be heard in judicial/administrative proceedings
	+ **Article 23** – right to “enjoy a full and decent life” and live with dignity (disabled children have access to treatment, education, training and care – free of charge if possible, and states should exchange information)
	+ **Article 19** – responsibility of state to take “legislative, administrative, social and educational measures to protect children against all forms of physical or mental violence” as well as prevention/reporting of violence committed against children.
	+ **Article 34** – State parties undertake to protect children from all forms of sexual exploitation and sexual abuse”. Particularly take measures, national and multilateral, to prevent:
		- a) inducement or coercion of child to engage in any unlawful sexual activity;
		- b) exploitative use of children in prostitution or other unlawful sexual practices
		- c) exploitative use of children in pornographic performances and material.
	+ **Article 35** – “take all appropriate national, bilateral and multilateral measures to prevent abduction of, sale of or traffic in children for any purpose/in any form”; acknowledgement of scale/influence that global prostitution/pornography industries have on welfare/well-being of children
* **Redefining “Family”**
	+ CL relationships growing in popularity, especially for divorced persons. Same sex couples = 0.8% of couples, 1/3 married, 2/3 CL
* **Public/Private Divide** – take note…. Re unpaid work
* **Religion, Culture and Family Law** – numerous issues…. (case study on arbitration in family law – banned in Ont because of issues re vulnerable persons) – BC allows family law arbitration!
* **Religious Freedom and Civil Commitments** – (remember ***Bruker v Marcovitz*** *–* re the Jewish “get”)

**CREATING RELATIONSHIPS**

History of Marital Exclusions

* young people (under 21); diseased folk (VD…..); Mixed race couples (First Nations women and white men – children would lose status; white women and non-white men); Same-sex couples; multiple partners; incest

**Requirements for Marriage**

1. CAPACITY
* A) **Age** (***Marriage Act*** – BC**)**
	+ **s. 28**: **if under 19, must have** : **a)** consent of living parents, **b)** consent of lawful guardian, **c)** Order of BCSC (they will dispense with consent if it is being withheld “unreasonably or from undue motives”, **d)** consent of PGT
	+ **s. 29**: **if under 16** – **cannot UNLESS BCSC makes order**
	+ **s. 30** – nothing in ss. 28 or 29 invalidate a marriage (bias in law in favour of validity of marriages)
* **Consanguinity and Affinity**
	+ *Marriage (Prohibited Degrees) Act*
		- **s. 2(1)** subject to ss (2), persons related by consanguinity, affinity or adoption are NOT PROHIBITED from marrying each other by reason only of their relationship
		- **s. 2(2)** No person shall marry another person if they are related lineally, or as brother or sister, or half-brother or half-sister, including by adoption.
* **Single**
	+ If not single, void *ab initio* – even if you think sopuse is dead, marriage is VOID if they are in fact alive
	+ **Bigamy** – knowing you are married and marrying someone else without second spouse knowing – see **s. 290** *Crim Code*
	+ **Polygamy** – being married to multiple partners at once – see **s. 293** *Crim Code*
	+ **Polyamory** – being in a consensual relationship between more than two partners
* **Sanity**
	+ Test: must understand the nature of the marriage contract and the duties and responsibilities it creates – *Hunter v Edney*
	+ Courts have interpreted this very narrowly, hard to establish that person did not understand nature of the marriage
* **Opposite Sex** (no more, was based on CL definition),
	+ *Reference Re Same Sex Marriage*, 2004)
	+ See now *Civil Marriage Act*, 2005
		- Preamble – every individual equal before/under the law/courts in majority of provinces have recognized the right of same sex couples to marry; only equal access to marriage would respect rights of same-sex couples to equality…
		- **s. 2** – Marriage, for civil purposes, is the lawful union of two **persons** to the exclusion of all others
		- **s. 3** – Officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs
	+ Marriage Commissioners
		- Sask HR Tribunal – marriage commissioners part of “gov’t” (re *Charter*?)
		- Commissioners in Sask and Man – unsuccessfully complained about being obliged to state willingness to marry ALL couples or resign
		- PEI allows marriage commissioners to refuse
1. CONSENT
* **Test:**
	+ The question which I have to determine is not whether she was aware that she was going through the ceremony of the marriage, but whether she was capable of understanding the nature of the contract she was entering into – *Hunter v Edney*
	+ **Requisite understanding** – it is an engagement between a man and a woman to live together, and love one another as husband and wife, to the exclusion of all others – *Durham v Durham*
* **Lack of consent renders a marriage void**
* **Subsequent conduct can ratify a marriage that was unconsented to**
* **1) Duress –** genuine and reasonable fear; Australian court held duress includes non-violent controlling parental coercion; void/voidable as request of that party
* **2) Mistake or Fraud** – must vitiate consent: nature of ceremony or identify of one of the parties; very strict interpretation; must go to nature of ceremony or identity of party; lying about name, age, race, wealth, occupation etc are not grounds; if you do not know you are going through ceremony – grounds for annulment
1. CAPACITY TO PERFORM SEXUAL ASPECTS (Consumation)
* **Reason:** belief that heterosexual sexual relationships are the foundation of marriage
* *Juretic v Ruiz*
	+ Ad for Spanish speaking wife; wife did not want to be touched; husband stopped trying after two attempts; represented themselves as a couple; no annulment granted. (**sex not really the thing!**)
* **Test** – a practical impossibility of consummation. It must be caused by physical or psychological defect. Wilful and persistent refusal amounting to caprice (sudden and unaccountable change of mood or behaviour) or obstinacy is not a ground for annulment – *Deo v Kumar*
* **And…**
	+ It is not enough for parties to simply establish that they have not had sex since date of marriage
	+ If Pl alleges that one spouse is impotent by reason of psych defect, **must amount to “an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity**”
	+ A marriage on the basis of immigration reasons, even when there is no consummation of the marriage and no intention to live together, is not alone sufficient grounds to dissolve the marriage – *H v H*
	+ A mere capricious refusal to consummate does not qualify as psych defect. But **refusal to try to consummate may have gone on long enough to justify inference of impotence**
	+ Court will not grant declaration of nullity, unless Pl has demonstrated elements noted above
	+ Even if undefended – courts still have not granted declarations where relevant facts have not been established
1. (Formal validity – provincial jurisdiction) – COMPLIANCE WITH FORMALITIES OF MARRIAGE
* *Marriage Act* (BC) (**purpose of Act is to validate marriages**)
	+ **s. 9:** religious marriages **and s. 20** civil marriages
		- **both require**
			* **license (s. 15 license)**
			* **2 witnesses**
			* **both parties present**

**Procedural Steps to Marriage**

* *Marriage Act*, BC
	+ **License (s. 8)**
	+ **Good for 3 months (s. 17)** (must be solemnized by marriage commissioner within that time)
	+ **Civil marriage (s. 20 req’ts)**
		- Marriage may be contracted before/solemnized by marriage commissioner under license under this Act and on pmt of prescribed fee if
			* a) marriage is contracted in public manner in presence of marriage commissioner and 2+ witnesses
			* b) each party to marriage in presence of marriage commissioner and witnesses declares, “I solemnly declare that I do not know of any lawful impediment why I, *A.B.*, may not be joined in matrimony to *C.D.*”, and
			* c) each party to marriage says to other, “I call on those present to witness that I, *AB*, take *CD* to be my lawful wedded wife (or husband) (or spouse)”.
	+ **Caveats – s. 23** – may lodge issue with issuer of marriage licenses, includes grounds of objections
	+ **Manner of Registration** – must register in a book (**s. 25**)
	+ **Must be signed by** – each party to marriage, at least 2 witnesses, religious rep or marriage commissioner, if you lose marriage register, liable to penalty of not more than $50 (s. 27)
	+ **Validity of Foreign Marriage**
		- **Recognition if:**
			* Formally valid under place of celebration
			* Essentially valid under place of each party’s prenuptial domicile
		- Equality rights apply to everyone – recognize marriage that is formally valid and essentially valid, even if not recognized in country of domicile.

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| ***C.M.D. v R.R.S. Jr****.* (2005 BCSC 757)**Enough steps taken, even while drunk, to show valid consent even if no consummation. No annulment. (Vegas wedding)** - married in Vegas, knew each other 4 hours - CMD resident of BC, seeks annulment (guy was from Alta) - got marriage license, attended ceremony, went separate waysISSUE – **void?** – they were drunk, potentially no consent* **voidable?** – no consummation

HELD – No annulment, no evidence from which ct could reasonably conclude that she did not consent.* evidence shows that she went through deliberate/time consuming steps all directed towards getting marriage contract
* she doesn’t get the divorce
 |

**Customary Marriage**

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| ***Connolly v Woolrich* – 1967****Quebec Court says yes, customary marriages valid under western law.***William and Suzanne (Cree woman) together for years, had children. Customary marriage. Williams leaves Suzanne, marries his cousin Julia. Contest on his death between Julia and Suzanne’s children when he died. Were children legitimate? (ie was marriage valid, so they would be legit and inherit?)*HELD – Customary marriage found to be ok, Suzanne’s kids had rights to half of William’s property. |

**Polygamous Marriage**

* *Crim Code*
	+ **s. 293(1)(a):** indictable offence to enter into any form of polygamy or conjugal union with more than one person at a time, whether or not it is a binding marriage.
	+ **s.** **293(1)(b):** indictable offence to celebrate, assist or be a party to a rite, ceremony, contract, or consent that purports to sanction a polygamous relationship

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| ***Reference re Section 293 of the Criminal Code of Canada (Polygamy Reference)*** **2011, BCSC***Advisory only* * **s. 293** of *Crim Code* does not require union to involve a minor or occur in context of dependence, exploitation, abuse of authority, gross imbalance of power or undue influence
* **is constitutional with one exception:**
* violates religious liberty (**s. 2(a) *Charter***) but **justified under s. 1**
* violates **s. 7 *Charter* interests of children under 18, not justified under s. 1**
* compelling evidence of harm, including to women, children and society and institution of marriage
* **provisions that could criminalize actions of young people (women bw 12-17) should not stand**
* into monogamy between 2 people…
 |

**Conscious Coupling** (when you have more than a one-night stand, write it in your diary)

*Being Marriage-like*

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| ***Takacs v Gallo* – 1998….****Indicia of marriage-like relationship**1. **Shelter** (did parties live under same roof? Sleeping arrangements? Did anyone else occupy/share accommodation?)
2. **Sexual/Personal Behaviour** (Did parties have sex? If no, why? Attitude of fidelity to one another? Feelings towards each other? Communicate on personal level? Eat meals together? What, if anything, did they do to assist each other with problems/during illness? Buy gifts for each other on special occasions?)
3. **Services** (Conduct/habit of parties as to: meal prep, washing/mending clothes, shopping, household maintenance, other domestic services)
4. **Social** (Did they participate together or separately in neighbourhood/community activities? Relationship/conduct of each of them toward members of their respective families and how did such families behave towards parties?
5. **Societal** (What was attitude/conduct of community toward each of them and as a couple?
6. **Support (economic)** (Financial arrangements bw parties regarding provision of/contribution toward necessaries of life (food, clothing, shelter, recreation etc? Arrangements concerning acquisition/ownership of property? Special financial arrangement bw them which both agreed would be determinant of overall relationship?)
7. **Children** (What was attitude/conduct of parties concerning children?

**View relationship as a whole to determine whether parties lived together as spouses. Reference to THEM will prevent inappropriate emphasis on one fact to exclusion of others, and ensure that all relevant factors considered.** |

**ENDING RELATIONSHIPS**

*Divorce Act*

* includes **fault-based** and **no-fault grounds**. Spouse who invokes **fault-based ground** must **prove fault of respondent**, rather than their own fault
* **s. 2** “spouse” = either of two persons married to each other

**Section 8 – Grounds for Divorce**

**8(2)(a)** – **Living Separate and Apart**

* must have lived separate/apart for **at least one year** immediately preceding the determination of the divorce proceeding and were living separate and apart at commencement of proceeding
	+ **separation does not have to be consensual (***Oswell v Oswell***)**
		- *FLA* **s. 3(4)(a)** spouses may be separated despite continuing to live in same residence, and, **(b)** the court may consider, as evidence of separation, **(i)** communication, by one spouse to the other spouse, of an intention to separate permanently, **and** **(ii)** an action, taken by a spouse, that demonstrates the spouse’s intention to separate permanently.
	+ **separation must predate application for divorce (see above)**

**8(3)(b)(ii)** – **One year period not interrupted/terminated when**

* spouses resume cohabitation **in order to attempt reconciliation**, so long as the period (or periods) of cohabitation is **less than 90 days total**

**FAULT-BASED GROUNDS**

* benefit – immediate divorce, no waiting one year
* onus of establishing adultery or cruelty on claimant
* Rarely invoked

**8(2)(b)(i) – Adultery**

* *Orford v Orford; Kahl v Kahl;*  - adultery defined judicially as **voluntary sexual intercourse between a married person and another person of the OPPOSITE SEX other than his/her own spouse**
* *Orford* – artificial insemination by wife amounted to adultery (husband didn’t know)
* *P.(S.E.) v P.(D.D.)* – Courts have moved towards “broader” definition of what constitutes adultery – intimate sexual activity (see Same Sex Adultery)

**8(2)(b)(ii) – Cruelty**

* **physical or mental cruelty that makes the continued cohabitation of the spouses intolerable (the section)**
* *Balasch v Balasch* – treatment must be **grave and weighty, going beyond incompatibility**. Issue is not intent of spouse to be cruel, but rather **the subjective effect of the treatment on the other spouse**.

**NOTE**

* lawyers advise no-fault divorce, otherwise will have to PROVE adultery/cruelty in court, revisit everything again and again… often better to just wait the one year (and get out of the bad situation)

**Bars to Divorce (s. 11)**

Duty of court to satisfy itself that

* **11(1)(a)** **no collusion** re application for divorce, must dismiss application if finds collusion in presenting it
	+ **11(4)** – **“collusion”** = agmt/conspiracy to which applicant for divorce is directly/indirectly a party of for purpose of subverting administration of justice, includes any agmt, understanding or arrangement to fabricate/suppress evidence or deceive ct, does not include agmt to extent that it provides for separation bw parties, financial support, division of property or custody of child of marriage.
* **11(1)(b) Reasonable arrangements** **have been made for support of children** of marriage, having regard to applicable guidelines, and, if such arrangements not made, to **stay the granting of divorce until such arrangements are made**
* **11(1)(c) no condonation or connivance** on part of spouse bringing proceeding, and to dismiss application if spouse has condoned/connived at act/conduct complained of unless, in opinion of ct, public interest better served by granting divorce **(**re adultery/cruelty **grounds)**

**Section 21.1 – Failure to remove religious barriers to remarriage**

* Ct may dismiss divorce application and strike out any other pleadings and affidavits filed by that spouse under this Act.
* Re *Bruker v Marcovitz* – Jewish “get”

**Section 9 – Duty of Legal Advisors (discuss reconciliation)**

* to **draw to attention of spouse** the provisions of this Act that have as object the **reconciliation** of sposues, and
* to **discuss with spouse the possibility of reconciliation** of spouses and **inform them of marriage counseling**/guidance facilities known to him/her that might be able to assist spouses achieve reconciliation, **unless** circumstances of case of nature that it would **clearly be inappropriate to do so.**

**Section 10 - Duty of Court – Reconciliation**

* duty of court, before considering evidence, to satisfy itself there is no possibility of reconciliation of the spouses, unless circumstances such that clearly inappropriate to do so

**Section 3 – Jurisdiction**

* either spouse has been **ordinarily resident** in province for **at least one year** immediately preceding commencement of proceeding
* **if two proceedings commenced in two provinces/territories**:
	+ **Exclusive jurisdiction where first filed**
	+ **If commenced same day, Federal Court has exclusive jurisdiction**

**Capacity to Separate**

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| ***Wolfman-Stotland v Stotland* – 2011 BCCA*** chambers judge: Mrs. Stotland lacked necessary capacity to divorce, unable to manage own affairs. CA overturned trial decision on basis that TJ applied wrong test for capacity. **Min capacity req’d to form intent to separate in capacity to instruct counsel**

Background* married 57 years; no children (extended family); Ms. Stotland commenced divorce proceeding, 92 years old; Mr. Stotland opposed divorce, said wife did not have requisite capacity, 93 years old
* Mr. Stotland handled family finances; had not live in same residence for 10 years (health reasons). There was **evidence of financial abuse –** husband controls a trust that pays for all of the needs of the couple. Mrs. Stotland wanted control of her own stuff.
* **S. 57** *FRA* – sought to trigger division of assets. Chambers judge questioned capacity to form intent to separate, and desire to divorce at this age. Ordered capacity assessment by physician
* Doctor found capacity, but chambers judge dismissed anyway (seemed ageist…)
* **CA overturned!! Relied on hierarchy of levels of capacity (see below). Stotland had capacity to form intent to live separate/apart**
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| ***Calvert (litigation guardian of) v Calvert* - 1997 On SC****Hierarchy of levels of capacity (from *Stotland*)****Capacity to manage financial affairs 🡪 capacity to instruct counsel 🡪 capacity to marry/divorce*** **separation is the simplest act, requiring the lowest level of understand.** Person has to know **with whom** he/she does/does not want to live. **Divorce**…req’s more understanding. Req’s **desire to remain separate and be no longer married** to spouse. Undoing of K of marriage.
* **Mental capacity req’d for marriage same as for divorce (simple…**),
* **Distinction bw decisions person makes re personal matters such as where/with whom to live and decisions re financial matters.** Financial matters require higher understanding, capacity to instruct counsel involves ability to understand financial/legal issues…. Higher on competency hierarchy.
* **Highest level of capacity is that req’d to make a will**. Lack of ability to instruct counsel does NOT mean inability to make personal decision to separate/divorce.
 |

**DATE OF SEPARATION**

* determination of **when** spouses begin living “separate/apart” important for purposes of *Divorce Act* but also to determine
	+ property interests
	+ debt responsibility
	+ excluded property/debt (Accumulated post-separation); and
	+ support claims (retroactive support)
* **residency arrangements need not change** (*FLA* **s. 3(4)**)
* **Giving Notice –** only one person req’d to form intent to separate, must be communicated in words/demonstrated by action *FLA* **s. 3(4) – see above**
* **Some courts look to criteria such as whether wife performed domestic services for husband –** *Torosantucci v Torosantucci*

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| ***Oswell v Oswell* – 1990 OHC***Confusing course of events between a couple. Man said wanted separation, but then they continued to vacation together, but sometimes not sleep together. Conflicting evidence… family/friends didn’t know about problems for a long time. How to determine when DATE OF SEPARATION happened?***Indicators of Separation*** **physical separation** – often indicated by spouses occupying separate bedrooms
* **withdrawal by one/both spouses from matrimonial obligation with intent of destroying matrimonial consortium**
* **absence of sexual relations** – not conclusive, but considered
* **discussion of family problems/communication bw spouses**… all indicia of CL marriage **(see above, *Takacs v Gallo***)
 |

***Riha v Riha* – significant change in relationship (for date of separation)**

**NOTE – WRITTEN NOTICE IS BEST APPROACH**

**SAME SEX DIVORCE**

**History**

* same sex marriages performed June 10, 2003 in CAD, after CL, heterosexual definition of marriage affirmed as unconstitutional in Ont by OCA
* BUT, definition of “spouse” in *Divorce Act* not changed at same time, so gays/lesbians legally able to marry but unable to divorce without constitutional challenge
* Corrected July 20, 2005, **s. 2 “spouse”** amended to “either of two **persons** who are married to each other”
* June 26, 2013, *Civil Marriage of Non-Residents Act* enacted
	+ Makes valid in CAD law al marriages of non-residents whose marriages were performed in CAD.
	+ Also allows non-resident same-sex couples to divorce in CAD, if divorce not possible in their country of residence

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| ***P.(S.E.) v P.(D.D.)* – 2005 BCSC****CL definition of “adultery” includes same-sex adultery in BC*** 2005, months after enactment of *Civil Marriage Act*, BC, BC court ruled on whether CL definition of adultery included sexual acts with individuals of same sex
* involved Vancouver couple, married for 17 years. **Wife discovered husband having affair with another man.** Parties separated, wife filed for divorce, seeking immediate end due to adultery. Husband signed affidavit admitting it, did not contest divorce.

Trial* Garson J refused to rule on divorce immediately, **CL definition of adultery did not include same-sex relations**. Informed counsel of wife that she would re-hear case if counsel would argue why legal definition of adultery should include same-sex adultery

Re-hearing* HELD – **CL definition should be changed to include same-sex acts**
* “I consider Parliament’s enactment of the *Civil Marriage Act* to be a legislative statement of the current values of our society consistent with the Charter that I am obliged to used as a guide to my consideration of the current common law definition of adultery. Individuals of the same sex can now marry and divorce and the common law would be anomalous if those same-sex spouses were not bound by the same legal and social constraints against extra-marital sexual relationships that apply to heterosexual spouses.”
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| ***Thebeau v Thebeau* – 2006 NB****CL definition of “adultery” includes same-sex adultery in NB.** |

**DIVORCE STATS**

* with intro of “no fault” divorce and changes to *Divorce Act* (3yr separation to 1yr separation), steady increase in divorce rate
* **2008 – 70, 226 divorces in CAD** (21.1 divorces/10,000 pop). Crude divorce rate highest in Yukon. Alta had highest provincial rate, followed by Ont.
* **Almost 1/5 of divorces were marriages up to 5 years duration, while 22.6% were marriages 5-9 years.**
	+ 41.6% = marriages of 10-24 years
	+ 16.4% = marriages of 25+ years
* **primary reason was separation of at least one year (93.6%).**
	+ **Adultery – 3.7%**
	+ **Mental cruelty – 1.6%**
	+ **Physical cruelty – 1.2%**
* **Steady increase of “silver separations” and “grey divorces”**
	+ 37.6% marriages entered in 2008 expected to end in divorce before 25th yr
	+ 43.1% marriages entered in 2008 expected to divorce before 50th year

**COLLABORATIVE LAW**

* Non-adversarial approval to Family Law Problems, inter-disciplinary
* Team-based: lawyers, divorce coaches, child specialists, financial advisors
	+ INTEREST-BASED negotiations

**Differences from Litigation**

1. Agreement **NOT** to go to court
2. Open communication/transparent negotiations
3. 4-way meetings (lawyer/spouse A, lawyer/spouse B)
4. Team Approach
5. Each party represented

**Similarities to Litigation**

1. Each party has legal advice, aware of rights/obligations
2. FULL FINANCIAL DISCLOSURE REQ’D
3. At conclusion of process, parties will have dispute fully/finally resolved

**Benefits of Collaborative Divorce**

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| No certainty in court – retain control over outcomes | Maintain goodwill |
| Preserve privacy | Enhanced Participation |
| Timely, more cost effective than lit | Parties develop OWN solutions |
| Emotional support/legal guidance | Protects dignity, integrity, long-term interests of families |

**Suitability of Process**

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| **Works When** | **Doesn’t Work When** |
| All parties committed to the process | History of fraudulent behaviour |
| Open communication | Personality disorders/mental illness |
| Full disclosure, made promptly | Client misrepresents information |

**Lawyers – Who can do it?**

* Minimum 3 years of practice
* **80 hours SPECIFIC** **mediation training**
* Collaborative training (120 hours – courses only held once/year, sometimes limited enrollment)
* Each group has own governing body (lawyers, psychologists…etc)
* **NOTE** – still practicing law, so Rules of the Law Society still apply

**Participation Agreement: Content**

1. COMMUNICATIONS **–** Respectful and constructive, focus on issues
2. NO THREATS TO GO TO COURT – neither party will do this to get what they want
3. THE CHILDREN –
	1. agree that settlement issues WILL NOT be discussed in front of children, or that communication with children regarding issues only occur at appropriate times with mutual agreement, or advice of child specialist
	2. **agree they will not move residence of children without agreement of other parent**
4. WILL NOT TAKE ADVANTAGE – shall not take advantage of inconsistencies or miscalculations of other, but shall disclose them and seek to have them corrected
5. FULL DISCLOSURE – 1) provide all documents/information, 2) no formal discovery
6. NO COURT ACTION – nor will any other motion/document be prepared or filed which would initiate court intervention
7. DISQUALIFICATION OF LAWYERS
	1. Neither collaborative lawyer can act if one party leaves process
	2. If one party withdraws, hires litigation lawyer, other collaborative lawyer must withdraw
8. PROVISION FOR HIRING JOINT EXPERTS
	1. Often we will hire joint neutral experts
	2. These members can support team when necessary and financially affordable
9. WITHOUT PREJUDICE – all communications exchanged will be confidential and without prejudice
10. LAWYER MUST WITHDRAW IF – they learn client has **withheld or misrepresented information or taken unfair advantage** of the Collaborative Law Process
11. OBLIGATIONS PENDING SETTLEMENT
	1. During the process neither parent will unilaterally
		1. Dispose of assets
		2. Change beneficiary of will, pension, RRSP, insurance or investment
		3. Alter insurance policies
		4. Move residence of the children
		5. Sever any JT on property
		6. Incur additional debt for which other would be responsible

**Start of File**

* One or both spouses want to proceed collaboratively, and can agree to do so, or counselors recommend the process.
	+ Supported by word of mouth and mental health

**Files**

* 4-way meetings, structured with Agenda; Divorce Coaches may assist parties; team approach; 2-5 meetings for most files; **90% of files resolve**

**Testimonials**

* **Positive** - *“The process focuses on resolution, not “winning.” This process made me aware that in divorce, no one wins. The process gave me emotional support – my lawyer found me a therapist. Divorce is mostly a hellish journey and the idea that there is no need to blame and “fight” to reach an agreement is the best of what I think that collaborative process has to offer.”*
* **Negative** -*“My wife was not committed and pulled out of the process. If I was to do it again I would make sure that my partner was willing to communicate and firmly committed to working together towards a settlement. It takes cooperation of all parties to make the process work.”*

**MEDIATION**

* “interest-based negotiation” to get at needs, desires, concerns, fears and aspirations of parties (“what”, “why” and “how and why” of negotiation).
* Between 2+ persons voluntarily trying, with assistance of impartial 3rd party, to formulate consensual resolution to issues between them
* 3rd party isolates disputed issues, develops options, considers alternatives…
* **less formal, less adversarial**
* **mediator does not provide advice**, can inform “of the law, the consequences of legal positions, general legal information”
* **try not to dwell on the past (hard…)**

Bottom Line

* NOT about right/wrong, winning/losing
* Finding **WORKABLE** (not perfect) solution that meets needs/concerns of participants in good faith, less conflict
* **confidentiality**

**Objectives of Mediator**

* **BE A GOOD LISTENER** – **RECOGNIZE** people, not necessarily believing every word they say. Figure out **INTEREST** at issue (need a way to work vs. I WANT THE CAR!)
* Seating…
* Build trust, facilitate communication, help articulate interests.
* Separate emotional content from informational content
* **Lawyer has no obligation to report child abuse, moral pickle… encourage person HARD to self-report – MEDIATOR MUST REPORT**

**SEE MEDIATION SUMMARY FOR 5 STEPS/STAGES OF MEDIATION**

1. **Pre-Mediation Meeting**
2. **Opening – Once together**
3. **The Issues**
4. **Interests (go back and forth bw 3-4…)**
5. **Reaching Agreement**

**Terminate Mediation When:**

* party does not fully understand process, is so deficient in information/knowledge that agmt not based on informed consent
* party lacks ability to identify/express interests
* party unwilling to honour mediator’s basic guidelines
* party indicates agmt is under duress, not free will
* one or both want to end process
* if agmt is: illegal, grossly inequitable, based on false info, resulted from bad faith bargaining, impossible to enforce, clearly will not hold over time

**LITIGATION**

**Madame Justice Russell**, *De Kova v De Kova*, “First, and perhaps it is because of the very awkward construction of the forms used to initiate family claims, I must point out that what used to be accomplished in one form, now seems to take several. The result is that the claims of the parties are difficult to put together because they are contained in several schedules to the initial claim. The use of these claims seems to be entirely for the purpose of assisting data collection for court services’ statistics, not for the purpose of assisting the parties to put their dispute squarely before the court.”

**Types of Orders**

* URGENT – *Ex Parte* orders
* Short leave
* Interim orders
* Final orders

**NOTES**

* **Notice of Application important… -** Madam Justice Adair, *Dupre v Patterson*

**ACCESS TO JUSTICE ISSUES**

* *De Kova v De Kova* – Madam Justice Russell
* [13] 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.
* [14] **This 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 to 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**.
* [15] 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.**

**BABY STEPS – ASSISTED REPRODUCTION TECHNOLOGIES (ART)**

Reasons to look for help conceiving a child

* one/both members of opposite-sex couple is infertile, and/or unable to carry child
* single person wants child
* lesbian or gay couple wants to have a child
* one/both members of a couple is transgender
* couple wants to include donor or surrogate parent as part of three-parent family

**Past Issues**

* where couples separated and biological mom tries to shut out non-biological “father”
* people working around the written law (*Law and Equity Act* s. 61 – parents were “his or her natural parents”) because that’s all that existed
* Fed gov’t enacted *ART* – ***Assisted Human Reproduction Act***, 2004, as crim law, now it forbids surrogates from receiving pmt for services, and forbids sale of genetic material b/c Quebec challenged Act as *ultra vires* in some ways

***FLA (Family Law Act)***

**Section 20**

**“Assisted Reproduction”** a method (ANY) of conceiving a Child other than by sexual intercourse

* **NOTE –** includes donor insemination, *in vitro* fertilization (IVF), inter uterine insemination (IUI) and surrogacy

**“donor”** means a person who, for the purposes of assisted reproduction **other than for person’s own reproductive use** provides

1. his/her own human reproductive material, from which child is conceived, or
2. an embryo created through the use of his/her human reproductive material

**Legal Parentage Established for All Purposes**

* Core of Part 3 (*FLA*) is **s. 23**, provides that determination of parentage under Part 3 is determination for the purposes of **all of the laws of British Columbia**

**23** **(1)** For all purposes of the law of British Columbia,

1. a person is the Child of his or her Parents,
2. a Child's Parent is the person determined under this Part to be the Child's Parent, and
3. the relationship of Parent and Child and kindred relationships flowing from that relationship must be as determined under this Part.

**23 (2)** For the purposes of an instrument or enactment that refers to a person, described in terms of his or her relationship to another person by birth, blood or marriage, the reference must be read as a reference to, and read to include, a person who comes within the description because of the relationship of Parent and Child as determined under this Part.

**NEW THINGS**

* Birth certificate provides proof of parentage – *FLA* + *Vital Stats Act*
* **“legal parentage”**
	+ non –ART – **s. 26** by the birth mother and biological father. Presumption of who is biological father (**26(a)-(f)**)
	+ ART – pursuant to *FLA* Part 3 scheme (**see below**)
* **Donors are never legal parents** by virtue only of being donors (**s. 24**) **unless donation for purpose of donor’s own reproductive use** (**s. 20, see above**)
* Multiple legal parents by **pre-conception agreements** (**s. 29, 30**) or by declaration of parentage (**s. 31**)
* **Co-parent** with birth mother of child conceived by **ART presumed to be legal parent** (**s. 27**) unless consent to parental project withdrawn before conception or was never consented to
* **Declaration of parentage** specifically provided for (**s. 31**), used when **“uncertainty or dispute”** as to parentage (available immediately after birth of child)
	+ **Prov Ct** can do it, if issue otherwise in jurisdiction of Prov Ct **(31**)
* **Provides Scheme for:**
	+ a) pre-conception agmt bw Intended Parents and surrogate followed by
	+ b) relinquishment of Child to Intended Parents and
	+ c) birth registration of Intended Parents based on agreement: no court order req’d
		- **s. 30**
* **Specific provision** for Children conceived with genetic material from person who died before conception (**s. 28**)
* **“Parenting”** rights and legal responsibilities assigned to legal parents and others who played role in life of Child – eg guardians and stepparents **– not dependent on determination of parentage under Part** 3 (see **Part 4 *FLA*)**

**Non-ART conceived children**

 - parties have sexual intercourse to conceive child without assistance of donors, surrogates, insemination or transplanting services. **s. 26**

**26**  **(1)** On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father.

**(2)** For the purposes of this section, a male person is presumed, unless the contrary is proved or subsection **(3)** applies, to be a child's biological father in any of the following circumstances:

**(a)** he was married to the child's birth mother on the day of the child's birth;

**(b)** he was married to the child's birth mother and, within 300 days before t he child's birth, the marriage was ended

**(i)** by his death,

**(ii)** by a judgment of divorce, or

**(iii)** as referred to in section 21 *[void and voidable marriages]*;

**(c)** he married the child's birth mother after the child's birth and acknowledges that he is the father;

**(d)** he was living with the child's birth mother in a marriage-like relationship within 300 days before, or on the day of, the child's birth;

**(e)** he, along with the child's birth mother, has acknowledged that he is the child's father by having signed a statement under section 3 of the *Vital Statistics Act*;

**(f)** he has acknowledged that he is the child's father by having signed an agreement under section 20 of the *Child Paternity and Support Act*, R.S.B.C. 1979, c. 49.

**(3)** If **more than one person may be presumed to be a child's biological father, no presumption of paternity may be made.**

**ART-conceived children**

* parties require assistance of donors for human reproductive genetic materials, embryo and/or assistance of surrogates and/or fertility treatments
* relevant sections
	+ **s. 24 – donor not automatically parent**
		- Where assisted reproduction used to conceive child, donors of genetic material (sperm/egg/embryo) NOT presumed to be child’s parents
	+ **s. 27 – parentage if assisted reproduction**
		- Where child conceived by assisted reproduction, child’s birth mother is parent, even if birth mother not genetically related to child (donor egg or donor embryo)
		- Also, person married to or in marriage-like relationship with child’s birth mother when child conceived is also child’s parent, unless proof that, before child was conceived, person did not consent/withdrew consent to be parent
	+ **s. 28 – parentage if assisted reproduction after death**
		- **Applies if**: child conceived through assisted reproduction; person who provided genetic material used in conception of child did so for own reproductive use; person who provided genetic material died before child’s conception and that there is proof that the person
			* i) gave written consent to use of genetic material after death, by person who was married to, or in a marriage-ike relationship with, the deceased person when person died,
			* ii) gave written consent to be parent of child conceived after person’s death, and
			* iii) did not withdraw consent referred to in subpara (i) or (ii) before person’s death
		- **If above complied with, child’s parents when child born are:**
			* a) the deceased person, and
			* b) regardless of whether he/she also provided genetic material used for assisted reproduction, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.
	+ **s. 29 – parentage if surrogacy arrangements**
		- Surrogate mother presumed to be birth mother and parent of child conceived by this form of assisted reproduction regardless of any genetic connection surrogate may have to child.
		- Intended parents and surrogate have to have written agmt **prior** to conception of child that confirms that surrogate will not be parent to child; surrogate will surrender child to intended parents and intended parents are to be parents of child.
	+ **s. 30 – parentage of other arrangement**
		- Where child conceived by assisted reproduction, people can make Agmt as to who will be parent. Can include combination of intended parents, sperm donor, egg donor, and surrogate
		- Agmt needs to be made **prior** to conception and no parties can withdraw from Agmt prior to conception for Agmt to be valid.
		- As a result of these pre-conception agmts, may be more than 3 parents of the child.

**Section 31**

* if “dispute” or “uncertainty” as to whether person is/is not parent, person can make application to ct seeking order declaring whether person is child’s parent.

**Class Discussion**

* **agreements –** non-enforceable, really good to have things sorted ahead of time so everyone’s on the same page. Messy if not…
	+ **get started ASAP before stuff starts happening**
* **ownership of genetic material issues** – sperm straws case (see below)
* **conflicts** – she will work for a couple, but donor must have ILA then
	+ she always discusses possibility of couple separating, what will happen then?
* **2 kinds of surrogacy**
	+ **traditional** – birth mom using her own eggs, carrying child that will be raised by other parents (discouraged)
	+ **gestational** – carries an embryo that is not biologically related to her
* **s. 27 applies if s. 29 does not – s. 29 covers surrogacy situations**
* **s. 29 applies if (ss(2))**
	+ a) before child is conceived through assisted reproduction, a written agreement is made bw a potential surrogate and an intended parent or the intended parents, and
	+ b) the agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child’s birth,
		- i) the surrogate will not be a parent of the child,
		- ii) the surrogate will surrender the child to the intended parent or intended parents, and
		- iii) the intended parent or intended parents will be the child’s parent or parents.

**Interesting**

* fertility clinics in BC will inseminate through IVF only if egg donor known to prospective mother
* written consent of donor req’d to use donated genetic material – **s. 8 *AHRA***(*Assisted Human Reproduction Act*, federal)
* mother can unacknowledged father on birth certificate (*Vital Stats Act*)
* *Pratten v BC* – child born as result of conception with sperm from anonymous donor did not have right to know paternal lineage.

**Ownership of Genetic Material**

* frozen sperm/eggs are property

|  |
| --- |
| ***C.C. v A.W.***  **Sperm is property, can be gifted.***AW contributed sperm, embryos created by IVF. Twins born to CC after implantation, other embryos left. AW did not want to release remaining embryos to CC because dispute re access to twins.* HELD – sperm was property, AW had gifted his sperm unreservedly. CC’s property to use as she saw fit. |

|  |
| --- |
| ***J.C.M. v A.N.A.*****Sperm straws are property that can be divided upon separation/divorce.***Two women (spouses) purchased “straws” of sperm from single sperm donor. Each had child using that sperm. Froze 13 straws to save, then separated.*ISSUE – what to do with the 13 straws?HELD – each entitled to som, JCM got seven, ANA got 6, JCM had to compensate ANA for getting last straw. - straws were property subject to division bw spouses. BIOC not a factor to consider. |

**GRANDPARENTS**

* Have rights under *FRA* (not *FLA?*)
* Few cases exist in CAD…
* *A.R. and B.R. v M.W.*
	+ Jehovah’s witness grandparents (parents of runaway father) who kept trying to show grandchild religion against mother’s wishes. Mother refused to let them see child anymore, grandparents brought application for contact. Said their *Charter* right to religion was being violated.
	+ No violation of religious rights… can practice without showing it to kid. They also repeatedly went against Mother’s wishes, causing damaging conflict in relationship with her (bad for child).
	+ They get one hour of supervised contact/wk.

**FAMILY VIOLENCE**

***FLA* – s. 1**

**“family violence”**

1. physical abuseof a **family member**, including forced confinement or deprivation of necessities of life, but not including the use of reasonable force to protect oneself or others form harm
2. sexual abuse of a **family member**
3. attempts to physically or sexually abuse a family member
4. psychological or emotional abuse of a family member, including
	1. intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property
	2. unreasonable restrictions on, or prevention of, a family member’s financial or personal autonomy
	3. stalking or following the family member, and
	4. intentional damage to property, and
5. in the case of a child, direct or indirect exposure to family violence (considered in *H.H. v H.C.*)

**“family member”**

1. person’s spouse or former spouse
2. a person with whom the person is living, or has lived, in a marriage-like relationship
3. a parent or guardian of the person’s child
4. a person who lives with, and is related to,
5. the person, or
6. a person referred to in any of paragraphs (a) to (c), or
7. the person’s child

includes a child who is living with, or whose parent or guardian is, a person referred to in paras (a) – (e)

**Family Dispute Resolution Professionals (*FLA* Section 8)**

* include **family law lawyers, family law mediators, parenting coordinators, family justice counselors, and arbitrators (*FLA* s. 1)**
* Law Society of BC has specific training req’ts for lawyers who want to be qualified as mediators, parenting coordinators or arbitrators, includes **14 hours training in family violence**

**Duties of FDRiPs**

**8(1)** imposes a **positive duty** on FDRiPs to assess whether family violence is present, and extent to which family violence may adversely affect

1. the safety of the party or a family member of that party, and
2. the ability of the party to negotiate a fair agreement

**8(2)** req’s FDRiPs to

1. discuss with party the advisability of using various types of FDR to resolve the matter, and
2. inform the party of the facilities and other resources, known to the FDRiP, that may be available to assist in resolving the dispute
* **Certifying Compliance with 8(2)**
	+ **197(1)** – if lawyer acting behalf of party in proceeding under *FLA*, must provide at start of proceeding a statement, signed by lawyer, certifying that lawyer has complied with **s. 8(2)**

**8(3)** req’d FDRiPs to advise party that agreements and orders respecting the following **must be made in the best interests of the child (BIOC) only**

1. guardianship
2. parenting arrangements, and
3. contact with a child

**Notice Exemptions** – When is notice not req’d?

* **Guardianship orders** – court can exempt party from req’t to give notice for applications for guardianship **52(3)**
* **Relocation Orders** – ct can exempt a party from all/part of the req’t to give notice when a guardian wishes to relocate her/himself or a child, if the ct is satisfied that notice cannot be given without incurring a risk of family violence by another guardian or person with contact **66(2)(a)**
* **Disposition of Property** – ct can make order restraining party from disposing of property without notice to other party **91(1)**
* **Protection orders** – can be sought on a without notice basis **186**
	+ *For above two, court will usually provide leave to set aside Order on short notice*
	+ **THRESHOLD – to get these orders without notice, must be a pattern of behaviour SHOWN that party will do bad things and that there is a sense of urgency….**

**Guardianship and Parenting Arrangements (*FLA* Part 4)**

**BIOC (Section 37)**

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

**37(2)** To determine what is in BIOC, all of the child’s needs/circumstances must be considered, including following:

1. child’s health and emotional well-being
2. child’s views, unless inappropriate to consider them
3. nature/strength of relationships bw child and significant persons in child’s life
4. history of child’s care
5. child’s need for stability, given child’s age and stage of dev’t
6. 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/her responsibilities
7. the impact of **family violence** on the child’s safety, security or well-being, whether the family violence is directed toward the child or another family member
8. whether the actions of a person responsible for **family violence** indicate that the person may be impaired in his/her ability to care for the child and meet child’s needs
9. appropriateness of an arrangement that would require the child’s guardians to cooperate on issues affecting the child, including whether req’ing cooperation **would increase any risks to the safety, security or well-being of the child or other family members**
10. any **civil or criminal proceeding** relevant to the child’s safety, security or well-being

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

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

**Assessing Family Violence** (**Section 38)**

**38** For the purposes of **s. 37(2)(g)** (impact of family violence on child) and **(h)** (assessing actions of person responsible for family violence), court **must consider all** of the following

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

**When denial of Parenting Time of Contact is not wrongful** (**Section 62)**

**62** If there is an agreement or order for parenting time or contact…**denial** of parenting time of contact is **not wrongful if**”

1. the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised
	1. **NOTE –** many child protection social workers have held the belief that they can direct a parent to withhold contact bw a parent and child as part of a “safety plan”, even when there is an order for access in place. Master Young recently held that MCFD does not have the authority to override an existing court order unless they have removed the child – *MLF v RJD* – 2013 BCSC

**Protection Orders (*FLA* Part 9 – Sections 182-191)**

**182**

* **“at risk family member”** – a person whose safety and security is or is likely at risk from family violence carried out by a family member
* **“residence”** – a place where an at-risk family member normally or temporarily resides, including a place that was vacated because of family violence

**Who Can Apply for Protection Order?**

**183(1)**

* a family member who is claiming to be an “at-risk family member”
* a person on behalf of the “at-risk family member”
* The court can make the order on its own initiative

**NOTE –** a Protection Order can be sought as a stand-alone application; that is, without any other proceeding or claim for relief under the *FLA*

**183(2)** – **Court will grant Protection Order if ct determines that**

1. the family violence is likely to occur, and
2. the other family member is an at-risk family member

A Protection Order **expires in one year** unless otherwise ordered: **s. 183(4)**

Applications for protection order can be made without notice – **s. 186**

**Orders that can be made**

**183(3)**

* no direct/indirect communication
* no attending or entering place regularly attended by at-risk person (residence, school, workplace et)
* no following at-risk person
* no possessing weapons
* directions to police to remove person from property, accompany person to remove belongings, seize weapons
* req’t to report to court
* *Any terms or conditions the court considers necessary to protect the safety and security of the at-risk family member, or implement the order*

**Factors to consider**

**184** – in determining whether to make order under this Part, court must consider at least the following **risk factors**:

1. any history of family violence by family member against whom the order is to be made
2. whether any family violence is repetitive or escalating
3. whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member
4. the current status of the relationship bw the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate
5. any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence
6. the at-risk family member’s perception of risks to his/her own safety/security
7. any circumstance that may increase the at-risk family member’s vulnerability, including pregnancy, age, family circumstances, health or economic dependence

**If family member is CHILD**

**185** – if child… **must consider**

1. whether the child may be exposed to family violence if order under this Part **NOT** made
2. whether order under this Part should also be made re child if order is made respecting child’s parent/guardian

**Realities of Family Violence**

* **Mutual Protection Orders:** ct must consider whether to make order against ONE PERSON ONLY, taking into account – history of/potential for family violence, extent of injuries/harm, respective vulnerabilities
* **Self-Defence**: PERSON WHO INITIATES AN INCIDENT OF FAMILY VIOLENCE is not necessarily the person against whom order should be made
* **Protection Order may be made, even if**…Ct may make order REGARDLESS of whether family member has complied with previous order; family member is temporarily absent form hom; at-risk family member is in shelter/safe house; criminal charges have been laid; the at-risk family member has history of returning; order restricting communication (**s. 225**)

**Enforcement of Protection Orders**

* may NOT be enforced under *FLA* or *Offence Act* – **188(1)**
* **Enforceable as offence under s. 127 *Crim Code***
* Protection Orders from other CAD jurisdiction enforceable under ***Enforcement of Canadian Judgments and Decrees Act* – s. 191**
* Police officer with reasonable grounds to believe person has contravened Protection Order may take action to enforce order, use reasonable force if necessary – **s. 188**
	+ **NOTE – proof of service not req’d**
* However, for successful prosecution under **s. 127** of *Criminal Code*, actual service of the order seems essential given that *mens rea* has to be established

**Conflict – Protection Order trumps**

**189** – where there is conflict/inconsistency with Protection Order and other Order made under *FLA* (such as for parenting time), then that Order is suspended until either the other Order for the Protection Order is varied so there is no conflict or inconsistency, or the Protection Order is terminated.

**Exclusive Occupancy**

***FLA* Section 90**

* SC (but not Prov Ct) may grant order that *SPOUSE* has
	+ a) exclusive occupancy of family residence, or
	+ b) possession of specified personal property stored at the family residence
* **test is:**
	+ **a) the practical impossibility of sharing the residence, and**
	+ **b) the balance of convenience**

**Restraining Orders (*FLA* s. 255)**

* **restraining order made under *FRA* remains in force in accordance with terms of Order**
* **transition provision**

**CASE LAW**

* *MWB v ARB* – Courts should take a **broad view** of what constitutes family violence
* *DNL v CNS* – demeaning remarks, blaming parent to a child qualify as family violence
* *DNL v CNS* – Derogatory outbursts, demeaning comments qualify
* *MWB v ARB* – Litigation abuse, failure to cooperate qualify
* *Hokhold v Gerbrandt* – Behaviour causing financial hardship and stress, threats to cause financial hardship qualify
* *JCP v JB*; *SN v EC* – Deliberate failure to pay child support intended to inflict emotional harm to control behaviour qualifies

**POST-SEPARATION PARENTING**

TERMS

* **custody** – in *Divorce Act*, not in *FLA*
* **guardianship** – NOT in *Divorce Act*, is in *FLA*
* **Parenting responsibilities** – Not in *Divorce Act*
* **Joint Custody/Shared Custody/Split Custody** – in federal guidelines, money is a big part of this (how much custody you have relates to child support pmts). Not in terms of parenting, more for child support
* **Full Custody** – doesn’t exist in our law really, we have “**sole custody**”, means one parent does all of the decision-making about day to day matters
* **Access/Contact** – “access” in *Divorce Act*, “contact” in *FLA*
* **Parenting time –** only certain people get this – guardians. If you aren’t a guardian/parent, you get “contact”

**Legislation**

* *Divorce Act*
	+ **s. 16 – Order for Custody**
	+ **s. 17 – Variation, Rescission or Suspension of Orders**
* *FLA* Part 4
	+ Definitions of “child”, “contact with child”, “family member”, “family violence”, “guardian”, “parent”, “parental responsibilities”
	+ **S. 37** – BIOC factors (2); **s**. **38 –** Assessment of family violence; **s. 39** – parents generally guardians (they get certain things)
	+ **Div 3** – Guardianship; **Div 4** – Contact with child

***Divorce Act***

**Section 2(1) Definitions**

* **“child of the marriage”** a child of two spouses or former 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
* Access defined only in French version of *Divorce Act* – “right to visit”

**Custody/Access**

* **Custody**
	+ almost all rights incidental to guardianship of a person (right to determine child’s education, health care, religion etc) and
	+ physical care and control of a child
* **Access** – time a parent has with child

Custody/Access Orders

**16** – sets out what the court is to consider when making such an order

* **(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 parent of the child
* **(10)** Maximum contact principle **(only in *DA*)**

Variation of Orders

**17** ct can make an order varying a custody order or any provisions thereof

* **(5)** must be satisfied that there has been a “change in the conditions, means, needs or other circumstances of the child since making the order”
* **BIOC and max contact ppl remain governing factors**

**Joint Custody and Guardianship – Master Joyce Model (under *DA* and *FRA*)**

* jt guardians of the child’s estate; if 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
* custodial parent must discuss with other significant decisions, including about child’s health (except emergency decisions), education, religious instruction, general welfare
* parent who doesn’t have custody must discuss with custodial parent and try to agree on those major decisions
* if can’t agree, custodial parent has right to make decision
* other parent believes not in child’s best interests, has right, under **s. 32 *FRA*, to ask ct to review decision**
* each parent has right to get info about child directly from 3rd parties

***FLA***

**Definitions Section 1**

* **“child”**, except in Parts 3, 7 and s. 247, means **person under 19 yrs**
* **“guardian”** means guardian under **s. 39** and **Div 3 of Part 4**
* **“parent”** means parent under Part 3
* **“family violence” (see above, defined in FAMILY VIOLENCE)**

Who is Guardian?

* parents presumptively are, while living together and after separation unless agmt/order to contrary – **s. 39**
* Person is parent under **s. 30** (agmt with potential birth mother/donor re parentage)
* Parent who never resided with child is **NOT** guardian unless agmt or regular care of child **39(3)**
* Person who has custody of child under **54.01(5) or 54.1** of the ***CFCSA*** deemed guardian under *FLA* **s. 51(5)**

**No more *de facto* Custody/guardianship**

* used to be that parent with care/control of child was sole guardian, and parent who child usually resides with may exercise custody
* gone now, implications for single mothers where ex gone for years

**Guardian of Child’s Estate** (Part 8)

* child’s guardian is not, by reason only of being guardian, trustee of child’s property/entitled to discharge property received on behalf of child – **s. 176** (if over $10K, MUST get trustee)
* exception is in relation to property the trustee has authority to hold for child, or property within prescribed value or prescribed class of property (**s. 178**)

**Termination of Guardianship**

* **39(2)** – agmt or Order may be made after separation, or when about to separate, that one parent is not child’s guardian
* **51(1)(b)** – ct may terminate a person’s guardianship of child, except when director is guardian under *Adoption Act* or *CFCSA*
* **TERMINATION OF GUARDIANSHIP ONLY APPROPRIATE IN:**
	+ Extreme situations; important to give parents “maximum opportunity to remain a significant part of child’s life” –*D v D*
	+ Rarest and clearest of cases where cancelling guardianship is clearly in the child’s best interest – *STH v RMG*

**Appointing a Guardian by Agreement**

**50** – person cannot become child’s guardian by agmt except

1. if person is child’s parent, or
2. as provided under this Division (**s. 51**), *Adoption Act* or *CFCSA*

**Ct May Appoint a Guardian**

**51** – applies to non-parents, and parents who have not lived with child and have not had regular care of child. – **step-parent is not presumptive guardian (s. 39(4) –** if child’s guardian and person who is not child’s guardian marry/enter marriage-like relationship, person does not become child’s guardian by reason of marriage)

**51(1)(a)** ct may appoint person as child’s guardian, or terminate persons guardianship of child

**51(2)** test is BIOC

**51(4)** if child 12+, ct must not appoint person as guardian without child’s **written** approval

**52(1) NOTICE** must be given to all parents, guardians and others who provide care for child or with whom child lives

* in case of Nisga’a and Treaty First Nations children, applicable First Nations gov’t must be served and has standing (**ss. 208, 209**) – like Maa-nulth and Tsawwassen First Nations

**Evidence for Appointment of Guardian**

*Provincial Court Family Rules* – **Rule 18.1**

*Supreme Court Family Rules* – **Rule 15-2.1**

* affidavit must be prepared for guardianship applications, to which must be attached criminal records check, record checks from MCFD and the Protection Order Registry
* Affidavit must set out Applicant’s relationship with child; any incidents of family violence affecting the children; any involvement in court proceedings under *CFCSA, FRA* or the *Divorce Act* concerning children in the applicant’s care; and any history of criminal conviction and the existence of any current criminal charges
* See prescribed forms

**Parenting Arrangements**

* defined as arrangements for parental responsibilities and parenting time **s. 1**
* **only guardian has parenting responsibilities and parenting time**
* **48** – if “normal” part of child’s routine, “informal parenting arrangements” cannot be changed without consulting other guardians, unless unreasonable or inappropriate to consult
* **45** – Ct may make orders for allocation of parental responsibilities or parenting time, that parties participate in dispute resolution, for implementation of parenting Order (eg re exchanges/supervised access)

**NO PRESUMPTIONS**

**40(4)** – no particular arrangements presumed to be in child’s best interests.

* NO PRESUMPTION THAT
	+ Responsibilities allocated equally
	+ Parenting time shared equally
	+ Decisions made separately or together
* **BUT** – *FLA* essentially sets up “joint” guardianship regime as each guardian entitled to exercise parenting responsibilities unless agmt/Order provides otherwise

**Parental Responsibilities**

**41** – concern:

|  |  |
| --- | --- |
| Day-today decisions re child | Where child will reside |
| With whom child will live/associate | Education/extra-curricular activities |
| Cultural/linguistic/spiritual upbringing and heritage | Medical/dental/other health related treatments |
| Application for passport/license/permit etc for child | Giving/refusing consent |
| Receiving notice entitled to by law | Requesting info from 3rd party |
| Starting/defending proceeding involving child | Exercising other responsibilities reasonably necessary to nurture dev’t |

**Allocation of Parental Responsibilities**

* guardian must exercise parental responsibilities in best interests of child (**40, 43**)
* (**section?)** must exercise parental responsibilities **in consultation** with all other guardians unless
	+ agmt/order to contrary
	+ would be unreasonable/inappropriate
* **45(1)(a)** parental responsibilities may be allocated among guardian by agmt,; **44(1)(a) or by Order** (need not necessarily be shared)

**NOTE** – agmt only binding and Order can only be made in respect of parenting arrangements if guardians (parents) are separated (**44(2) and 45(2)**)

**Assigning Guardianship**

**53** – guardian may appoint person to act as guardian in event of guardian’s death, and that person has same responsibilities (not more or less) as guardian. That is, surviving guardian does not automatically become “sole” guardian of child **(Testamentary Guardian**)

**55** – guardian may appoint person to be standby guardian, by execution of prescribed form, to act in case of terminal illness or permanent mental incapacity on part of guardian (**Standby Guardian**)

**57** – person must ACCEPT the appointment

Regulations made under *FLA* for prescribed forms to be used for each type of guardian

**43(2)** – if guardian unable to exercise PR, guardian may authorize, in writing, person to exercise, in BIOC, 1+ of guardians PRs (**Temporary Guardian**)

**NOTE – guardian cannot assign to temp his/her responsibility re where child will reside, child’s cultural, linguistic, religious and spiritual upbringing/heritage, or starting/defending or settling a proceeding**

**Parenting Time**

**42 –** time with child as allocated under agmt/order

* during this time, guardian may exercise day-to-day decisions affecting child, unless agmt/Order says otherwise

**Contact**

* time someone who is NOT a guardian has with child, including people other than parents – **1 and 58**
* Agreements for contact only binding if made with all guardians having parental responsibility for contact – **58**
* Orders for contact may include terms and conditions, such as supervision req’ts – **59**

**Supervision of Contact**

*LAMG v CS* – 2014 BCPC

* PPls
	+ Supervision orders to serve BIOC with regard to considerations in legislation
	+ Long term ones generally discouraged, very rare to have infinite ones unless BIOC
	+ Factors

|  |  |
| --- | --- |
| Child’s right to know/have relationship with parents | Limitations that may constrain parent’s ability to perform parenting functions competently |
| Level of commitment of parent said to require supervision | Nature of relationship bw parents, its impact on children |
| Nature of relationship bw parents, its impact on children | Need to protect child from physical, sexual, emotional abuse |
| Whether child intro’d, re-intro’d into life of parent after significant absence | Existence of substance abuse issues |
| Existence of “clinical issues” | History of harassment, violence, other harmful behaviour directed toward primary caregiver |
| History of parental alienation | Ongoing denigration of primary caregiver |
| Evidence of abuse/neglect of children  | Wishes/preferences of children themselves |

**Order in high conflict case**

*DAM V DAT* – 2014 BCSC (Madame Justice Fisher)

*Claimant father alleged to have sexually abused parties’ two children, respondent mother alleged to have alienated children against father.*

**ORDER**

1. children will reside with mother, provided her residence is NOT her parents
2. mother will exercise all PRs, will consult father re
	1. where children will reside
	2. education/location of school
	3. health and the giving, refusing, or withdrawing consent to medical, dental and other health-related treatments
3. father entitled to request/receive info from 3rd parties (health, education etc)
4. 12 month probation time for father’s contact with kids, and counseling. Conditions
	1. if parent coordinator cannot do counseling, must report to court and provide reasons
	2. if can do it, must report in 6mths about progress
	3. neither party will communicate with PC outside of counseling process
	4. neither will communicate except jointly for
		1. copy of reasons
		2. copy of previous reasons for judgment
		3. copy of Dr report
		4. “
	5. PC to provide final report to ct within 12mths of this order, include summary
	6. PC may report if he needs further direction
	7. During counseling process
		1. Mother will not talk about process with children
		2. Mother will not retain other counseling services for children
		3. Neither will retain other professional to conduct assessment/evaluation pertaining to children
	8. Cost of PC shared equally bw parties
5. Mother must refrain from conveying negative messages about father, follow advice of PC and counselors.

**BEST INTERESTS OF THE CHILD**

* *Divorce Act*, **s. 16;** *FLA*, **s. 37**
* **s. 211** Reports/Views of the child

*Divorce Act*

**16** – **Custody Orders**

**16(1)** A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of/access to, or the custody of and access to, any or all children of the marriage

**16(6)** **Terms/Conditions** – the court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

**16(8)** **Factors** – in making order under this section, court **shall take into consideration only the best interests of the child** of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

**16(9) Past Conduct -** In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is so relevant to the ability of that person to act as a parent of a child.

**16(19) Maximum Contact** – In making an order under this section, the court **shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child** and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

***FLA***

**BIOC**

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

**37(2)** To determine what is in BIOC, all of the child’s needs/circumstances must be considered, including following:

1. child’s health and emotional well-being
2. child’s views, unless inappropriate to consider them
3. nature/strength of relationships bw child and significant persons in child’s life
4. history of child’s care
5. child’s need for stability, given child’s age and stage of dev’t
6. 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/her responsibilities
7. the impact of **family violence** on the child’s safety, security or well-being, whether the family violence is directed toward the child or another family member
8. whether the actions of a person responsible for **family violence** indicate that the person may be impaired in his/her ability to care for the child and meet child’s needs
9. appropriateness of an arrangement that would require the child’s guardians to cooperate on issues affecting the child, including whether req’ing cooperation **would increase any risks to the safety, security or well-being of the child or other family members**
10. any **civil or criminal proceeding** relevant to the child’s safety, security or well-being

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

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

**Expert Reports**

**Section 211 – Orders Respecting Reports**

**211(1)** a court may appoint a person to assess, for purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:

* + - 1. the **needs** of a child in relation to a family law dispute;
			2. the **views** of a child in relation to a family law dispute;
			3. the **ability and willingness** of a party to a family law dispute to satisfy the needs of a child

**211(2)** A person appointed under ss (1)

1. must be a family justice counselor, a social worker or another person approved by the court, and
2. unless each party consents, must not have had any previous connection with the parties

**211(3)** An application under this section may be made without notice to any other person.

**211(4)** A person who carries out an assessment under this section must

1. prepare a report respecting the results of the assessment,
2. unless the court orders otherwise, give a copy of the report to each party, and
3. give a copy of the report to the court.

**211(5)** The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

**NOTE –** Recommendations made in **s. 211** reports are not determinative, however judges do rely on them.

**Views of the Child Report**

* useful tool, not a full assessment where needs/views of child and ability and willingness of each parent to meet child’s needs are considered.
* Can be completed by a number of professionals, including lawyers.

**Other Ways to Get Child’s Evidence**

**Court may decide how child’s evidence is received**

**202** – In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:

1. admit hearsay evidence it considers reliable of a child who is absent;
2. give any other direction that it considers appropriate concerning the receipt of a child’s evidence.

**Children’s Lawyer**

**203(1)** The court may at any time **appoint a lawyer to represent the interests of a child** in a proceeding under this Act if the court is satisfied that

1. the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and
2. it is necessary to protect the best interests of the child.

**203(2)** If the court appoints a lawyer under this section, the court may allocate among the parties, or require one party alone to pay, the lawyer’s fees and disbursements.

**CASE LAW**

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| ***BDM v AEM –* 2014 BCSC****Consideration of some 37(2) factors.***High conflict case involving 6yr old. Ct addressed most of s. 37(2), A to spend majority of time with mother.** **Child’s health and emotional well-being and ability of parents to execute parenting responsibilities -** *father had trouble discriminating bw his own objectives and perceptions and the best interests of A*
* **Child’s View *–*** *too young to be consulted*
* **Relationship bw child and others** – *ct considered A’s relationship with each parent, and each parent’s relationship with their own immediate and extended family and social network as well as mother’s relationship with father’s family – father led socially isolated life.*
* **Child’s need for stability** – *noted parents had very different parenting philosophies – as a result A should spend majority of time with one parent.*
* **Whether an arrangement that req’s co-operation is appropriate** – *very limited co-operation req’d, as it had already adversely affected A*.

Court stated – “It is clear to me that the best interests of A require that any parenting arrangement ordered cannot be dependent upon cooperation between the parents” |

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| ***Hokhold v Gerbrandt* – 2014 BCSC****Mobility application, went through s. 37 factors, FINANCIAL ABUSE found***Involved a 6 and 4 year old,* ***mobility application*** *(mother wanted to move to Swift Current for work/family). Ct found parents had dysfunctional relationship. Had benefit of [now* ***s. 211****] report. Applied* ***s. 37*** *factors.* * **child’s health/emotional well-being** – *father was using distraught emotions of children to bolster his court application for increased access – children to attend counseling (video of child punching his father for 6 minutes, father did nothing, did not try to console)*
* **child’s views** – *4 year old too young, 6 year old clear with his views (equal time)*
* **child’s need for stability** – *animosity bw parents created instability for children. Father’s inability to meet parental responsibilities (Getting kids to school on time) considered here.*
* **Ability of each parent to exercise parental responsibility** – *mother lacking* **financial means** *because father would not pay support, but mother more capable of meeting parental responsibilities (supported by father’s statement to Dr. Waterman (Triple A mother) – tried to recant at trial).*
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| ***Keith v MacMillan* – 2014 BCSC***Court had benefit of Views of Child Report for 2 teens subject of this litigation. Shows importance of including child’s voice in litigation involving children, Children asked to rate how their parents “get along” on scale of 0 (no cooperation) to 10. They got -6 and 0.* * Children shared family violence they witnessed and experienced, neither parent disclosed the family violence.
* Court ordered comprehensive **s. 211** report to further investigate issues raised by children in views of the child report
 |

*Van de Perre v Edwards* – one where the b-ball player cheated on his wife a bunch, had a kid with mistress, custody battle bw mistress and b-ball player and his wife

**SPECIFIC ISSUES IN PARENTING**

***Hague Convention***

* international treaty that Canada signed, also part of the law in Canada as a result of its incorporation into provincial and territorial statutes. Intended to address problems that arise when children are wrongfully taken by one parent form one country to another in the context of parental separation and to deter wrongful international removals of children.
	+ **Art 3** – removal/retention of child considered wrongful where
		- a) it is in breach of *rights of custody*… under the law of the State in which the child was *habitually resident immediately before the removal or retention*; and
		- b) at the time of removal or retention those rights *were actually exercised, either jointly or alone*, or would have been so exercised but for the removal or retention
	+ **Art 16** – courts outside child’s jurisdiction of habitual residence NOT to undertake consideration of merits of custody requests, unless it has been determined that a child is not going to be returned pursuant to the Convention
* **Main issues to be addressed in Convention application**
	+ 1) is child 16 years or younger? (**Art 4**)
	+ 2) If so, was child “habitually resident” in the left-behind jurisdiction? (**Art 3(a)**)
	+ 3) If so, did the left-behind parent have “rights of custody”? (**Art 3(a)**)
	+ 4) If so, was the left-behind parent exercising custody rights at the time the child was removed or retained? (**Art 3(b)**)
	+ 5) If the answers to questions 1-4 are “**yes**”, are there any exceptions in the individual case recognized in the *Convention* to the general expectation that the child will be returned to his/her place of habitual residence? (**Art’s 12 & 13**)
		- *Wilson v Huntley*

**Art 12 – now-settled**

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| ***Kubera v Kubera* – BCSC****“Now-settled” exception to return of wrongfully retained child – Art 12***Mother traveled with 3yr old from Poland, where child/parents had lived together since child’s birth, to Canada to visit relatives. Visit was to have been 3 mths, but mother extended visit, father initially agreed. Father aware of “marital difficulties”, hoped she would sort it out for herself. Mother in new CL relationship with someone else eventually, told father she wanted to stay in CAD with partner and child.*HELD – Child found “now settled” in Canada, not going to make her return* chambers just held that the “now settled” exception under **Art 12**, dismissed fathers application to return child to Poland
* CA said that because 1 year since child wrongfully retained, mother could introduce evidence that child was “now settled”, and that they would take a “child-centric” approach to determine child’s circumstances
* “objective of securing prompt return has been seriously undercut; restoring the status quo may be impossible; it can no longer pre presumed that the country of origin is the best forum to determine the issue of custody; and, finally, generally deterrence, which much less prone to the passage of time, must also eventually yield to the welfare interests of the particular child”
 |

**Art 13 Exceptions**

* Consent or acquiescence
* “grave risk” of harm or other “intolerable situation”
* child’s objections to return

**Failure to Exercise Parenting Time**

* ***FRA***  = no remedies to deal with person who repeatedly fails to exercise parenting time/contact agreed to/granted in an order
* **s. 63** of the *FLA* addresses this issue and provides limited remedies – ensuring remedy in not at odds with BIOC – like forcing a relationship with an uninterested adult
	+ gives judges discretion to allocate cost req’d to facilitate parenting time/contact or dispute resolution (including counseling)

**Failure to exercise parenting time or contact**

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

1. require one or more of the things described in **section 61 (2) (a), (b) or (e)** *[****denial of parenting time or contact****]* (**see below**);

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

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

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

**Denial of Parenting Time**

* new to family law in BC – *FRA* did not have specific remedies for denial of parenting time allegations
* **s. 61** *FLA* – enforcement regime so judges ensure parties respect one another’s parenting time/contact arrangements
	+ **range of remedies, preventative🡪punative. Include:**
		- compensatory time; reimbursement of expenses incurred as result of the denial; and req’ing offending party to provide security or pay find up to $5K.
	+ gives judges discretion to allocate cost, if any, of family dispute resolution, counseling or supervised transfer of children to facilitate parenting time/contact
	+ applications must be made within 12 mths of denial

**61 (1)** An application under this section may be made only

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

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

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

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

**(b)** require one or more parties or, without the consent of the child's guardian, the child, to attend **counselling**, specified services or programs;

**(c)** specify a period of time during which the applicant may exercise **compensatory** parenting time or contact with the child;

**(d)** require the guardian to **reimburse** the applicant for expenses reasonably and necessarily incurred by the applicant as a result of the denial, including travel expenses, lost wages and child care expenses;

**(e)** require that the **transfer of the child** from one party to another be **supervised** by another person named in the order;

**(f)** if the court is satisfied that the guardian **may not comply** with an order made under this section, order that guardian to

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

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

**(g)** require the guardian to pay

**(i)** an amount not exceeding $5 000 to or for the benefit of the applicant or a child whose interests were affected by the denial, or

**(ii)** a fine not exceeding $5 000.

**(3)** If the court makes an order under subsection (2) (a), (b) or (e), the court may allocate among the parties, or require one party alone to pay, the **fees** relating to the family dispute resolution, counselling, service, program or transfer.

**When Denial is not Wrongful**

* **s. 62** *FLA* provides egs of circumstances where denial of parenting time/contact is NOT wrongful. Most remedies for denial only available when parenting time/contact WRONGFULLY denied
* But, even when denial not wrongful, ct can still order compensatory time to guardian to make up for missed time

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| ***DNL v CWS* – 2014 BCSC****Parenting time terminated, not in BIOC to spend time with father.***12 yr old child refused to spend time with father, father had scared her with conduct. Father seeking to enforce parenting time and mother seeking to terminate parenting time with father.* ***View of Child Report*** *– child didn’t want to spend time with father because of angry outbursts, accusations against her mother, refuses to let her go to mother’s home when upset, insults her mother and maternal grandmother, blames her for his behaviour. Father claimed mother turned child against him, psych found it was his own conduct*HELD – considered 37(2), found BIOC to terminate ct-ordered parenting time |

**62 (1)** For the purposes of section 61 *[denial of parenting time or contact]*, a denial of parenting time or contact with a child is not wrongful in any of the following circumstances:

1. the guardian **reasonably believed the child might suffer family violence** if the parenting time or contact with the child were exercised;
2. the guardian **reasonably believed the applicant was impaired by drugs or alcohol** at the time the parenting time or contact with the child was to be exercised;
3. **the child was suffering from an illness** when the parenting time or contact with the child was to be exercised and the guardian has a **written statement, by a medical practitioner or nurse practitioner**, indicating that it was not appropriate that the parenting time or contact with the child be exercised;
4. in the 12-month period before the denial, the applicant **failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact** with the child;
5. the applicant
6. informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and
7. did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;

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

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

**Child Abduction**

**Legal Framework**

*FLA*

* **Section 64 (see leg booklet)** – 2 types of orders with respect to removal of a child
	+ **1)** allows a court to restrict a person from taking a child out of a certain area – generally about parenting together and making sure each guardian knows where child is
	+ **2)** used where there is concern that a person may remove and not return a child. In these circumstances, the court may take action to stop the person from leaving with the child, such as surrendering passports, transfer specific property to ct-named trustee, pay child support to trustee named by ct or providing security to motivate the person to stay.
* **Section 80** – addresses the *Hague Convention on the Civil Aspects of International Child Abduction* to ensure cont’d application of Convention in BC
	+ Gov’t not bound to assume costs of legal counsel/advisors (except under legal aid system)
	+ Apply to child who was **habitually resident** in contracting state, but **not** someone in **(7)**

**(7)** Division 7 *[****Extraprovincial Matters Respecting Parenting Arrangements****]* applies respecting

**(a)** a child who is in Canada and who, immediately before a breach of custody or access rights, was habitually resident in Canada,

**(b)** a child who, immediately before a breach of custody or access rights, was habitually resident in a state other than a contracting state,

**(c)** a child who, immediately before a breach of custody or access rights, was resident, but not habitually resident, in a contracting state, and

**(d)** any other child affected by an extraprovincial order, other than a child respecting whom subsections (1) to (5) of this section and the convention apply.

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

* Under this Convention, the removal of a child, or the retention of a child, is considered wrongful if it breaches the rights of custody under the law of the jurisdiction in which child was **habitually resident** immediately before the removal/retention, and custody rights were actually being exercised (**Art 3**).
* **Art 3** also dictates that **ct must order return of the child “forthwith”** unless one of the narrow exceptions under **Arts 12, 13 (see above) or 20 apply**.

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| ***Kubera v Kubera* – SEE ABOVE** |

**Mobility/Relocation**

**Definition – Section 65(1)**

**“Relocation”** means 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**; one or more **other persons having a significant role** in child’s life.

* change of residence within a metropolitan center does not qualify as “relocation” (*Berry v Berry*)

Summary of Law - *Gordon v Goertz*

1. Parent applying for move must beet the threshold req’t of material change
2. Fresh inquiry on best interests of child
3. Evidence of new circumstances
4. No presumption of legal presumption, although custodial parent’s views entitled to great respect

**Legal Framework**

*FLA*

* **Section 46** – changes to child’s residence if no agmt or order
	+ **Applies if**
		- No written agmt or Order re parenting arrangements
		- Application made for an Order (under **s. 45**); and
		- Guardian plans to change child’s residence, change can be reasonably expected to have significant impact on child’s relationship with another guardian.
* **Sections 65-70** – Relocation
	+ **Applies if:** written agmt or Order re parenting arrangement or contact and guardian plans to relocate self or child, or both
	+ **Goal** is to introduce some **certainty** to this area of law by mandating **notice** of proposed move, defining what constitutes **relocation** and directing courts about both circumstances that should be considered and those that should not.
	+ **NOTE** – only **guardians** have right to challenge relocation

**Leading Case**

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| ***Gordon v Goertz* – 1996 SCC***Separated parents in Sask, mother wanted to relocate to Australia to study Orthodontics. Mother tried to vary access provisions of custody order to permit her to move child’s residence. TJ varied access order, gave father access in Australia only.*HELD – Access order varied to allow access in CAD as well.**Two Part Test to be Eligible to Relocate Child**1. Threshold req’t 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 needs, and the ability of the respective parents to satisfy those needs.

**Consider**: - all regular **s. 37(2)** factors **plus maximum contact principle! (s. 16/17 *DA*)** |

**Notice of Relocation** – **Section 66**

* must give **all other guardians and persons having contact with child**
	+ at least 60 days advance notice; and
	+ in writing, with date of the relocation and name of the proposed location.
* Ct can grant exemption if
	+ Notice cannot be given without incurring risk of family violence, or
	+ No ongoing relationship bw child or other guardian or contact person
		- Application for exemption can be brought *ex parte*

**Resolving Relocation Issues – Section 67**

After notice given – guardians and contact persons must use **best efforts**  to cooperate in resolving any issues re proposed relocation.

* BUT, nothing prohibits
	+ Guardian from bringing application for Order respecting relocation (**s. 69)**
	+ Person with contact from bringing application for Order re contact (**59, 60**)

**Objecting to Relocation – Section 68**

If other guardian objects to relocation of child, that guardian must

* File application for Order to prohibit relocation **within 30 days** after receiving notice of plan to relocate child.

**NOTE – If other guardian does not initiate application within 30 days, relocation may occur on/after date stated in written notice.**

**Orders Respecting Relocation – Section 69**

Court can make Order permitting or prohibiting relocation

* **TEST**
	+ BIOC (**37(2)**)
	+ Good faith
	+ Reasonable and workable arrangements to preserve the relationship bw child and other guardians, persons entitled to contact, and other persons who have significant role in child’s life.
* **Onus depends on** whether o rnot there is **substantially equal parenting time**

**Not Substantially Equal Parenting Time – Section 69(4)**

Relocating guardian must satisfy ct that

* proposed relocation made in good faith; and
* she/he has proposed reasonable and workable arrangements to preserve relationships.
* If ct satisfied of above, relocation **must** be considered in BIOC unless other guardian satisfies Ct otherwise.

*Onus on non-relocating guardian*

**Substantially Equal Parenting Time – Section 69(5)**

Relocating guardian must satisfy the Ct that

* proposed relocation is made in good faith;
* she/he has proposed reasonable/workable arrangements to preserve relationships; and
* relocation is in best interests of child

*Onus on relocating guardian.*

**Factors NOT to be considered** – **Section 69(7)**

* Ct must NOT consider whether guardian would still relocate if child’s relocation were not permitted (improper double-bind question)

**Parental Alienation**

* No specific provisions under *FLA* dealing with allegations of parental alienation, but numerous judgments

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| ***NRG v GRG* – 2015 BCSC****Signs of estrangement and alienation and possible remedies.*** “**estrangement”** (sometimes “realistic enstrangement”) is when child understandably refuses contact with parent because of parent’s behaviour, physical or emotional abuse, rigid or restrictive parenting, immature and self-centered behaviour, and/or dysfunctional conduct arising from the parent’s own psych issues. May be reasonable/adaptive response to estranged parents behaviour.
* **“alienation”** – little or no objectively reasonable cause for child’s rejection of parent, particularly when it is product of other parent’s hostility and antipathy towards his/her former spouse and intentional undermining of child’s relationship with former spouse. While undermining can be direct/indirect, it’s expressly designed to alienate the child from other parent. **Pernicious and unpardonable.**

**Remedies Adopted by Courts*** Detailed **case mgmt. and parental conduct orders** with cost consequences for non-compliance
* Judicial exhortation urging compliance and emphasizing emotional harm caused to children (generally only effective in less severe cases of alienation)
* Court-ordered **therapeutic intervention** where appropriate, recognizing “force-marching” a child to reunification may be unrealistic and harmful
* Ordering supervised access/parenting time to allay child anxiety, pave way for further strategies to achieve positive relationship
* Suspension of child/spousal support as sanction to enforce more engagement with other parent
* Transferring custody from alienating parent to rejected parent where expert testimony establishes the long-term benefits will outweigh any short-term emotional trauma to the child
* Terminating access by/parenting time of alienated parent when alienation is so entrenched that the “cure is worse than the illness”, recognizing that children do sometimes resume a relationship with rejected non-custodial parent after long period without contact, sometimes in later years.
 |

**CONDUCT ORDERS**

**Part 10 – Court Processes**

* authority to make orders re: procedural matters; to manage case or parties; for enforcement.
* Unless indicated, authority for both courts. As Prov Ct only has no inherent authority, only legislated, outlining broad powers provides Prov Ct with greater tools/powers to manage proceedings etc.

**Section 199 – Conduct of Proceeding**

**199(1)** ct must ensure that proceeding under this Act conducted

1. with as little delay as possible
2. in a manner that strives to
3. minimize conflict bw, and if appropriate, promote cooperation by, the parites, and
4. protect children and parties from family violence

**199(2)** If child may be affected by proceeding under this Act, a court **must**

1. consider the impact of the proceeding on the child, and
2. encourage the parties to focus on the best interests of the child, including minimizing the effect on the child of conflict bw the parties.

**Section 206 – Exclusion of public or from publication**

**206** a court may make an order

1. excluding any person, other than a party, from attending a hearing, or
2. prohibiting publication of the identity of a party or child in reports of a hearing if the court considers the publication would have an adverse effect on, or cause undue hardship to, the party or child

**Sealing Orders**

**SC Practice Direction 35 (June 1, 2012)**

* Sets out procedure for applying for order sealing all/part of file and specific form of Order
* Party can ask to seal entire file, specific documents, clerk’s notes, an Order…

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| ***Aquilini v Aquilini* – 2012 BCSC***Husband sought sealing order (for almost everything). Said proceedings attract media attention, real risk to 4 children and family business interests, and of confidential financial information being released. Wife opposed order, said public interest of open court outweighed private interest of Husband, and children accustomed to public interest in family.*HELD – Ct granted sealing order for affidavits/transcripts, but not reasons for judgment and court orders.**TEST (same as for injunctive relief)**1. **serious issue to be tried**
2. **irreparable harm if not granted?**
3. **Balance of convenience**

**NOTE** – Rarely give these… usually just initialize the names, incentive to settle |

**Non-disclosure: the cancer of matrimonial property litigation**

“Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women to simply give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done. Non-disclosure also has the tendency to deprive children of property support. – *Justice Fraser,* ***Cunha v Cunha***

**Section 212 – Orders re Disclosure**

**212(1)** a ct, at any time, may make order to disclose information in accordance with Rules (SC or Prov Ct)

**212(2)** court may order a party to pay cost of complying with the order

**212(3)** A person who receives the disclosure must not use the information except as necessary to resolve a family law dispute.

**Section 213 – Enforcing Disclosure**

**213** If person fails to comply with order/req’t (under Rules or Child Support Guidelines) for disclosure, ct may:

1. make disclosure order
2. draw adverse inference, including imputing income
3. require party to post security
4. require person to pay
5. for expenses reasonably/necessary incurred as result of non-disclosure or incomplete, false or misleading disclosure, including fees and expenses related to family dispute resolution **(no limit!)**
6. an amount not exceeding $5K for benefit of a party, or spouse or child whose interest were affected by non-disclosure
7. fine not exceeding $5K
8. any other order ct considers appropriate

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| ***TJB v BAF* – 2014 BCOC***Applicant father brought application to recalc child support because parenting time increased to over 40%. R mother opposed, sought order that Father pay legal fees for failure to disclose and providing incomplete, false, misleading information.*HELD – Father breached **s. 213(1)**, must be “penalized for his abuse of ct process and wasting of ct time and the mother’s resources. Subject to fine of $13, 617 pursuant to **s. 213(d)(i)** to compensate Mother for legal expenses (**NO LIMIT ON THIS ONE!!)*** Father had “continually provided Ct with incomplete and misleading disclosure. Disclosure req’d was not onerous or complex”.
* Father claimed financial distress, but bank records showed high liquor store purchases
* Father’s financial materials incomplete, inaccurate and misleading, “highly aggravating factor”
 |

**Section 221 – Misuse of court process (ABUSE OF PROCESS/FRIVOLOUS CLAIMS!)**

**221(1)** court may make order prohibiting party from making further applications without leave if ct is satisfied party has made application that is trivial, conducted a proceeding in manner that is a misuse of ct process, or is otherwise acting in manner that frustrates or misuses ct process.

**221(2)** If ct makes order under ss(1), ct may also set specified period for order, impose terms/conditions for obtaining leave, or require a party to pay expenses incurred by other party, or amount or fine up to $5K.

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| ***Williams v Williams* – 2015 BCSC****Numerous applications, amounting to abuse… over the line.***Proceeding started 15yrs prior. Initial trial re child support. 2010-2014, 21 applications, resulting in 27 orders. Each party sought order preventing other from initiating further applications. Two judges had previously restricted parties access to cts for set periods of time.*ISSUE – not which party brought most applications, but relative merits of the applications, and whether conduct of either party necessitated them.HELD – Husband’s conduct “amounted to attempts to control and harass the Pl wife”. Neither party allowed to file applications without leave of court for 5 years.* husband even filed applicant to dispute indigent status order obtained by wife (for those with little money, get breaks on court fees etc)
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**Orders Respecting Conduct**

**Division 5 – Explained by Ministry of Justice**

* provides ct with wide range of tools to help judges manage behaviour, de-escalate tensions, promote compliance, and facilitate settlement of disputes. Includes collection of tools/remedies that range from preventive measures, such as sending people to counseling/programs 🡪 punitive measures (fines/pmt of expenses). Allow judge to tailor processes to needs of particular family.
* New measures available to both SC and Prov Ct. Ensure more consistency bw tools/remedies available bw two levels of ct, and ensure Prov ct (with leg authority) has tools they need to manage family law cases.

**Section 222 – Purpose of Conduct Orders**

**222** Ct may make an order under this Division for one+ following purposes:

1. facilitate the settlement of family law dispute or issue in dispute
2. manage behaviours that might frustrate the resolution of family law dispute
3. prevent misuse of the court process
4. facilitate arrangements pending final determination of family law dispute

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| ***KSL v BM* – 2015 BCPC****Serious case management. Payment of s. 7 expenses (special expenses)***Issues raised at hearing over special expenses for C/L. Apparent that Ms. L and Mr. M had not properly discussed issues. Parents acknowledged inability to cooperate, so structure necessary.* Orders made1. Ms. L prepare budget for special expenses she proposes to incur for C/L during 12 months… must include sufficient information for Mr. M to make reasoned assessment of each budget item.
2. Must deliver budget to Mr. M by…
3. Mr. M must provide written response by… If he objects to any item, must state basis for objection
4. If parties unable to agree, Ms. L should schedule court application for ….
5. Whether final budget agreed/settled by ct order, Mr. M responsible for 2/3 special expenses, Ms. L 1/3
6. Ms. L will render to Mr. M accounting of special expenses incurred… Mr. M will pay to her 2/3 of amts incurred within 14 days of delivery of statement of acct. If dispute, bring application to ct.
7. If unforeseen circumstances, Ms. L must notify Mr. M in writing, seek agmt to expense. If no agmt, Ms. L should apply to ct to resolve question.
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| ***VEA v ARG* – 2013 BCPC****Order to sign passport application of child.****[24]**… in context of s. 222(b), “resolution” means the imposition by the ct of a set of rights and obligations which will govern parties’ future conduct in relation to one+ issues in the proceeding.**[25]** With that definition… conclude that order to compel Ms. A to sign E’s passport application may be made for purpose of managing behaviour on part of Ms. A which would likely frustrate resolution of issue bw parties. “Behaviour” in question is refusal to sign the application. Issue is Mr. G’s mobility rights as custodial parent. “resolution” might be order of this court, authorizing Mr. G to remove E, temporarily or permanently, from CAD. Ct is empowered by ss. 222 and 227 *FLA* to order Ms. A to modify her behaviour to avoid frustration of ct’s authority to adjudicate disputes about E’s mobility.**…****[30]** There will be an order that Ms. A sign E’s passport application and deliver the completed application, bearing her signature to counsel for Mr. G at…. |

**Section 223 – Case Management**

**223** A court may make order to:

1. dismiss or strike all/part of a claim
2. adjourn a proceeding while parties attempt to resolve issues or a party complies with an order
3. require further applications be heard by judge or master making order
4. prohibit the party from making an application, without leave, re any matter within the parenting coordinators authority.

**Section 224 – Dispute resolution counseling**

**224** A court may make an order

1. req’ing parties to participate in family dispute resolution;
2. req’ing one+ parties, or a child (with/without consent of guardians) to attend counseling, specified services or programs

**Section 225 – Restricting Communications**

**225** Unless a Protection Order is more appropriate, a ct may make an order setting restrictions or conditions re communications bw parties, including when/how they may be made

* communication only by text or email (like texting “whore” to ex every few mths)
* prohibiting direct communication
* restricting communication to child-related subjects
* **s. 228(2)** – if fail to abide by this, ct **must** consider protection order

**Section 226 – Orders re Residence**

**226** A court may make an order

1. req’ing a party to pay the rent/mortgage, utilities, taxes, insurance
2. prohibiting a party from terminating services;
3. req’ing a specified person to supervise the removal of personal belongings from the residence

*These Orders may be made in conjunction with orders for exclusive occupancy of the family residence (****s. 90****)*

**Section 227 – Orders re Conduct**

**227** A ct may make order req’ing party to

1. give security in any form;
2. report to ct or to a person named by ct;
3. do/do not do anything, as the court considers appropriate, in relation to a purpose in s. 222

**Section 228 – Enforcing Conduct Orders**

**228 (1)** If a party fails to comply with Order under Div 5, ct may

1. make further order
2. draw an adverse inference
3. make an order req’ing party to pay
4. for expenses reasonably/necessarily incurred as result of non-compliance, including fees/expenses related to family dispute resolution (**no limit! Argument re *TJB v BAF*)**
5. amt not exceeding $5K for benefit or party, or spouse or child whose interest affected by non-compliance
6. find not exceeding $5K
7. may make any other order necessary to secure compliance

**228(2)** If party fails to comply with Communications Order (**s. 225**), Court **must** consider whether it would be appropriate to make a Protection Order

**Section 230 – Enforcing Orders Generally**

**230(1)** An order may only be made under this section for the purpose of enforcing an order made under this Act, if no other enforcement provision applies.

**230(2)** Court on application by a party may

1. require a party to post security
2. require a person to pay
3. for expenses reasonably and necessarily incurred as a result of the party’s actions, including fees and expenses reasonably related to family dispute resolution (**maybe no limit! *TJB v BAF***)

***NOTE –*** *not necessary to prove service of order being enforced (****s. 229****)*

* *this section does not apply to Protection Order;* ***s. 188*** *applies*

**Section 231 – Extraordinary Remedies**

**231(1)** Applies if person fails to comply with order made under this Act, and ct satisfied that **no other order under this Act will be sufficient to secure person’s compliance**.

**231(2)** Ct may make order that person be **imprisoned** for term **no more than 30 days**

**231(3)** Person must be given reasonable opportunity to explain non-compliance; ct may issue arrest warrant

**231(4/5)** For wrongful denial of parenting time (**s. 61**) or contact, ct may order police officer to apprehend child and take child to person

**231(6)** In order to locate and apprehend child, police officer may enter and search any place where child is believed to be.

**Section 228 and 231**

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| ***JRB v JHF* – 2015 BCPC***After 11 days of trial, R Mother awarded guardianship, Father denied contact until demonstrated success at devotion to therapy to deal with psych issues. Mother sought fine (****s. 228****) and imprisonment (****231****) for failure to comply with orders. Protection Order granted, father breached several times, led to criminal harassment charges, Father pled guilty; conditional sentence. Publication ban at end of trial. Father sent inappropriate e-mails to Mother’s lawyer, defaming and sending explicit content of Mother*.HELD – Fine would not secure compliance, father already $12K in arrears of child support, **ordered 10 days jail time**.* Father motivated to continue to harass mother. Extended history of harassing the Mother, failure to address his anger, sending of offensive materials to others.
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**CHILD SUPPORT**

3 fundamental ppls

1. Parents have joint and ongoing legal obligation to support children
2. Support is the right of the child
3. Support pmts based on earning capacity; that is, not only on what parent does earn, but also what parent **CAN** earn (court will **impute** income) – case re drug smuggling, will ct make you keep doing it? (no…)

**Legislation**

***Divorce Act* – ss. 15.1, 15.3, 17(1), (3), (4), (6.1), 25.1, 26.1**

***Family Law Act* – Part 7 (ss 147-159)**

***Federal Child Support Guidelines***

***Divorce Act***

**15.1** **(1)** A ct of competent jurisdiction may, on application by either/both spouses, make order req’ing spouse to pay for support of any/all children of the marriage.

**15.1(2)** Where application made under ss(1), ct may, on application by either/both spouses, make interim order req’ing spouse to pay for support of any/all children of marriage, pending determination of application under ss(1).

**15.1(3)** ct making order under ss(1) or interim order under ss(2) shall do so in accordance with applicable guidelines.

**15.1(4)** Ct may make order under ss(1) or interim order under ss(2) for definite or indefinite period or until specified event occurs, and may impose terms, conditions or restrictions in connection with order or interim order as it thinks fit/just.

**2(1)** **“child of the marriage”** means a child of two spouses/former spouses who, at the material time,

1. is under the age of majority and who has not withdraws from their charge, or
2. 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;

**11(1)(b)** It is the duty of the ct to ensure that reasonable arrangements have been made for child support “having regard to the applicable guidelines”. If reasonable arrangements have not been made, ct must stay granting divorce until such arrangements are made.

*Hansen v Hansen* – Desk order divorce application stayed because child support payable under separation agmt not satisfactory in light of Child Support Guidelines. Agmt stipulated he would pay $350/mth for support of two children, but Guidelines dictated it should be $564/mth for two children.

**“Other Cause”** – Post-Secondary (from ***DA*** “child of the marriage” (b), is age of majority or over and under parents’ charge but is unable, by reason of illness, disability **or other cause** to withdraw from their charge or obtain necessaries of life.

***Federal Child Support Guidelines*** – **s. 3(2)(a)** – if child over age of majority, gets same amount by table as under age of majority – if inappropriate, court considers what appropriate re means, needs, conditions of child (parents’ financial ability in play now)

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| ***Farden v Farden* – 1993**Considerations for whether child will get support towards post-secondary education:

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| Whether child studying part time or full time (3 classes = full time) | Whether child applied for, or is eligible for, student loans or other assistance |
| Whether child’s career plans are reasonable/appropriate | Child’s ability to contribute to his/her own support through part time employment |
| Child’s age | Past academic performance/demonstrates success |
| Parent’s plan for education of children, esp. when plans made during cohabitation | In case of mature child, whether child unilaterally terminated relationship with parent from whom support sought |

 |

* **re further degrees, depends on above factors again –** *Case* – doctor complained about daughter going to med school, reasonable as he is doctor, had to pay.

***Family Law Act***

**147(1)** Each parent/guardian of child has duty to provide support for child, **unless** child

1. is a spouse, or
2. is under 19 years of age, has voluntarily withdrawn from his/her parents’ or guardians’ charge, except if child withdrew because of family violence or because child’s circumstances were, considered objectively, intolerable.

**147(2)** If child referred to in ss (1)(b) returns to his/her parents’ or guardians’ charge, their duty to provide support for the child resumes

 - when kids over 19, doing school etc… then money starts to go into child’s hands…

**147(3)** If a guardian who is not the child’s parent has a duty to provide support for that child, the guardian’s duty is secondary to that of the child’s parents.

**(4) and (5)** deal with step parents and child support (below)

**Case Law (*FLA*)**

* *CLP v ND* – purpose is to ensure children have consistent and reasonable std of living; primary responsibility lies on parents, and if parents cannot adequately provide, step-parent may be ordered to contribute. However, is possible that step-parent will not have to pay support and is also possible that step-parent will have to pay full amt.

**Re “Voluntary withdrawal” of children** – **s. 147**

* *DZM v SM* – Removal of children by state is not “voluntary withdrawal” as intended by *FLA*
* *Henderson v Bal* – child’s refusal to visit does not amount to “voluntary withdrawal”
* *MA v FA* – child who is incarcerated for more than one year has voluntarily withdrawn

*Federal Child Support Guidelines*

* Came into effect May 1, 1997; Based on recommendations from federal/provincial/territorial “Family Law Committee”
* Before the Guidelines, judicial discretion used to determine levels of support
* Child Support Guidelines Regulation, BC Reg 61/98 in effect April 14, 1998, makes Guidelines applicable in BC

**Objectives of *FCSG***

**Section 1: The objectives of the Guidelines are:**

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

**Amount of Child Support – Section 3 Presumptive Rule**

**3(1)** Unless otherwise provided under these Guidelines, the amount of child support order for children under the age of majority is

1. the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
2. the amount, if any, determined under **s. 7**

**3(2)** For when child is age of majority or over

**3(3)** applicable table… (one we have)

**3(4)** Where income of the spouse against whom child support order is sought is over $150K, amt of child support order is.

1. amount under **s. 3**
2. if court considers that amt inappropriate…

**Income over $150K – s. 4 *FCSG***

Where income of payor spouse over $150k, amt of child support is:

* + - * 1. amt determined under **s. 3** (table amounts) or
				2. if ct considers that amt inappropriate, then

table amount up to first $150k

amt ct considers appropriate having regard to:

conditions, means, needs and other circumstances of children, and

financial ability of each spouse to contribute to support of children

amount, if any, determined under **s. 7**

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| ***Francis v Baker* – 1999 SCC***Parties married 1979, 2 kids. Mr Baker lawyer and biz owner in TO; Ms. Francis high school teacher. Divorced, reached separation agmt where Ms. Francis paid $30K child support each year. Later, Ms. Francis applied for increase in child support, matter reached trial 9 years later… she amended pleadings to claim child support under* FCSG.  *Time of trial, Mr. Baker earned $945, 538/yr, net worth $78M. Ms. Francis earned $63K/yr.*Trial – child support of $10,034/mthCA – dismissed Baker’s appealSCC – considered “appropriate” from **s. 4(b)** guidelines* req’s objectives of **predictability, consistence and efficiency** on one hand, balanced with those of **fairness, flexibility, recognition of actual “conditions, means, needs, and other circumstances of children”** on other
* “**inappropriate”** defined to mean “**unsuitable**” rather than merely “inadequate”
* Parl intended **presumption in favour of Table amounts**, must be “articulable” reason for displacing Guideline figures, relevant factors differing case to case
* **CA** interpretation of “inappropriate” not upheld, **downward variation of Guideline figure possible**

**NOTE – HIGH INCOME EARNERS will argue** that this is income distribution… not spousal support here… |

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| ***Metzner v Metzner* – 2000 BCCA***Summary of* ***s. 4*** *principles*

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| **Presumption of table amounts** | Only **increased or decreased** if **party rebutted presumption** |
| **clear/compelling evidence** for departing from Guidelines | Factors for determining appropriateness **4(b)(ii)**(conditions/means/needs; parent financial ability) |
| Focus on **“centrality”** of actual situation of children, req’d balance | Objective is **maintenance of children**, not household equalization/spousal support |
| Ct **needs necessary information** to determine appropriateness | **Onus on paying parent to show expense not reasonable** (too high) |

 |

**Determining Income**

* Guideline income based on present year’s predicted income/historical pattern of income; Each source of income **added together**
* Income may be determined under **ss. 16-21 *FCSG***; Income may also be **imputed** where failure to comply with disclosure obligations **s. 21**

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

**Section 17** – pattern of income; using last 3 years and determining what is fair/reasonable, including in light of fluctuations and non-recurring amounts

**Section 18** – for SHs or directors of corporations, ct can consider all/part of pre-tax income and amt commensurate with service the payor receives from corp

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

**Imputing Income**

**Section 19** – Court can impute income as it considers appropriate in circumstances, including

1. payor **intentionally under-employed or unemployed** (expected to work full time)
2. payor **exempt from** paying federal or provincial **tax**
3. Payor lives in country with **lower tax rate**
4. Appears **income has been diverted** which would affect level of child support payable (income splitting with new spouse most common here)
5. Spouse’s **property not reasonably used to general income**
6. Payor **failed to provide income information**
7. Payor **unreasonably deducts expenses from income**
8. Payor derives **significant portion of income from dividends, capital gains, other sources taxed at lower rate or exempt** from tax
9. Payor **beneficiary under trust** and is/will receive income from trust

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| ***Koch v Koch* – 2012 BCCA****Imputing Income – Under/un-employment**General Principles

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| Parents who are healthy and can work have duty to seek employment | Reasonable income-earning capacity based on parent’s age, education, skills, health, experience |
| Limited experience and skills do not justify failure to pursue employment | Persistence in un-remunerative employment or unrealistic career aspirations not an excuse |
| Self-induced reduction in income will **not** justify avoidance of child support obligations |  |

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| ***SAB v CDB* – 2004 BCSC – drug trafficker case!!****Court will not impute income for non-legal means of income-earning. Imputed on basis of LEGAL EARNING POWER. Public policy.***D is drug trafficker, long crim record (including living off avails). Earned virtually all income during marriage from trafficking (“work”). Has not trafficked since action started, faces enormous assessment of income tax arrears ($200k-$300k), which he’s contesting. Pl exotic dancer since before met D, now has cleaning job in hospital in Victoria, but supplements with some dancing.*ISSUE – What income attributable to D? (will ct make him go back to trafficking?)HELD - legal earning capacity… |

**Section 7 Expenses (Special or Extraordinary Expenses) (came up in** *KSL v BM*)

Court may order that parents pay for all/any portion of following expenses:

|  |  |
| --- | --- |
| Child care to facilitate parent in working or going to school | Medical/dental insurance premium |
| Health-related expenses, not covered by plan | Extraordinary expenses for primary or secondary school that meet’s child’s particular needs |
| Expenses for post-secondary education | Extraordinary expenses for extracurricular activities |
| Expenses that exceed those requesting parent can reasonably cover | Expenses court considers extraordinary taking into account:* **i)** amt of expense re income of requesting spouse
* **ii)** nature/number of educational programs/activities
* **iii)** special needs/talents of children
* **iv)** overall cost of programs/activities
* **v)** any other similar factor court considers relevant
 |

* **“extraordinary expense”** defined **s. 7.1**….

**Split Custody** – **Section 8**

**Section 8** Where each spouse has custody of one+ children, amt of child support order is difference bw amt that each spouse would otherwise pay if child support order sought against each spouse. (**uncommon, usually keep kids together, maybe when older**)

**Shared Custody – Section 9** (NOT like in *DA*) – **significant amt of litigation**

**Section 9** Where spouse exercises right of access to/has physical custody of, child for **not less than 40% of the time over the course of the year**, amt of child support order must be determined by taking into acct

1. amts set out in applicable tables for each spouse
2. increased costs of shared custody arrangements; and
3. conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

**Shared Custody (Section 9) – Quantum**

* **s. 9** req’s ct to determine amt of child support in accordance with 3 facts listed (once 40% threshold met)
* specific language of **s. 9** warrants emphasis on flexibility and fairness to ensure that econ reality and particular circumstances of each family property accounted for
* weight given to each factor depends on particular facts of each case
* **no presumption of reducing/increasing amt payable under Table amts; no conclusive formula**

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| ***Contino v Leonelli-Contino* – 2005 SCC****TWO-STEP TEST**1. **Does the parent cross the 40% threshold?**
2. **What amount of child support should be paid given factors under s. 9?**

**40% threshold*** to trigger s. 9, access/parenting time of 40% over course of year must be met
* section criticized as arbitrary, possible discouragement from primary care parent allowing “liberal and generous access”
* *Onus on parent seeking to invoke* ***s. 9*** *to establish care of 40% or more*
 |

**Calculating Time (for 40% threshold)**

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| ***Maulstaid v Blair* – 2009 BCCA*** although courts have bemoaned the imprecision of the section and expressed concerns over the consequences for children, court is not free to disregard the language of **s. 9** and the criteria for its application
* no single method in determining amount of time, but some methods include:

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| Counting hours each parent has with children over 2-week period | Counting hours over a year, including during school and holidays |
| Counting hours in a typical week | Counting number of days |

 |

**Undue Hardship – Section 10**

**10(1)** On either spouse’s application, **ct may award amt of child support that is different from amt determined under any of ss. 3, 5, 8 or 9 if ct finds that spouse making request or child in respect of whom request is made, would otherwise suffer undue hardship**

**10(2) Circumstances that may cause undue hardship include:**

1. spouse has responsibility for high level of debts reasonably incurred to support spouses/children prior to separation or to earn a living
2. spouse has unusually high expenses re exercising access to child
3. spouse has legal duty under judgment, order or written separation to support any person (other families… parents used to be able to sue you but NOT ANYMORE)
4. spouse has legal duty to support child, other than child of marriage, who is
5. under age of majority, or
6. age of majority or over but unable…to obtain necessaries of life
7. spouse has legal duty to support any person who is unable to obtain necessaries of life due to illness/disability

**10(3) Standards of living must be considered** (deny hardship if spouse claiming hardship has, after determining child support under **3, 5, 8, or 9** has higher std of living than household of other spouse)

**10(4) Standards of living test** – court may use comparison of household stds of living test set out in Schedule II (**set of steps**)

**10(5) Reasonable Time** – Where ct awards different amt of child support under ss (1), may specify, in child support order, reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and amt payable at end of that time.

**10(6) Reasons** Where ct makes child support order in different amt under this section, must record reasons for doing so.

**DIVISION OF PROPERTY**

* *FLA* new, replaced *FRA* – to reduce litigation and encourage out of court settlement
* Changes – application to CL and married spouses alike; redefines that is family property; redefines property division and includes division of family debt
* **Judicial interpretation** – difficulties – family law pilot project

**Who can make a claim?**

**Section 3 *FLA***

**“spouse”** – married individuals, or

* those that have lived together in a marriage-like relationship for a continuous period of at least 2 years
	+ “living together” not necessary, other indicia of “marriage-like relationship”
* Or have had child together – only for the purpose of support (**exception** – not spouses for the purpose of property and pensions division)
* Spouse includes former spouse

**Entitlement & Responsibility**

Presumption of equal entitlement & equal responsibility

***FLA* Section 81**

* equal entitlement to family property and equal responsibility for family debt, regardless of use or contribution
* on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt

Exception – “significantly unfair”

***FLA* Section 95** – court may order unequal division of family property and/or family debt if it would be significantly unfair to equally divide between the spouses.

 *Applies to marries and common law spouses alike*

**Date of Separation – Section 3(4)**

1. spouses may be separated despite continuing to live in the same residence, and
2. the court may consider, as evidence of separation,
3. **communication, by one spouse to the other spouse, of an intention to separate permanently, and**
4. an action, taken by a spouse, that demonstrates the spouse’s intention to separate permanently

**NOTE** – living separately may not be sufficient to indicate intention to separate

**Importance of Date of Separation**  (in addition to above stuff re *Orwell* case…)

* **Acts as a triggering event** – the point in time when the joint financial unit of the spouses is undivided into two individual financial units
* **Exception** – assets bought with family property/debts incurred for family purpose
* **Advice to clients** – deliver written notice of intention to separate
* **Reconciliation** – impact on date of separation
	+ ***FLA* section 83(1)** – spouses not considered to have separated if, within 1 year after separation,
		- a) they begin to live together again and the primary purpose for doing so is to reconcile, and
		- b) they continue to live together for one or more periods, totaling at least **90 days**

**Family Property**

***FLA* Section 84**

* includes **all real and personal property**, **unless** it is **excluded property – then it’s the increase in value** of that asset during the relationship that is family property
* Includes any property that
	+ At date of separation, is owned by at least one spouse, or in which at least one spouse has a beneficial interest; and/or
	+ After separation, was acquired by at least one spouse, or in which at least one spouse acquires a beneficial interest, that is derived from the family property
* **Ownership is not necessary**

**May include**

|  |  |
| --- | --- |
| Real estate/land | share or interest in a corporation |
| money of a spouse in an account with a financial institution | spouse’s entitlement under annuity, pension, RRSP or income plan |
| Part of trust property contributed to by a spouse in which:* spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment
* spouse has a power to transfer to himself or herself that part of the trust property, or
* the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse
 |

**Family Debt**

***FLA* Section 86**

* all financial obligations incurred by either spouse during the course of the relationship (date of cohabitation/marriage to date of separation) = family debts subject to equal division
	+ if person can prove debt incurred solely for benefit of other person (not family), excluded
* debts incurred post-separation excluded, unless incurred for purposes of maintaining family property
* pre-relationship debts are excluded

**Excluded Property**

***FLA* Section 85 – includes**

|  |  |
| --- | --- |
| Property that existed prior to relationship | Gifts or inheritances to a spouse |
| A settlement or award of damages to a spouse, compensation for injury/loss (unless income) | Property held in a discretionary trust* to which spouse did not contribute
* of which spouse is beneficiary
* that is settled by a person other than the spouse
 |
| Money paid/payable under an insurance policy (unless income) | Property derived from excluded property or the disposition of excluded property |

**Exception** – the amount by which the value of excluded property has increased in value since the later of the date

* the relationship between the spouses began, or
* the excluded property was acquired.
* The increase in value is family property

**Unequal Division**

***FLA* Section 95 (1)** The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

1. equally divide family property or family debt, or both, or
2. divide family property as req’d under Part 6 [*Pension Division*]

**95(2) Factors to consider** – for the purposes of ss(1), SC may consider one+ of following

|  |  |
| --- | --- |
| **a)** duration of relationship | **b)** terms of any agmt bw spouses, except **93(1)** [*setting aside agmts re property div*] agmts |
| **c)** spouse’s contribution to career/career potential of other spouse | **d)** whether family debt incurred in normal course of relationship bw spouses |
| **e)** if amt of family debt exceeds value of family property, ability of each spouse to pay a share of it | **f)** whether a spouse, after separation, caused significant decrease or increase in value of family property beyond market trends |
| **g)** fact that a spouse, other than spouse acting in good faith: **i)** substantially reduced value of family property, or **ii)**disposed of/transferred/converted/exchange d property that is/would have been family property into other form, causing other spouse’s interest 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 as a result of an order |
| **i)** any other factor, other than the consideration referred to in ss(3), that may lead to significant unfairness |

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

**Valuation**

***FLA* Section 87**

Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6 (Pensions),

* the value of family property must be based on its **fair market value**, and
* the value of family property and family debt **must be determined as of the date**
	+ an **agreement** dividing the family property and family debt is made, or
	+ of the **hearing** before the court respecting the division of property and family debt

**Before Agreement or Final Order is Made**

***FLA* Section 89** – **Orders for interim distribution of property**

* If satisfied that it **would not be harmful** to the interests of a spouse and is **necessary for a purpose listed below**, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund
	+ a) family dispute resolution
	+ b) all or part of a proceeding under this Act, or
	+ c) the obtaining of information or evidence in support of family dispute resolution or an application to a court

***FLA* Section 90 – Temporary orders respecting family residence**

The Court may make an order granting a spouse, for a specified period of time,

1. exclusive occupation of a family residence, or
2. possession or use of specified personal property stored at the family residence, including to the exclusion of the other spouse

**90(3)** An order under this section does not

1. authorize a spouse to materially alter the substance of the family residence or personal property
2. grant to a spouse a proprietary interest in the family residence or personal property, or
3. subject to ss (4), grant to a spouse any right that continues after the rights of the other spouse, or of both spouses, as owner or lessee are terminated.

***FLA* Section 91** – **Temporary orders respecting protection of property**

**91(1)** On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 [*Pension Division*] until or unless the other spouse establishes that a claim made under this Part of Part 6 will not be defeated or adversely affected by the disposal of the property.

Court may make one or more of the following orders:

1. for the possession, delivery, safekeeping and preservation of property
2. for the purpose of protecting the applicant’s interest in property from being defeated or adversely affected
3. prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or
4. vesting all or a portion of the property in, or in trust for, the applicant

**91(3)** The Supreme Court may make an order under this section before notice of the application is served on the other spouse, or may order that notice of the application be served on the other spouse.

**91(4)** Despite **s. 215(2)** [*changing, suspending or terminating orders generally*], the Supreme Court may change, suspend or terminate an order made under this section.

**Part 6 – Pension Division**

* Pensions are family property
* Part 6 of the *FLA* deals with the division of pensions
* There are numerous provisions detailing how to effect the division of pensions

**SPOUSAL SUPPORT**

**What is it?**

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

**Section 161 *FLA* and 15.2 *DA***

The **objectives of spousal support** are:

1. to recognize any **economic advantages or disadvantages** to the spouses arising from the relationship bw the spouses or the breakdown of that relationship;
2. to **apportion between the spouses any financial consequences** arising from the care of their child, beyond the duty to provide support for the child;
3. **to relieve any economic hardship** of the spouses arising form the breakdown of the relationship between the spouses;
4. as far as practicable, to promote the **economic self-sufficiency** of each spouse within a reasonable period of time

(this is exactly what **s. 161 *FLA*** says)

**Spousal support order** (***Divorce Act*)**

**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.

* **Interim order**

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

* **Terms and conditions**

**15.2(3)**The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

* **Factors**

**15.2(4)**In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

* + **(*a*)**the length of time the spouses cohabited;
	+ **(*b*)**the functions performed by each spouse during cohabitation; and
	+ **(*c*)**any order, agreement or arrangement relating to support of either spouse.
* **Spousal misconduct**

**15.2(5)**In making an order under subsection (1) or an interim order under subsection (2), the court **shall not take into consideration any misconduct** of a spouse in relation to the marriage.

* **Objectives of spousal support order**

**15.2(6)**– SEE ABOVE – OBJECTIVES

***FLA***

**160** – **Duty to provide support for entitled spouse -** if spouse entitled to spousal support, other spouse had duty to provide in accordance with **162**

**161 – objectives (see above) of spousal support**

**162 – Determining spousal support** – consideration of means/needs/other circumstances including **a)** length of time spouses together**; b)** functions performed by each spouse during period they lived together; **c)** agmt between spouses, or order, relating to support of either spouse.

**Three Conceptual Grounds OF ENTITLEMENT**

1. **Contractual** (agmt that someone will pay spousal support)
2. **Compensatory; and** (someone gave up career opportunities, took lower paying job for family)
3. **Non-compensatory** (in the interests of fairness, not for any compensatory purpose but should get spousal support)

**CONTRACTUAL GROUNDS (163 *FLA*)**

**The *Pelech* Trilogy and *Miglin v Miglin***

* applies in situations where parties have entered into marriage/separation agreement, or contractual obligation is implied
* **until *Miglin*, authority on how much weight ct should attach to agmt was trilogy**.
* Held that, subject to exceptions, parties should be bound by agmt.
* Discretion to depart from spousal support provisions of agmt on application of supported spouse **limited to cases** in which applicant could show **radical change of circumstances flowing from a pattern of economic dependence caused by marriage**.

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| ***Miglin v Miglin* – 2003 SCC***SCC ruled that threshold established by trilogy no longer appropriate under current, broader support objectives under Divorce Act. Held* ***that grounds for ordering support in amount that differs from agmt are broader****; however,* ***agmts on support still entitled to deference.*****TWO-STAGE TEST** for approaching originating application for support where there is existing agmt. Assess agmt from 2 points in time, time agmt made, and current circumstances.**Stage 1**: Ct must look at:1. the circumstances in which the agmt was made to determine whether the agmt was obtained fairly; and
2. whether the agmt substantially complied with the objectives of the *DA*
* **Agmt not obtained fairly or that departed substantially from objectives of Act given little weight**

**Stage 2:** * If agmt satisfied first stage, ct must consider **whether it still reflects original intentions of parties** and remains in substantial compliance with the objectives of the Act.
* If **material change of circumstances not reasonably anticipated by parties occurred that has led to not condonable situation**, ct may give little weight to agmt
* “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]
 |

***FLA* – Varying Support Agreements**

**164** – provides for when court can make order that replaces all/part of existing agreement for spousal support.

* ct cannot make order for spousal support in face of agmt unless all or part of agmt is set aside (**165(3)**)

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| **TEST 1**Concerns procedural fairness in making agmt. **If any of following circumstances existed when parties entered into agmt, ct may set it aside:*** **a)** spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of agmt;
* **b)** spouse took improper advantage of other spouse’s vulnerability, including other party’s ignorance, need or distress;
* **c)** spouse did not understand the nature/consequences of the agmt
* **d)** other circumstances that would under the CL cause all/part of a contract to be voidable. (duress/undue influence etc)
 | **TEST 2** “significant unfairness” Court may set aside agmt if satisfied that agmt is significantly unfair. May consider:* **a)** length of time passed since agmt made
* **b)** any change, since agmt made, in condition/means/needs/other circumstances of a spouse
* **c)** intention of the spouses, in making agmt, to achieve certainty
* **d)** degree to which spouses relied on terms of agmt
* **e)** degree to which agmt meets objectives set out in **s. 161** *FLA*
 |

* two tests in **s. 164** that, if met, allow ct to set aside/replace agmt with order – **either test may be met to allow setting aside agreement**

**COMPENSATORY GROUNDS**

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| ***Moge v Moge**** **where spouse has forgone opportunities/endured hardships as a result of the marriage**
* relied upon most frequently where one spouse (usually woman) has left workforce to care for children, or just stay at home; **economic disadvantage to that spouse flowing from shared decision should be regarded as compensable**
* Also compensable: if spouse **declines promotion, refuses transfer, leaves position to allow other spouse to take advantage of an opportunity** for advancement or otherwise curtails employment opportunities and incurs econ loss (**para 82**)
* **Financial consequences of end of marriage include** things like: **loss of future earning power; loss of seniority; missed promotions; lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance**. Persons not in work force also cannot take advantage of **job retraining and upgrading of skills** provided by employers (**para 79**)
* **Spouse entitled to support not guaranteed same std of living**, but longer relationship, closer economic union, greater will be the presumptive claim to equal standards of living (**para 84**)

**Purpose of Spousal Support*** “to relieve economic hardship resulting from “marriage or its breakdown”. Whatever respective advantages to parties of marriage in other areas, focus of inquiry when assessing spousal support after marriage ended must be effect of marriage in either impairing or improving each party’s economic prospects” [**para 43**]
 |

**“Traditional” v “Modern” Dichotomy**

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| ***Heinemann v Heinemann* – 1989 NSCA****Differences bw breadwinner/housewife tradition and modern double-earner “modern” model. Primary goal of spousal support should be self-sufficiency.*** “It would appear that cts have recognized substantial change in nature of marriages and roles played by parties.
* At one end of scale we have traditional marriage where one spouse is breadwinner and other is child-rearer, often entitled to be supported for life.
* At other end we have type of marriage where both spouses participate in economic advancement of family unit and although one may be disadvantaged for a period of time during the marriage by deserting career opportunities, can be balanced upon dissolution by provisions promoting self-sufficiency of that spouse and thereafter both parties go their own ways. In between these 2 extremes, variety of marital arrangements that must be fairly dealt with on dissolution…
* IMO, judge today… should continue to recognize distinction bw traditional and modern marriages. Upon dissolution of modern marriage, goal should be to place both parties in position of economic self-sufficiency at earliest possible time… Temporal limits on maintenance should be utilized to accomplish this end, and illness/other factors not related to the marriage should not be used to justify the continuation of maintenance which otherwise should cease”
 |

**Recognizing Disadvantages of Marriage**

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| ***Back to Moge v Moge**** **perverse in extreme to assume that Parl’s intent in enacting the act was to financially penalize women in this country – para 63**
* division of functions bw marriage partners – wage-earner and homemaker **– almost invariably creates economic need in one spouse during marriage**… One divorce, law should ascertain extent to which withdrawal from labour force by dependent spouse during marriage (**considering factors listed above, skills/seniority etc**) has adversely affected ability to maintain him/herself. Need upon which right to maintenance is based follows from loss incurred by maintained spouse in contributing to marriage partnership…
* If functions of financial provision, household mgmt. and child care are divided in particular way bw husband/wife, law should characterize this as arrangement for accomplishing shares req’ts of partnership according to preferences, cultural beliefs, religious imperatives, or similar motivating factors.
* **Spouse who does one of these things should be seen as freeing other spouse to perform the remaining functions (para 65)**

**HOWEVER –** once marriage dissolves, kinds of non-monetary contributions made by wife may result iin significant market disabilities. Sacrifices she has made at home catch up with her, balance shifts in favour of husband who has remained in work force, focused his attention outside the home. She is left, in effect, with diminished earning capacity and may have conferred upon husband an embellished one (**para 70**)**Doctrine of Equitable Sharing of the Economic Consequences** of marriage/marriage breakdown upon dissolution which…Act promotes/seeks to recognize/account for both economic disadvantages incurred by spouse who makes sacrifices and economic advantages conferred upon other spouse. **Signficantly, recognizes that work within the home had undeniable value and transforms the notion of equality from rhetorical status to which it was relegated under a deemed self-sufficiency model, to substantive imperative. (para 73)** |

**Divorce – Impact on Women and Children (**Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America)

* “For most women/children, divorce means precipitous downward mobility – economically and socially. **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 case social dislocation and loss of familiar networks for emotional support and social services, intensify psych stress for women/children alike. **On a societal level, divorce increases female/child poverty and creates ever-widening gap between economic well-being of divorced men, on the one hand, and their children/former wives on the other**”

**JUDICIAL DISCRETION REQUIRES** – examination of all objectives; a broad approach; not all elements will be equally important

**NON-COMPENSATORY MODEL**

* applies in situations where **recipient spouse’s need exceeds entitlement to be compensated**. Obligation to provide support derives **from “basic social obligation”** of the marital relationship (ex-husband is safety net, not state)

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| --- | --- |
| ***Bracklow v Bracklow*****ISSUE** – “may a spouse have an obligation to support a former spouse **over and above** what is req’d to compensate the spouse for loss incurred as a result of the marriage and its breakdown (or to fulfill contractual support agreements)?* In cases where extent of econ loss can be determined, compensatory factors may be paramount….[but] “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” (from *Ross v Ross*) (**para 36**)
* Where **compensation not indicated and self-sufficiency not possible**, support obligation may … arise from marriage relationship itself (**para 37**)
* Leg suggests concern with need that transcends compensation or contract. **Even if a spouse has foregone no career opportunities or has not otherwise been handicapped by marriage, the court is req’d to consider that spouse’s actual ability to fed for him/herself and effort that has been made to do so, including efforts after marriage breakdown.** Leg invites broad consideration of all factors re parties’ financial positions… (**para 40**)
* Econ hardship…arising from breakdown of marriage” can mean health/career disadvantages… also just that person who formerly enjoyed intraspousal entitlement to support now finds herself/himself without it (**para 41**)
* A spouse’s **lack of self-sufficiency may be related** to foregoing career/educational opportunities because of marriage. But also may arise from completely different sources, **like disappearance of kind of work the spouse was trained to do** (career shift having nothing to do with marriage/breakdown) or… ill health (**para 42**)

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| *Stein v Stein* – review of spousal support where husband wanted to stop paying after 6-7 years. Wife took money (over $10K/mth), went to film school, met someone, pays for his film school and lets him live in her house… ex-husband has to keep paying (there is no way she will be self-sufficient…) |

**Re Quantum** – same factors that go to entitlement have impact on quantum (**para 50**)* for practical purposes, may be **useful to proceed by establishing entitlement first, then effecting necessary adjustments through quantum** (**50**)
* **Quantum awarded, in sense of both amount and duration, will vary with circumstances and practical and policy considerations affecting particular cases (para 53)**
 |

**Indefinite Support?** (no…)

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| ***Messier v Delage* – 1983, SCC*** That does not mean that obligation of support bw ex-spouses should continue indefinitely when marriage bond is dissolved, or that one spouse can continue to be drag on 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, difficulty in finding work, and resulting high rate of unemployment, and asked whether “a divorced spouse who is working always should bear the consequences of this and provide for the needs of his unemployed former spouse, or is it for the gov’t, if it cannot remedy, at least to alleviate the effects and to what extent?
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| ***Boston v Boston* – if someone very elderly, no expectation that they go back to work, but IS expectation that they invest any property they have during separation/upon division of property** |

**Same Sex Equality** – *M v H* – Exclusion of same-sex spouses from statutory right and obligation of spousal support UNCONSTITUTIONAL

**VARIATION OF SUPPORT ORDER**

**Section 17(4.1) *DA***

* Before ct makes variation order re spousal support order, shall satisfy self **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 last variation order made in respect of that order, and in making the variation order ct shall take that change into consideration.

**Section 167 – *FLA***

**167 (1)** On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.

**167 (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**:

**(a)** a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;

**(b)** evidence of a substantial nature that was not available during the previous hearing has become available;

**(c)** evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

**(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.

**NOTE** – if person CAUSED issue that req’s payment, court will take that into account, possibly retroactively reduce payments…

**Review of Spousal Support – s. 168 *FLA*** (may be provided for in agmt or order re SS)

**SPOUSAL SUPPORT ADVISORY GUIDELINES** (“**SSAG”)**

* Rollie Thompson and Carol Rogerson developed, make S Support more predictable/consistent. Draft 2005, released 2008
* Suggest appropriate ranges of support in variety of situations for **spouses entitled to support**. No advice on entitlement
* **Not legally binding**, informal guidelines, operate on advisory basis
* **With/without child formulas**; **income ceiling ($350k) and floors ($20k)**

***Yemchuk v Yemchuk* –** Guidelines intended to reflect current law rather than change it, and build upon law as it exists. Guidelines are not official law, but neither do they constitute evidence or even expert evidence that needs proving in court.

* **NOTE** – lawyers bring own incomes of clients etc, but support #s not in dispute

**Without Child Formula**

**Two Crucial Factors**

1. **gross income difference bw spouses; and**
2. **length of relationship**
* **Amount** ranges from 1.5 to 2% times the income difference between the spouses’ gross incomes times years of cohabitation, to a maximum of 50%
* amount and duration increases incrementally with length of relationship
* **note** – existence of software used to develop quantum/duration – DivorceMate (expensive)

**EG** – 20yr marriage, man had finished degree when met, worked for bank… worked through ranks. Transferred several times (she obviously went with him), ended up with gross annual income $90K. She was bank teller at start, stayed at home until son in school, then part time as store clerk. Son now independent, Ellen full time receptionist making $30K… both mid-40s, separated.

1. What grounds of entitlement apply?
	1. Compensatory (she transferred with him, stayed at home for family) and non-compensatory (she makes way less than him, lower std of living etc)
2. What is answer to amount of support under without child support formula?
	1. **Step 1 –** gross income difference bw spouses - $90k - $30k = $60k
	2. **Step 2** – length of relationship – 20 yrs; 1.5x 20yrs = 30% **to** 2 x 20yrs = 40%
	3. **Step 3** – (30% x $60k **= $18k/yr or $1500/mth**) **to** (40% X $60k = **$24k/yr or $2000/mth**)

*Can also do lump sum pmts, some people may just want it all in one go*. – **170 *FLA***

*Payor gets tax deduction for support, payee pays tax on it*.

**With Child Support Formula**

* different considerations
* priority must be given to child support – **s. 173 *FLA***
* what drives support in these cases is not length of marriage, or marital interdependency, or merger over time, but **presence of dependent children and need to provide care/support for those children**

**Differences**

* **With Child**
	+ a) uses **net incomes** of spouses, not gross
	+ b) divides pool of combined **net incomes** bw the two spouses, not gross income difference
* upper/lower % limits of net income division **do not change with length of relationship**

**Steps**

* **Step 1** – determine individual net disposable income (INDI) of each spouse
	+ **a)** Guideline income – child support – taxes/deductions = payors INDI
	+ **b)** guideline income – notional child support – taxes/deductions + gov’t benefits/credits = recipient’s INDI
* **Step 2** – add together individual net disposal incomes. By iteration, determine range of spousal support amts req’d to leave lower income recipient spouse with **bw 40-46% of combined INDI**

***W v W* – 2005 BCSC** – SSAGs are consistent with law in BC (para 25); SSAGs are just guidelines and advisory, an example of one useful took to lawyers (para 27)

***Redpath v Redpath* – 2006 BCCA**

* if particular award deviates substantially from Guidelines with no exceptional circumstances to explain it, could be grounds of appeal
* ct increased award of $3500/mth to $5000/mth even though TJ considered all factors, did not misapprehend evidence.

**SPOUSAL MISCONDUCT**

* past misconduct not generally considered, no fault separation system; not trying to remedy conduct bw parties **UNLESS** it goes to family violence, esp. if children involved **OR** in case of property division, and misconduct goes to misuse of family funds…

***DA* – Section 11**

* directs ct to have “regard to **the conduct of the parties** and the condition, means, and other circumstances of each of the” in exercising discretion in making award of spousal support

**15.2(5)** – **Spousal misconduct**

* in making order under ss(1) or interim order under ss (2) **court shall not take into consideration any misconduct of spouse** in relation to the marriage.

***FLA*  - Section 166 – Misconduct of Spouse**

**166** In making order respecting spousal support, ct must **NOT** consider any misconduct of a spouse, **except conduct that arbitrarily or unreasonably**

* + - * 1. causes, prolongs or aggravates the need for spousal support, or
				2. affects the ability to provide spousal support

**NOTE ALSO**  **- s. 167(1)(c)**, allows ct to change support order in certain circumstances, including lack of financial disclosure.

|  |
| --- |
| ***Leskun v Leskun* – 2006 SCC****Spousal misconduct not relevant to spousal support, but CONSEQUENCES of spousal misconduct may be relevant insofar as they affect self-sufficiency.***20 yr marriage, wife worked, financially contributed to husband’s continuing education, had child. Suffered back injury, laid off. Husband then wanted to divorce to marry other woman. Divorced in 1999.* Trial – wife entitled to support, $2,250/mth until return to work, then review.2003 – application by husband to discontinue support pmts (he was unemployed), denied. Wife not self-sufficient, remained in need of spousal support. CA agreed. *DA* did not prevent consideration of failure to achieve self-sufficiency as **result, at least in part, of emotional devastation caused by other spouse’s misconduct**. Appeal to SCC dismissed. |

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

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

**Intersection of Property and Spousal Support**

***FLA***

**Section 95** – permits ct to order unequal division of family property/debt/both if significantly unfair to equally divide, one factor ct can consider is

* **95(3)** 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 objectives of spousal support under **s. 161** have not been met.
* *If can’t reasonably make person pay more, take it out of assets*

**Securing Spousal Support (s. 170 *FLA*)**

* **Estate** – support pmts can be secured by making pmts binding on estate of payor; by agmt or by ct order
* **Life Insurance** – support pmts can also be secured through life insurance on life of payor whereby recipient is irrevocable beneficiary for duration of support obligation; by agmt or by ct order

**AGREEMENTS**

**What Kind of Agreement Is It?**

***FLA***

* **s. 9 “agreements”**: made by 2+ people, resolve family law disputes (separation agmt) **or** respecting a matter that may be a **future** family law dispute (cohab/marriage agreement)
* **s. 44(2)** – limits on agreements re parenting arrangements (**only binding after separation or when parties about to separate**)
	+ same with **148(1)** re child support (limitations)
	+ **Contracts re parentage** – when people going to have child but dad doesn’t want involvement, they can sign agreement saying that… but not legally enforceable.
* **s. 92** – agreement re property division
* **s. 163** – agreements re spousal support (can include waiver)
* **s**. **171** – agreements silent as to impact of support on death of payor

**Setting Aside Agreements**

* **s. 93** –agreements will be set aside for
	+ lack of procedural fairness,
	+ common law pitfalls (duress, undue influence, non-disclosure, fraud, mistake, unconscionability) **or**
	+ if (when applied) they are “significantly unfair”
* **93(3) (property division) and 164(3) (spousal support)**
	+ set side part/all **only if satisfied** that **one+** of following circumstances existed when Agreement entered
		- **a)** non-disclosure;
		- **b)** improper advantage of ignorance, need or distress;
		- **c)** did not understand nature/consequences of agreement;
		- **d)** other circumstances that would, under the common law, cause all/part of contract to be voidable (unconscionability, fraud etc)
* **93(5)** and **164(5)** – even if none of ss (3) circumstances exist, ct can set aside/replace order if agreement **significantly unfair** re
	+ **a)** length of time that has passed since agmt made;
	+ **b)** any changes, since agmt made, in condition, means, needs or other circumstances of spouse; (**164(5) only)**
	+ **c)** intention of spouses, in making agmt, to achieve certainty
		- **some think agmt lasts only 5yrs, wrong…**
		- if want a **review clause** put one in, and make known to parties
	+ **d)** degree to which spouses relied on terms of agreement
	+ **e)** degree to which agreement meets spousal support objectives of **s. 161 (164(5) only)**

**WHEN THINGS GO WRONG**

**Blame the Contract**

* **Contract Remedies**
	+ Mistake
	+ Fundamental breach (still used in family law!)
	+ Capacity issues
		- Especially high re high-functioning alcoholics, tries to have long meetings so they’re dry at signing time
* **Practitioners – screen, scrutinize, CYA (cover your ass)**
	+ Make sure to ask WHEN IT COULD POSSIBLY BE CONSIDERED that marriage-like relationship was entered into, might be before they started sharing a residence

**Blame the Process (or practitioner)**

* **Procedural Fairness**

|  |  |
| --- | --- |
| **Duress** | **Undue Influence** |
| **Unconscionability***Newman v La Porta* ***–***1. inequality in bargaining position of parties because of ignorance, need or distress of weaker party;
2. proof of substantial unfairness in bargain itself
* viewed differently than unconscionability in com’l context

*Rick v Brandsema* – unconscionability in separation agmts* duty of full/honest disclosure re everything in agme
* extent of disclosure will impact ct’s willingness to step in
 | **Independent Legal Advice** **-** MAKE SURE PEOPLE GET IT! |
| **Fraudulent non-disclosure** (as opposed to agreed-upon non-disclosure) | **Reconciliation** |

**Cohabitation/Marriage Agreements**

* **PROCESS** – do homework
	+ What is at stake? (value of assets/debts)
	+ How much financial entanglement anticipated?
		- Do they want tracing provisions? (HARD ACCOUNTING!)
		- What was the SOURCE of large purchases?
	+ What assets hoped to be on/off table? What is open to be shared?
	+ What assets, if any, expected to be jointly acquired, and how?
* **Questions**
	+ What do you anticipate from life in short, medium, long-term future?
	+ What life events/circumstances might change in finances of either party?
	+ What might trigger review of agmt? (related to above question…)
	+ Does client benefit from review language in agmt? (“have” will want review)
		- Life events/circumstances that make agmt not applicable: Marriage or kids with someone else? New job?
* **Unconsionability, Vulnerability, Emotions**
	+ **RECOGNIZE** emotional difficulties/limitations
	+ **Ask** about how conflict settled in relationship
	+ **Evaluate** financial pressure (how are you paying for things? How are you going to afford that new house?)
	+ **How will client feel** in 6wks, 6mths, 6yrs?

**Terms in Cohab/Marriage Agreements**

* **Recitals**: Important IDs/definitions (big assets, significant dates, relationship breakdown, separate property)
* **Separate Property**: Compensation in lieu? (sliding scale), tracing for contributions into joint assets? (use “separate”, not “excluded” to avoid confusion)
* **Joint Property**: Presumption of ownership? (contribution-based or equal?)
* **Personal Debts**: accumulated during relationship are sharable (even in name of one); if one-sided property division scheme, maybe asset heavy person gets lots of the debt
* **Joint Debts**….
* **Spousal Support** – waiver, sliding scale, put cap on income, leave it open
	+ Waiver/limited spousal support – consider including: work history; income earning capacity (range of incomes or statement that income will be similar/greater); **consider leaving it off the table….**
* **Housing Allowance** – in lieu of interest in property, meet needs for shelter
* **Estate Rights** – does agmt survive death absent a breakup?

**NOTE** – **“sunset clause”** – if person sticks with someone for x years (10-20), they will give up half of everything.

**Practice Points**

* can AGREE to non-disclosure
* party can acknowledge that they had opportunity to obtain ILA, has voluntarily chosen not to. **Common with lawyers (to choose not to) – PUT THAT IN!**
	+ consider what self-repped client **can** agree to, short of receiving ILA (cannot agree that “I am not under undue influence, there is no fraud…)

**Contracts for Opting In (to *FLA* regulation of relationship)**

* *FLA* led to increase in prep of cohab agreements (people that did not get married by choice)
* Consider where appropriate to draft one even when spouses opting in, can: crystallize values of assets/debts; set out pertinent dates (start of cohab, property purchase dates, etc); establish process for dividing property; establish dispute resolution mechanisms consistent with *FLA* to avoid court.

**Separation Agreements**

* **PROCESS**
	+ Draft from scratch easier than building on previous work (mediation, DIY templates, parenting plan, prior agreement…)
	+ Consider what is agreed already; consider what transactions have taken place since separation
	+ **ANY MISSING GAPS?**
* **Recitals** – set backdrop, give context, identify excluded property
* **Parenting Arrangements**
	+ Parenting responsibilities
	+ Parenting Schedule – be aware of vaguaries/assumptions of goodwill (et holiday times “to be agreed upon”, shared v shared equally – not same!!); set expectations; set review periods (esp. re young children)
	+ Unenforceable clauses (limits to when other starts dating etc…) – fine to have them in there, but EXPLAIN THAT THEY ARE UNENFORCEABLE
* **Child Support**
	+ “special provisions”
	+ s. 7 expenses (special expenses) – BE SPECIFIC: what are they? How reconciled? Post-secondary education?
	+ Expectations re imputation of income
	+ Reviews of support
* **Disposition of Family Residence**
	+ Terms of conduct of sale
	+ Ongoing pmts/maintenance pending sale
	+ Allocation of sale proceeds
* **Division of Assets**: Real property; Bank Accts/Investments; RRSPs; Pensions (valuations, consider role of experts); Insurance Policies (consider if security for support needed/wanted); Household contents; Vehicles; Business Assets (consider tax implications, steps to remove SH interest, division of corp. retained earnings)
* **Division of Debts**: Allocate responsibility; eliminate joint debts if at all possible (creditors don’t care about your agmt if name on debt); set deadlines for repayments)
* **Spousal Support** – review triggers
* **Security for support** – **s. 170 *FLA***
* **Extended Med Coverage**
* **Dispute Resolution Clauses**
* **Tie up Loose Ends** – when/who applies for divorce? Who pays for application? Timelines for making pmts/exchanging information; Who applies for CPP equalization?

**Separation Agreement is**

* **Roadmap; trouble-shooting guide; tie-breaker; supporting document (**border crossings, banks, estate planners)

**ARBITRATION**

* dispute resolution process – hire neutral 3rd party (family law arbitrator) to make decision resolving dispute by which parties agree to be bound
* arbitrator *acts as privately hired judge, imposes resolution after hearing evidence/listening to arguments of each party*

**Overview**

* integral part of family law. *FLA* specifically provides that **resolution of family law matters outside court is preferred** (*FLA* Div 1)
* arbitrators meet *FLA* min training/practice stds.
	+ Lawyer or
	+ Psychologist, or
	+ Social worker
	+ 10yrs experience in family-related field
	+ take specified training in arbitration, family law, decision-making, skills dev’t and family violence
* **only lawyer** arbitrator may conduct arbitrations on **all issues including child-related issues, property/spousal support.** Psychologist/social worker may only arbitrate child-related issues and “straightforward” child support (such thing?)

**Advantages**

|  |  |  |  |
| --- | --- | --- | --- |
| Quicker (few delays) | Flexible Scheduling | More cost-effective | Less formal, more streamlined |
| Simplified rules of procedure | Specialist “judge” (decision maker) | Confidential | Control of process (evidence, rules, timing etc) |

**Disadvantages**

|  |  |
| --- | --- |
| More costly? *Less correspondence bw lawyers, less legal fees*. | Not (procedurally) as “easy” to appeal? *Substantively, same std of appeal* |
| Creates lack of case law? *They are working on this, FLAG (Family Law Arbitrator Group)**creating bank of decisions (w/ consent)* | Deprives participants of ability to craft own solutions? *So does the court… if you can’t resolve through mediation/arbitration etc* |
| Does not promote ongoing relationships between parties? *Quick decision may promote coherence bw parties* |

**Choosing an Arbitrator**

* must **TRUST** them
* Experience and relevant qualification
	+ Subject matter (family law lawyer… children and finances?)
	+ Arbitration/decision-making in general
* Unique skills and experience
* Ability to control the process
* Timing/availability
* Language

**Arbitration Retainer Agreement**

* K where parties agree to use arbitrator to determine dispute outside ct
	+ **Must be exact on issues to be discussed**
* Contains terms/conditions of agmt bw parties arbitrator
* Confirms rules governing conduct of arbitration
* **Must be in writing** – *Arbitration Act*…. *Family Law Act Regulation…*
* Provision for **ILA** advisable – **s. 2.1(3)** *Arbitration Act*
* Arbitrator NOT legal counsel for parties; confirmation that arbitrator meets req’ts under *FLA* to act as arbitrator (**s. 5 *FLAR*)**
* Rules of procedure – **s. 22(1)** *Arbitration Act* – are BCICAC Rules
* What specific issues are to be submitted to arbitration (arbitrator’s jurisdiction comes form K; not statute)
* **Applicable Law**
	+ **s. 2(2)** *Arbitration Act* states that “a provision of arbitration agmt that removes jurisdiction of ct under *Divorce Act* (CAD) or the *Family Law Act* has no effect”
	+ **s. 23(2)** *Arbitration Act* states “a provision or award that is inconsistent with *Family Law Act* is not enforceable”
* Who screens for family violence? **s. 8 *FLA***
* Document disclosure – when/what/by whom (**s. 5 *FLA*; s. 5** *Arbitration Act*)
* **Rate of remuneration/retainer provisions**
* Timing of award
* Arbitrator’s jurisdiction on costs

**What happens after Arbitration Agmt Signed?**

|  |  |
| --- | --- |
| **Pre-Hearing Matters** | **Hearing** |
| Teleconference(s) | When & Where, Limits on Openings, cross examination? |
| Checklist | Recorded by court recorder? (hers were recorded on digital recorder, can DL onto computer system) |
| Intake sheet/Screening (ongoing) | Evidence?* *Viva voce*
* Affidavits
* Witnesses/witness statements
* Agreed statement of facts
 |

**DECISION**

|  |  |
| --- | --- |
| By when? | Interim or Final? |
| In what form?* written
* oral with written reasons to follow?
 | Enforcement of Decision - **Rule 2-1.2 of SC Family Rules** |
| Appeal of Decision – **ss. 31&42**  of the *Arbitration Act* |

**Efficient and Effective Advocacy**

* Differences bw advocacy in litigation and in arbitration
	+ Formality?
	+ Objections re: evidence?
* Preparation
* Shaping arbitration process to suit parties’ needs

**Using Arbitration as Part of Other Processes**

* **Litigation**
	+ No judge/master available; need decision immediately; discrete issue to be decided; parties wish to maintain confidentiality; trial has been adjourned
* **Mediation**
	+ When you reach impasse
	+ To decide all issues that cannot be resolved at mediation
* **Collaborative Process**
	+ For discrete or all issues
	+ 93% of cases settled there… **EFFECTIVE!!!**

**BIGGEST PROBLEM WITH ARBITRATION** – convincing other lawyer to do it…. more senior lawyers reluctant (no experience with the process); more people that believe in the process + more people recommending it = more and more people using it.

**PARENTING COORDINATION**

* child-focused dispute resolution process for separated families
* PCs are experienced family law lawyers or mental health professionals, have special training in mediating/arbitrating parenting disputes (**10 yrs lawyer, 120 hrs extra training**)

**When is one appointed?**

* After order/agmt for custody/guardianship, and parenting plan agreed to or Ordered by ct; meant to help implement and work with final parenting plan
* Parents sign agmt outlining role, objectives, scope of PC’s services, and rights/obligations of each parent
* PC retained for fixed period, 1-2yrs (she usually does one, can’t commit to a family for too long…)

**Three Components**

* **1) EDUCATION**
	+ educating parents to work together effectively to parent these children
* **2) CONSENSUS BUILDING**
	+ facilitates/participates in collaborative/interest-based interaction, resolve differences **together** and improve communication
	+ parents resolve issue by **consent**; PC then **confirm agreement in writing** (often e-mail)
* (clear move from consensus building phase to determination making phase… BE CLEAR THAT IT’S HAPPENING)
* **3) DETERMINATION MAKING PHASE**
	+ PC req’d to make decisions/be neutral observer; decisions based on evidence and submissions presented by parents
	+ Issue resolved by PC
	+ **not as flexible** as consensus building, decision of PC must be made pursuant to law, PC must follow rules of natural justice
	+ procedure followed in determination making phase need not be as formal as litigation process

***FLA* Part 2, Div 3**

* provides for and limits jurisdiction of PC
* **s. 14 – Parenting Coordinators**
* **s. 15 – When Parenting Coordinators May Assist**
* **s. 16 – Information Sharing for Parenting Coordinators**
* **s. 17 – Assistance from Parenting Coordinators**
* **s. 18 – Determinations by Parenting Coordinators**
* **s. 19 – Confirming, Changing or Setting Aside Determinations**

**PC Has Jurisdiction Over**

|  |  |
| --- | --- |
| Parenting arrangements | Contact with a child |
| A child’s daily routine | Education, including in relation to child’s special needs |
| Participation in extracurricular activities and special events | Temporary care by person other than a guardian |
| Provision of routine medical, dental or other health care | Discipline of a child |
| Transportation and exchange of child | Parenting time or contact with a child during vacations and special occasions |
| **Any other matters by agreement provided it is within jurisdiction** |

**PC does NOT have jurisdiction over**

|  |  |
| --- | --- |
| A change to the guardianship | A change to the allocation of parental responsibilities |
| Giving parenting time or contact with a child to a person who does not have parenting time or contact with child | A substantial change to the parenting time or contact with a child |
| The relocation of a child |  |

**First… make sure there is a parenting plan**

* need for **clear and comprehensive** parenting plan
* lack of detail regarding the parenting plan can greatly increase amt of work req’d on ongoing basis, will increase cost for parties in PC process (e.g. “holidays are shared” as opposed to “A gets C from x-y, B gets C from y-z”)

**PC Can Be Terminated in Limited Circumstances**

* if **appointed by agreement, PC can be terminated by agreement of parties or upon application to court**
* if **appointed by Order, PC may be terminated by Order of court upon application by either party**
* PC may **withdraw by giving notice to parties and to court** if **appointed by court Order**