Law 359 – Family Law – Winter 2015

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# 1. Creating Relationships

**THERE ARE 2 WAYS TO CREATE A RELATIONSHIP: (1) THROUGH MARRIAGE, AND (2) THROUGH COMMON LAW. IT IS IMPORTANT TO DETERMINE WHEN YOU HAVE CREATED A RELATIONSHIP BECAUSE THIS COMES WITH CERTAIN RECOGNITIONS.**

**Marriage, for civil purposes, is the lawful union of TWO PERSONS to the exclusion of all others – *Civil Marriage Act, 2005, c. 33***

## Requirements for Marriage

IN ORDER TO BE MARRIED, YOU HAVE TO **SATISFY BOTH FEDERAL AND PROVINCIAL** JURISDICTIONAL REQUIREMENTS.

### Essential Validity – Federal Jurisdiction

|  |  |  |
| --- | --- | --- |
| **(1) Capacity**  | ***Age*** | **Marriage Act (BC)** * **Section 28** – if under 19, must have (a) consent of living parents, (b) consent of lawful guardian, (c) consent of Public Guardian and Trustee, or (d) BCSC order which dispenses with consent if it is being withheld “unreasonably or from undue motives”;
* **Section 29** – if under 16, cannot be done unless BCSC makes an order;
* **Section 30** – Nothing in section 28 or 29 invalidates a marriage (bias in favour of validity of marriages);
 |
| ***Consanguinity and Affinity*** | **Marriage (Prohibited Degrees) Act, 1990 c. 46*** **Section 2(1)** – subject to subsection (2), persons related by consanguinity, affinity or adoption are **not** prohibited from marrying each other by reason only of their relationship;
* **Section 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 you are not single, the subsequent marriage is void *ab initio.* Even if you think that your first spouse is dead, if they are alive the marriage is void.  |
| ***Sanity*** | **TEST**: must understand the nature of the marriage contract and the duties and responsibilities it creates **[Hunter v Edney, 1885]*** 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]**
* Courts have interpreted insanity very narrowly and it is difficult to establish that a person did not understand the nature of the marriage
 |
| ***Opposite Sex*** | NO LONGER REQUIRED FOR CAPACITY after *Reference re Same Sex Marriage [2004] SCC.* **Civil Marriage Act, 2005*** **Preamble –** every individual is equal before and 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
* **Section 3 –** Officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs
 |
| **(2) Consent**  |  | **Lack of consent renders a marriage void*** Subsequent conduct can ratify it (but if it is void then there is nothing to ratify)

There can also be a lack of consent due to: * **(1) Duress** – genuine and reasonable fear; void/voidable at request of that party;
* **(2) Mistake or Fraud –** must vitiate consent and go to the nature of the ceremony or the identity of the party
* Very strict interpretation - Lying about name, age, wealth, job, etc. are not grounds
* If you do not know you are through ceremony, this is grounds for annulment
 |
| **(3) Capacity to Perform Sexual Acts** | ***aka Consummation*** | * **TEST**: A practical impossibility of consummation. It must be caused by physical or psychological defect. Willful and persistent refusal amounting to caprice or obstinacy is not a ground for annulment **[Deo v Kumar, 1993, BCSC]**
* It is **not enough** for the parties to simply establish that they have not had sex since marriage
* If a P alleges that one of the spouses is impotent by reason of psychological defect, the 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 mere capricious refusal to consummate does **not** qualify as psychological defect; however, the refusal to attempt consummation may have been so long continued or under such circumstances as to justify the inference of impotence

**Example*** **Juretic v Ruiz [1999] BCCA** – husband placed ad for Spanish speaking wife – wife did not want to be touched – husband stopped trying after 2 attempts – represented themselves as a couple – **no annulment granted.**
* **H v H [1953] ER** – marriage on the basis of immigration reasons, even when there is no consummation and no intention to live together, is not alone sufficient grounds to dissolve the marriage
 |
|  |  |  |

### Formal Validity – Provincial Jurisdiction

COMPLIANCE WITH THE **FORMALITIES** OF MARRIAGE. PURPOSE OF THE ACT IS TO **VALIDATE MARRIAGES.**

**Marriage Act, RSBC, c 282**

* **Section 8 – Licence Requirement**
	+ Religious representative may solemnize marriage only under a licence issued under this Act
* **Section 9 – Religious Marriages**
	+ (1) All marriages conducted by a religious representative must be in the presence of **2 or more witnesses** besides the religious representative
	+ (2) Ceremony must be performed in a public manner
	+ (3) Both parties to the marriage must be **present** in person at the ceremony
* **Section 15 – Issue of Licenses**
	+ (1) Religious representative must not solemnize a marriage unless the persons possess a marriage license that permits that representative to marry them
	+ (2) May issue license if the application complies with Section 16 and applicants pay fee
	+ (3) Marriage license must (a) bear date of issue, and (b) authorize marriage within any time within 3 months after issue
* **Section 17 – Unused Licence Void After 3 Months**
	+ If a marriage is not solemnized within the 3 month period referred to in 15(3)(b),
		- (a) The license is void, and
		- (b) The marriage must not be solemnized unless a new licence is obtained.
* **Section 20 – Civil Marriages**
	+ A marriage may be contracted before and solemnized by a **marriage commissioner** under a **license** if
		- (a) the marriage is contracted in a public manner in the presence of the marriage commissioner and **2 or more witnesses,**
		- (b) and (c) both parties must make declarations in **presence** of marriage commissioner and witnesses
* **Section 23 – Caveats**
	+ (1) A person may **lodge a caveat** with an issuer of marriage licences **against the issuing of a licence** for the marriage of a person named in the caveat
	+ (2) If a caveat is lodged, is **signed** by the person who lodged it, states the person’s place of **residence** and the **ground of** **objection**, no marriage licence may be issued until:
		- (a) the issuer has inquired into the matter of the caveat and is ***satisfied that it ought not to obstruct*** the issuing of the licence, or
		- (b) the caveat is ***withdrawn*** by the person who lodged it.
* **Section 25 – Manner of Registration**
	+ (1) When a religious representative or marriage commissioner solemnizes a marriage they must **register the marriage by entering a memorandum of it in a book** kept by them for that purpose under this section or by the religious body to which the religious representative belongs,
	+ (2) The memorandum **must be signed** (a) by each of the parties to the marriage, (b) by at least 2 witnesses, and (c) by the religious representative or marriage commissioner who solemnized the marriage
* **Section 27 – Protection of Marriage Register from Loss or Injury**
	+ A person who has custody of a marriage register who **negligently loses or injures it**, or negligently allows it to be injured, is liable on conviction to a penalty of *not more than $50*.

## Other Types of Marriage

### Foreign Marriage

As long as the marriage is **formally valid in the place of celebration** (where you got marriage) and **essentially valid in the place of each party’s prenuptial domicile**, the marriage is valid here. For equality reasons, BC will also recognize a marriage that is formally and essentially valid here, even if it is **not** recognized in the country of prenuptial domicile.

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| CMD v RRS Jr., 2005 BCSC 757  |
| **F** | Married in Vegas after knowing each other for 4 hours.  |
| **I** | *Is the marriage void because of consent (drunk), or voidable due to lack of consummation?*  |
| **A** | * No evidence that P did not have capacity to consent – decided by free will to get married, got the license, participated in the ceremony, etc.
* P failed to meet burden of consent, so not void
* In terms of consummation, no proof that they did not consummate the marriage so failed to meet burden of proof of inability to consummate – only that they did not consummate
 |
| **H** | Application dismissed |

### Customary Marriage

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| Connolly v Wollrich [1967] LC  |
| **F** | W and S together from 1902-1931. S was Cree. W and S lived together with her consent, her father’s consent, and in accordance with Cree customs. W married J in 1832, in accordance with Quebec Civil Law and the Catholic Faith. Contest was between he children of W and S and W and J regarding W’s estate.  |
| **A** | W and S had married in accordance with Cree custom and were husband and wife under Quebec law. P (S’s child) had rights to a proportionate share of ½ of W’s estate.  |

### Polygamous Marriage

Criminal Code

* Section 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;
* Section 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 Criminal Code of Canada (Polygamy Reference)  |
| **A** | * Section 293 of the CC does not require the union to involve a minor or occur in context of dependence, exploitation, abuse of authority, gross imbalance of power or undue influence;
* Section 293 is constitutional with one exception:
* Violates religious liberty (2a of Charter), but justified under section 1)
* Violates section 7 Charter interests of children under 18, and not justified under section 1
* Compelling evidence of harm, including harm to women, children and to society and the institution of marriage
* The provisions that could criminalize the actions of young people (women between 12-17) should not stand
* “The prevailing view through millennia in the West has been that exclusive and enduring monogamous marriage is the best way to ensure parental certainty and joint parental investment in children. It best ensures that men and women are treated with equal dignity and respect, and that husbands and wives (or same sex couples), and parents and children provide each other with mutual support, protection and edification through their lifetimes.”
 |

### Marriage-Like Relationship

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| Takacs v Gallo [1998]  |
| **A** | These organizing questions permit a TJ to view the relationship as a whole in order to determine whether the parties lived together as spouses, and will prevent inappropriate emphasis on 1 fact to the exclusion of others and ensure that all relevant factors are considered.**1. Shelter** Did the parties live under the same roof? What were the sleeping arrangements? Did anyone else occupy or share the available accommodation?**2. Sexual and Personal Behaviour** Did the parties have sexual relations? If not, why not? Did they maintain an attitude of fidelity to each other? What were their feelings towards each other? What were their feelings towards each other? Did they communicate on a personal level? Did they eat their meals together? What, if anything, did they do to assist each other with problems or during illness? Did they buy gifts for each other on special occasions?**3. Services**What was the conduct and habit of the parties in relation to (a) preparation of meals; (b) washing and mending clothes; (c) shopping; (d) household maintenance; and (e) any other domestic services? **4. Social** Did they participate together or separately in neighbourhood and community activities? What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?**5. Societal**What was the attitude and conduct of the community toward each of them and as a couple?**6. Support (Economic)** What were the financial arrangements between the parties regarding the provision of or contribution toward the necessaries of life (food, clothing, shelter, recreation, etc.)? What were the arrangements concerning the acquisition and ownership of property? Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?**7. Children**What was the attitude and conduct of the parties concerning children? |

# 2. Ending Relationships

## Divorce Requirements

**THE *DIVORCE ACT* INCLUDES BOTH FAULT-BASED AND NO-FAULT GROUNDS FOR DIVORCE. SECTION 8 OF THE DIVORCE ACT SETS OUT THE GROUNDS FOR DIVORCE (MARRIAGE BREAKDOWN) AND THE WAYS TO ESTABLISH THIS BREAKDOWN, INCLUDING: (1) LIVING SEPARATE AND APART, (2) ADULTERY, AND/OR (3) CRUELTY.**

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| DA Section 2 – Definitions  |
| **2** | “spouse” means either of two persons who are married to each other |
| DA Section 3 – Jurisdiction in Divorce Proceedings  |
| **3(1)** | A court in a province has jurisdiction to hear and determine a divorce proceeding if **either spouse** has been **ordinarily resident** in the province for ***at least one year*** immediately preceding the commencement of the proceeding.  |
| **3(2)** | Where divorce proceedings are commenced **on different days** in **two provinces/territories** both of which would normally have jurisdiction under subsection 3(1), exclusive jurisdiction is where the proceeding was **first filed.**  |
| **3(3)** | Where divorce proceedings are commenced on **the same day in two provinces/territories** both of which would normally have jurisdiction under subsection 3(1), the **Federal Court** has exclusive jurisdiction.  |
| DA Section 8 – Divorce  |
| **8(1)** | A court of competent jurisdiction may, on application by either or both spouses, grant a divorce on the grounds that there has been a **breakdown of their marriage.** |
| **8(2)** | **Breakdown of Marriage** Breakdown of marriage is established only if: 1. the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or
2. the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
3. committed adultery, or
4. treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.
 |
| **8(3)** | **Calculation of Period of Separation** For the purposes of paragraph (2)(a), 1. spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and
2. a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated
	1. by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse’s own volition, if it appears to the court that the separation would probably have continued if the spouse had not become to incapable, or
	2. by reason only that the spouses have resumed cohabitation during a period of, or periods totally, not more than ninety days with reconciliation as its primary purpose.
 |
| DA Section 12 – Effective Date Generally  |
| **12(1)** | A divorce takes effect on the 31st day after the day on which the judgment granting the divorce is rendered.  |
| **12(2)** | **Special Circumstances** Where, on or after rendering a judgment granting a divorce, 1. the court is of the opinion that by reason of special circumstances the divorce should take effect earlier than the 31st day after the day on which the judgment is rendered, and
2. the spouses agree and undertake that no appeal from the judgment will be taken, or any appeal from the judgment that has been taken has been abandoned,

the court may order that the divorce takes effect at such earlier time as it considers appropriate.  |

### Living Separate and Apart

Spouses must have lived separate and apart for **at least one year** immediately preceding the determination of the divorce proceeding **AND** were living separate and apart at the commencement of the proceeding **[Section 8(2)(a)]**. The one year period will **not** be considered to have been interrupted or terminated when the spouses resume cohabitation in order to **attempt reconciliation**, so long as the period(s) of cohabitation is less than 90 days in total **[Section 8(3)(b)(ii)].** Once granted, there is a 31-day appeal period from the date that the order is made.

* 1 year separation period **does not have to be consensual** – it only takes one spouse to say that they are going to separate
* Can make the application for divorce soon after the separation and before the expiry of the 1 year period

### Adultery and Cruelty

A spouse who invokes a fault-based ground must prove the fault of the respondent, rather than their own fault. The **onus** of establishing adultery or cruelty **is on the claimant**. The 31-day appeal period still applies from the date that the order is made. The benefit of pursuing fault-based grounds is that you are granted an **immediate** divorce without waiting the 1+ year period. However, this is rarely invoked – generally recommend that clients just wait the year and get out of the situation in the meantime.

* **Adultery** – has been defined as voluntary sexual intercourse between a married person and another person of the opposite sex other than his or her spouse **[Orford v Orford, 1921; Kahl v Kahl, 1943]**
	+ In ***Orford***, it was found that artificial insemination by the wife amounted to adultery (husband unaware), but see **Maclennan v Maclennan [1958]**
	+ In recent years, Courts have moved towards a broader definition of what constitutes adultery – i.e. intimate sexual activity
* **Cruelty –** Physical or mental cruelty that makes the continued cohabitation of the spouses intolerable **[Section 8(2)(b)(ii)]**
	+ The treatment must be **grave and weighty**, going beyond incompatibility. However, the issue is not the intention of the spouse to be cruel, but rather the ***subjective effect of the treatment on the other spouse*** **[Balasch v Balasch, 1987]**

## Duty of the Court

### Bars to Divorce

DUTY OF THE COURT TO SATISFY ITSELF THAT: **(1)** THERE HAS BEEN NO COLLUSION; **(2)** REASONABLE ARRANGEMENTS HAVE BEEN PUT IN PLACE FOR THE CARE OF ANY CHILDREN OF THE MARRIAGE; AND **(3)** THERE HAS BEEN NO CONDONATION OR CONNIVANCE.

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| DA Section 11 – Duty of Court --- Bars  |
| **11(1)** | In a divorce proceeding, it is the duty of the court 1. to satisfy itself that there has been no **collusion** in relation to the application for a divorce and to dismiss the application if it finds that there was collusion in presenting it;
2. that **reasonable arrangements** have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made;
3. that there has been no **condonation** or **connivance** on the part of the spouse bringing the proceeding, and to dismiss the application for a divorce if that spouse has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the divorce;
 |
| **11(4)** | “Collusion” means an agreement or conspiracy to which an applicant for a divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property or the custody of any child of the marriage.  |

### Other Duties

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| DA Section 9 – Duty of Legal Advisor  |
| **9(1)** | It is the duty of every lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding1. the draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of spouses, and
2. to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counseling or guidance facilities known to him or her that might be able to assist the spouses to achieve a reconciliation,

unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.  |
| **9(3)**  | Every document presented by the lawyer/advocate that formally commences a divorce proceeding shall contain a statement certifying that they have complied with this section |
| DA Section 10 – Duty of Court --- Reconciliation  |
| **10(1)** | It is the duty of the court, before considering the evidence, to satisfy itself that there is no possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.  |
| DA Section 21.1 – Failure to Remove Religious Barrier to Remarriage  |
| **21.1** | Court may dismiss divorce application and strike out any other pleadings and affidavits filed by that spouse under this Act  |

## Capacity to Separate

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| --- |
| Wolfman-Stotland v Stotland [2011] BCCA |
| **F** | WS and S were married in 1954. They have no children, and S handled finances during marriage. WE is 92 years old and had been living in a old-folks home since 2001. S is 93 years old and had been living in a separate old-folks home since 2007. WS said that she wanted the divorce because S “fell asleep during Bingo,” there was no evidence of mistreatment. From this evidence, CJ held that WS lacked the necessary capacity to divorce because she was unable to manage her own affairs.  |
| **I** | *Did WS have the capacity to separate?* |
| **A** | There is a hierarchy of levels of capacity [from Calvert]: * **Separation** – requires the lowest level of understanding, a person has to know **with whom he or she does not want to live**
* **Divorce** – requires a bit more understanding, requires the desire to *remain* separate and to be no longer married to one’s spouse – undoing the contract of marriage
* **There is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live, and decisions regarding financial matters.** Financialmattersrequire a higher level of understanding – the highest level of capacity is that required to make a will

The capacity to form intention to live separate and apart has been accepted as equivalent to the capacity to enter marriage. WS had the capacity to instruct counsel and understood that she wanted her share of the family assets.  |
| **H** | Overturned CJ decision on basis that applied the wrong test for capacity  |
| **R** | ***Minimum capacity required to form the intent to separate is the capacity to instruct counsel.***  |

## Date of Separation

**DETERMINING WHEN SPOUSES (MARRIED OR CL) BEGAN TO LIVE “SEPARATE AND APART” IS IMPORTANT FOR: (A) SECTION 8(2)(A) OF THE DIVORCE ACT, (B) DETERMINING THE ENTITLEMENT OF PROPERTY INTERESTS UNDER THE FLA, (C) DETERMINING ENTITLEMENT AND QUANTUM OF SPOUSAL SUPPORT, AND (D) DEBT RESPONSIBLIITY.**

* Residency arrangements need not change – spouses can continue to live in the same home and still meet the criteria for S&A
* Only one person required to form the intent to separate, but that intent must be communicated in words or demonstrated in action

#### FLA Section 3 – Spouse and Relationships between Spouses

**3(4)** For the purposes of this Act,

(a)spouses may be separated despite continuing to live in the same residence, and

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

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

 (ii) an action, taken by a spouse that demonstrates the spouse’s intention to separate permanently.

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| Oswell v Oswell [1990]  |
| **F** | H and W were married in 1977. W committed adultery on August 7, 1984. H did nothing for 2 weeks, hoping that W would explain herself. When she did not, he confronted her and told her that he wanted to separate. She did not want to separate. H argues that they have lived separate and apart under the same roof since this date. W argues that they did not begin to live separate and part until the petition for divorce was served in March, 1988. The parties agreed on the value of family property in both 1984 and 1988. |
| **I** | *Which property value should be used?* |
| **A** | ***There are various indicia in jurisprudence under the DA to assist a court in determining when spouses who occupy the same premises are living separate and apart:*** * (1) There must be a **physical separation** – often indicated by spouses occupying separate bedrooms. Just because a spouse remains in the same house for reasons of economic necessity **does not** mean that they are not living S&A **[Dupere v Dupere, 1974]**
* (2) There must be a **withdrawal** by one or both spouses from the **matrimonial obligation** with the intent of destroying the matrimonial consortium **[Dupere]** or repudiating the marital relationship **[Mayberry v Mayberry, 1971]**
* (3) Absence of **sexual relations** is **not** conclusive but is a factor to be considered **[Dupere; Cooper; Mayberry]**
* (4) Consider the discussion of family problems and **communication** between the spouses; presence or absence of **joint social activities**; the **meal pattern** **[Cooper, Mayberry]**
* (5) Although the performance of household tasks is also a factor, help may be hired for these tasks and greater weight should be given to those matters which are peculiar to the husband and wife relationship outlined above
 |
| **H** | The spouses did not live separate and apart with no real prospect of resumption of cohabitation until January 1988 |

|  |
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| Riha v Riha [2001]  |
| **F** | H and W married in 1969 in the Czech Republic and had two children. They came to Canada in 1982. Purchased a home in 1986. H claimed that the parties’ relationship changed dramatically at this point, although they cohabited in the matrimonial home for 10 years. They ceased sexual relations and had separate bedrooms. H claimed date of separation was August 1986, W claimed it was November 1994. |
| **A** | * Sexual relationship and sleeping arrangements is only one indicia and is not on its own sufficient to establish the date of separation.
* Not satisfied that the other indicia set out in Oswell were met in this case
 |
| **H** | Date of separation was November 1994 when W served H with divorce documents and he accepted that the marriage was over. |

## Same-Sex Divorce

**ANOMALY IN THE LAW WHICH MEANT THAT GAY/LESBIAN COUPLES WERE ABLE TO MARRY BUT UNABLE TO DIVORCE WAS AMENDED IN 2005 WHEN THE DA DEFINITION OF SPOUSE WAS CHANGED TO: EITHER OF TWO PERSONS WHO ARE MARRIED TO EACH OTHER.**

* In June 2013, the ***Civil Marriage of Non-Residents Act*** was enacted to amend the ***Civil Marriage Act***. The amendment made valid in Canadian law all marriages of non-residents whose marriages were performed in Canada.
* The ***Act*** also allows non-resident same-sex couples to divorce in Canada, if divorce is not possible in their country of residence.

### Same-Sex Adultery

*\*Will be on the exam*

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| P(SE) v P(DD) [2005] BCSC  |
| **F** | H and W married for 17 years. In October 2004, W discovered that H was having an affair with another man. They separated and W filed for divorce, seeking an immediate end to their marriage on the basis of adultery. H signed an affidavit acknowledging the adulterous relationship and did not contest the divorce.  |
| **I** | *Does the CL definition of adultery include adulterous acts with individuals of the same sex?* |
| **A** | **The CL definition of adultery 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 use 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 CL 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.
 |

**NOTE: THE ONLY OTHER PROVINCE WHERE THE CL DEFINITION OF ADULTERY HAS BEEN EXPANDED TO INCLUDE SAME-SEX ADULTERY IS NEW BRUNSWICK [THEBEAU V THEBEAU, 2006]**

# 3. Family Violence

**THE FLA NOT ONLY EXPRESSLY INCLUDES FAMILY VIOLENCE AS A MANDATORY FACTOR TO CONSIDER IN THE ‘BEST INTERESTS OF THE CHILD’ TEST FOR PARENTING ARRANGEMENTS, BUT ALSO DEFINES FAMILY VIOLENCE BROADLY. THE FLA ADDRESSES FAMILY VIOLENCE IN 2 MAIN WAYS: (1) BY INCORPORATING IT INTO THE BEST INTERESTS OF THE CHILD TEST FOR PARENTING ARRANGEMENTS, AND (2) BY IMPLEMENTING A NEW PROTECTION ORDER REGIME THAT IS ENFORCED BY CRIMINAL LAW.**

**THERE IS A BROAD DEFINITION OF FAMILY VIOLENCE:**

**FAMILY LAW ACT – SECTION 1**

**“Family Violence” includes:**

(a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse of a family member,

(c) attempts to physically or sexually abuse a family member,

(d) psychological or emotional abuse of a family member, including

(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

(ii) unreasonable restrictions on, or prevention of, a family member’s financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

**“Family Member,” with respect to a person, means**

(a) the person’s spouse or former spouse,

(b) a person with whom the person is living, or has lived, in a marriage-like relationship,

(c) a parent or guardian of the person’s child,

(d) a person who lives with, and is related to,

 (i) the person, or

 (ii) a person referred to in any paragraphs (a) to (c), or

(e) the person’s child

and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e);

**JURISPRUDENCE INTERPRETING DEFINITION OF FAMILY VIOLENCE:**

* **MWB v ARB [2013, BCSC]** – the court should take a broad view of what constitutes family violence
* **DNL v CNS [2014, BCSC]** - Demeaning remarks, blaming parent to a child qualify as family violence
* **DNL v CNS [2013, BCSC]** - Derogatory outbursts, demeaning comments qualify
* **MWB v ARB [2013, BCSC]** - Litigation abuse, failure to cooperate qualify
* **Hokhold v Gerbrandt [2014, BCSC]** - Behaviour causing financial hardship and stress, threats to cause financial hardship qualify
* **JCP v JB [2013, BCPC]** - Deliberate failure to pay child support intended to inflict emotional harm or control behaviour qualifies

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| H.H. v H.C. [2002] ABQB |
| **F** | H sought access to 2 young sons. W opposed based on serious history of physical violence against her. She claimed the attack took place in presence of children, he denied this. H argued that even if children were aware of attacks, they were very young. Although attack on her and her parents was very vicious and unprovoked, H only received a conditional sentence of 14 months. In addition to attacks, W argued that H had little involvement w/ children during the course of the marriage and that she was subject to constant emotional and financial abuse, which took place in front of the children.  |
| **I** | *Should H have access to the children?* |
| **A** | * Risks of H having access are (1) physical/psych harm to 2 children, and (2) risk to mother and adverse effects on her and 2 kids
* H appears to minimize the assaults in his affidavit and denies responsibility, blaming W; this is unacceptable given the seriousness of the assault and resulting injuries
* The Criminal Courts in BC did not seem to treat this matter as seriously as R; H has already been punished in BCSC for his acts and should not be punished again in these family law proceedings
* However, criminal law defences such as provocation and proof BARD are not available to H in these civil proceedings
* Letters of reference from friends and acquaintances indicate that incident was apparently very out of character, and have attested to his love for his children;
* Appears that the children were not in any direct danger, the children were upstairs sleeping until the assault moved outdoors at which point they may have been present
* W confirmed that there was otherwise no prior history of violence with H
* Continued denial of access is not necessarily in best interests of the children, and is punitive to H.
 |
| **H** | Some contact by H to his children is at this time in their best interests, which is the governing criteria. Allowed limited supervised daytime visit 1x per month.  |
| **R** | ***Each case must be reviewed on its own merits.***  |

## Duties of Family Dispute Resolution Professionals

**THERE IS A POSITIVE OBLIGATION TO SCREEN FOR FAMILY VIOLENCE. INCLUDES FAMILY LAW LAWYERS, MEDIATORS, PARENTING COORDINATORS, FAMILY JUSTICE COUNSELLORS, AND ARBITRATORS UNDER THE FLA (SECTION 1).**

1. Section 8(1) imposes a **positive duty** to assess whether family violence is present and the extent to which the family violence may adversely affect (a) the safety of the party or a family member of the party, and (b) the ability of the party to negotiate a fair agreement
2. Section 8(2) requires professionals to (a) discuss with the party the advisability of using various times of family dispute resolution to resolve the matter, and (b) inform the party of the facilities and other resources known to the professional that may be available to assist in resolving the dispute
	1. Under section 197(1), if a lawyer is acting on behalf of a party in a proceeding under the FLA, lawyer must provide, at the time the proceeding is started, a statement signed by the lawyer, certifying that the lawyer has complied with section 8(2)
3. Section 8(3) requires professionals to advise the party that agreements and orders respecting (a) guardianship, (b) parenting arrangements, and (c) contact with a child, must be made in the **best interests of the child only.**

## Notice Exemptions

Notice is **not** required when:

* **Guardianship Orders** – the court can exempt a party from the requirement to give notice for applications for guardianship **[Section 52(3)]**
* **Relocation Orders** – the court can exempt a party from all or part of the requirement to give notice when a guardian wishes to relocate themselves or a child, if the court is satisfied that notice cannot be given without incurring a risk of family violence by another guardian or a person with contact **[Section 66(2)(a)]**
	+ Does not have to be something that has happened – just have to have good reasons to perceive a risk
* **Disposition of Property** – the court can make an order restraining a party from disposing of property w/o notice to the other party **[Section 91(1)]**
	+ Muse be a sense of urgency and must be able to demonstrate this
* **Protection Orders** – can be sought on a w/o notice basis **[Section 186]**

## Guardianship & Parenting Arrangements – Best Interests of the Child

**The FLA modernizes the child’s best interests test through sections 37 and 38. Section 37(1) makes the child’s best interest the ONLY factor to be considered. Section 37(3) establishes overarching consideration that unless an order protects the child to the greatest extent possible, it is not in the child’s best interests. These provisions work together with the specific violence-related factors in section 37(2) and 38 to place greater emphasis on considering family violence when making decisions.**

|  |
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| **FLA Section 37** |
| **37(1)** | In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child ***only***.  |
| **37(2)**  | To determine what is in the ***BIOC*** all of the child’s needs and circumstances must be considered, including the following: 1. the child’s health and emotional well-being;
2. the child’s views, unless it would be inappropriate to consider them;
3. the nature and strength of the relationships between the child and significant persons in the child’s life;
4. the history of the child’s care;
5. the child’s need for stability, given the child’s age and stage of development;
6. the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
7. the impact of any family violence on the child’s safety, security or well-being, whether the family violence is directed toward the child or another family member;
8. whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child’s needs;
9. the appropriateness of an arrangement that would require the child’s guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
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 the 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 subsection (2), and only to the extent that it affects that factor.  |

*\*\*Note: 37(3) puts the onus on the courts/lawyers to make sure that the agreement is actually in the best interests of the child*

**Assessing Family Violence – FLA Section 38**

For the purpose of section 37(2)(g) and (h), a court must consider **all** of the following:

1. the 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 well-being 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.

**UNDER SECTION 40(4), “NO PARTICULAR ARRANGEMENT IS PRESUMED TO BE IN THE BEST INTERESTS OF THE CHILD.”**

**When Denial of Parenting Time or Contact is NOT Wrongful:**

**FLA – Section 62**

If there is an agreement or order for parenting time or contact, denial of parenting time or contact is **not** wrongful if: (a) the guardian **reasonably believed** the child might suffer family violence if the parenting time or contact with the child were exercised.

## Protection Orders

**A PROTECTION ORDER CAN BE SOUGHT AS A STAND ALONE APPLICATION – YOU DO NOT NEED TO HAVE ANY OTHER PROCEEDING OR CLAIM FOR RELIEF UNDER THE FLA. IF THERE IS FAMILY VIOLENCE INVOLVING A CHILD, THE VIOLENCE DOES NOT NEED TO BE DIRECTED AT THE CHILD, ONLY NEED EXPOSURE.**

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| **Definitions** | **182** | ***“at risk family member”*** means a person whose safety and security is or is likely at risk from family violence carried out by a family member ***“residence”*** means 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 a Protection Order?** | **183(1)** | A family member who is claiming to be an “at-risk family member” OR a person on behalf of the “at-risk family member” OR the court can make the order on its own initiative.  |
| **When will the Court Grant a Protection Order?** | **183(2)** | A court may grant a protection order if the court determines that1. family violence is likely to occur, and
2. the other family member is an at-risk family member
 |
| **Orders that Can be Made** | **183(3)** | * No direct or indirect **communication**;
* No **attending** or **entering** place regularly attended by the at-risk person (e.g. residence, school, workplace, etc.)
* No **following** the at-risk person;
* No possessing **weapons**;
* Directions to **police** to remove person from property, accompany person to remove belongings, seize weapons;
* Requirement 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
 |
| **Expiry** | **183(4)** | Protection order expires in **one year** unless otherwise ordered  |
|  | **184** | In determining whether to make a protection order, the court **must consider at least the following risk factors:** 1. Any history of family violence by the 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 between 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 circumstances 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 risk to their own safety;
7. Any circumstances that may increase the at-risk family member’s vulnerability, including pregnancy, age, family circumstances, health or economic dependence.
 |
| **If Family Member is a Child** | **185** | If a child is a family member, the court must consider, in addition to the factors set out in 184, 1. whether the child may be **exposed** to family violence if an order under this Part is not made, and
2. whether an order under this Part should also be made respecting the child if an order under this part is made respecting the child
 |
| **No Notice Necessary**  | **186** | Applications for a protection order can be made without giving notice  |
| **Enforcement** | **188** | May not be enforced under the FLA or Offence Act A police officer having reasonable grounds to believe that a person has contravened a protection order may take action to enforce the order and if necessary use reasonable forceNote: proof of service not required\* |
| **189** | Where there is a conflict or inconsistency with a protection order and another order made under the FLA (e.g. parenting time), then that Order is suspended until either the other order or the protection order is varied so there is no conflict or inconsistency, or the protection order is terminated.  |
| **191** | Protection Orders from another Canadian Jurisdiction are enforceable under the Enforcement of Canadian Judgments and Decrees Act  |

*\* Protection orders are enforceable under section 127 of the Criminal Code. However, for successful prosecution under section 127, actual service of the order is essential given that MR has to be established.*

* Mutual protection orders – court must consider whether to make the order against one person only, taking into account: (1) the history of or potential for family violence, (2) extent of injuries/harm, and (3) respective vulnerabilities.
* Self-defence – the 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… the Court may make an order regardless of whether the family member has complied with a previous order; the family member is temporarily absent from home; the at risk family member is in shelter/safe house; criminal charges have been laid, the at-risk family member has history of returning; or there’s

## Exclusive Occupancy

**FLA Section 90 - BCSC may grant an order that a spouse has (a) exclusive occupancy of the family residence, or (b) possession of specified personal property stored at the family residence. The test is the same as under section 124: (a) the practical impossibility of sharing the residence, and (b) the balance of convenience.**

## Restraining Orders

FLA Section 255 – a restraining order made under the FRA remains in force in accordance with the terms of the Order.

# 4. determining Best Interests of the Child

## Legislation

**FLA IS MUCH MORE COMPREHENSIVE THAN THE DA.**

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| Divorce Act – Section 16 – Custody Orders  |
| **Court May Order** | (1) Court may make an order for custody and/or access to any or all children of the marriage |
| **Terms/Conditions** | (6) Court may make an order for a definite/indefinite period of time OR until the happening of a specified event, AND may impose terms/conditions/restrictions that it sees fit and just  |
| **Factors** | (8) 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 when making an order  |
| **Past Conduct** | (9) Court shall **not** take into consideration the past conduct of any person unless the conduct is relevant to their ability to be parent a child  |
| **Maximum Contact** | (1) Court shall **give effect to the principle that a child of the marriage should have as much contact w/ each spouse as is consistent with the best interests of the child**, and will take into consideration the willingness of parties to facilitate such conduct  |
| FLA – Section 37 – Best Interests of Child  |
| **Only Consider Best Interests** | (1) In making an agreement or order for guardianship, parenting arrangements, or contact w/ a child, the parties and the court must **consider the best interests of the child ONLY**  |
| **Factors** | (2) To determine what is in the best interest of the child, must consider all of the child’s **needs and circumstances**:1. Child’s health and emotional well-being;
2. Child’s views, unless it would be inappropriate to consider them;
3. Nature and strength of the relationships between the child and significant persons in the child’s life;
4. History of the child’s care;
5. Child’s need for stability, given the child’s age and stage of development;
6. Ability of each person who is guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact w/ the child, to exercise his or her responsibilities;
7. Impact of any family violence on the child’s safety, security, or well being, whether the family violence is directed toward the child or another family member;
8. Whether the actions of a person responsible for family violence indicate that the person may be impaired in their ability to care for the child and meet the child’s needs;
9. Appropriateness of an arrangement that would require the child’s guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well being of the child or other family members;
10. Any civil or criminal proceeding relevant to the child’s safety, security or well being
 |
| **NOT in Best Interests Unless…** | (3) An agreement or order is not in the best interests of the child unless it protects, to the greatest extent possible, the child’s **physical, psychological and emotional safety, security and well being***\*\*Note: gives courts great discretion in determining what is appropriate*  |
| **Past Conduct**  | (4) Court may consider a person’s conduct only if it **substantially** affects a factor set out in (2), and only to the extent that it affects that factor |

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| BDM v AEM [2014] BCSC  |
| **F** | High conflict case involving 6 y.o. child (A). Child was too young to be consulted.  |
| **A** | Court addressed most of the section 37(2) factors in determining what parenting arrangement was in A’s best interests* + child’s health and emotional well-being and the ability the parents to execute parenting responsibilities: the father had difficulty discriminating between his own objectives and perceptions and the best interests of A.
	+ child’s views*:* she was too young to be **consulted**
	+ relationship between child and others: here the court not only considered A’s relationship with both parents, but also each parent’s relationship with their own immediate and extended family and social network as well as the mother’s relationship with the father’s family – in this case the father led a socially isolated life
	+ child’s need for stability*:* noted the parents had very different parenting philosophies- as a result A should spend majority of her time with one parent
	+ whether an arrangement that requires co-operation is appropriate*:* very limited cooperation, has already adversely affected A

**Clear that the best interests of A require that any parenting arrangement ordered cannot be dependent upon cooperation between the parents.**  |
| **H** | A to spend majority of time with mother.  |

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| --- |
| Hokhold v Gerbrandt [2014] BCSC |
| **F** | Mobility application w/ 6 and 4 y.o. children. Court found that parents had a dysfunctional relationship.  |
| **A** | Courts had the benefit of a section 211 report (formerly section 15 FRA)Applied Section 37 factors and found: * + child’s health and emotional well-being*:* father was using the distraught emotions of the children to bolster his court application for increased access (the McDonalds video, father’s behaviour was purposeful and not for good intentions) – children to attend counseling
	+ child’s views*:* 4 year old too young but 6 year old was clear with his views
	+ child’s need for stability*:* the animosity between the parents created instability for the children. Father’s inability to meet parental responsibilities (ie 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 (this supported by father’s statement to Dr. Waterman (Triple A mother) –tried to recant at trial!) [so, financial means had no impact].
 |

## Section 211 Reports

**RECOMMENDATIONS IN SECTION 211 REPORTS ARE NOT DETERMINATIVE, BUT JUDGES DO RELY ON THEM. POTENTIAL ISSUE THAT JUDGES UNFAMILIAR W/ FAMILY LAW OVER RELY ON THE REPORTS, AND SO THE REPORTS ARE NOT CROSS-EXAMINED OR CHALLENGED THOROUGHLY.**

|  |
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| FLA – Section 211 – Best Interests of Child |
| **Court May Appoint Assessment** | (1) Court may appoint someone to assess one or more of: 1. The needs of the child
2. The view of the child
3. The ability and ***willingness*** of a party to satisfy the needs of the child
 |
| **Who Can be Appointed** | (2) Appointed person must be: (a) a family justice counselor/social worker/another person approved by the court, AND (b) must not have any previous connection w/ the parties (unless each party consents) |
| **Notice** | (3) Application under this section can be made w/o notice to any other person  |
| **Requirements of Assessor**  | (4) Assessor must prepare a report of the results of the assessment, give a copy to each party (unless court orders otherwise), and give a copy to the court.  |
| **Fees** | (5) Court may order who is to pay the fees (shared or one party alone)*\*\*Note, usually parties agree or ordered to pay 50/50* |

**FOR SECTION 211 REPORTS, QUALIFIED EXPERT IS USUALLY A PSYCHOLOGIST WHO ASSESSES THE NEEDS OF THE CHILD IN RELATION TO THE FAMILY LAW DISPUTE AND THE WILLINGNESS OF EACH PARTY TO SATISFY THE NEEDS OF THE CHILD. THE EXPERT WOULD MEET WITH THE CHILD AND INTERVIEW TEACHERS, CAREGIVERS, PARENTS, AND HOUSEHOLD MEMBERS TO ASSESS WHO CAN BEST MEET THE CHILD’S NEEDS. THERE IS ALSO A HOME ASSESSMENT AT EACH PARENT’S HOME.**

**Views of the Child Report (VCR)**

Useful, but does not give a full assessment re: needs and views of child and willingness of each parent to meet those needs; can be completed by professionals, including lawyers. Although this report is not that comprehensive, a judge might order a Section 211 report if they see anything alarming in the VCR.

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| Keith v MacMillan [2014] BCSC |
| **F** | Court had benefit of Views of the Child Report for 2 teens, the subjects of the litigation.  |
| **A** | * Children were asked to rate how their parents “get along” on a scale of 0-10, with 0 being “no cooperation”
* The older child gave his parents -6 (negative) and the younger child a 0
* Children shared the family violence they witnessed and experienced – neither parent disclosed the family violence
 |
| **H** | Ordered a comprehensive section 211 report to further investigate the issues raised by the children in the views of the child report |
| **R** | ***Shows importance of including the Child’s voice in litigation involving children.***  |

**OTHER WAYS TO GET CHILD’S EVIDENCE:**

**FLA Section 202 – Court may decide how child’s evidence is received**

* Having regard to the BIOC, a court may:
	+ (a) admit hearsay evidence it considers reliable of a child who is absent, AND/OR
	+ (b) give any other direction that it considers appropriate concerning child’s evidence

**FLA Section 203 – Children’s Lawyer**

* **(1)** Court may appoint a lawyer to represent the interests of a child if
	+ (a) the conflict between parties is so severe that the ability of the parties to act in BIOC is significantly impaired, and
	+ (b) it is necessary to protect BIOC
* **(2)** If the court appoints a lawyer, the court may allocate fees among or to one party

*\*\*Note: No situations where this has happened yet*

Van de Perre v Edwards [2001] SCC 60. This case is listed in the readings but no slide?

# 5. Who is a Parent?

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| FLA – Part 3 |
| **20** | **Assisted Reproduction** means a method of conceiving a child other than by sexual intercourse; | Any form of conception that is not traditional conception. Includes donor insemination, in vitro fertilization, inter uterine insemination, and surrogacy.  |
| **23** | **(1)** For all purposes of the law of BC, (a) a person is the child of his or her parents, (b) a child’s parent is the person determined under this Part to be the Child’s parent, and (c) the relationship of parent and child and kindred relationships flowing from that relationship must be as determined under this Part. **(2)** For the purposes of an instrument or enactment that refers to a person, described in terms of his/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.  | * A determination of parentage under Part 3 of the FLA is a determination for the purposes of all of the laws of BC.
* Anywhere in the law where it says “parent,” whether or not you are a “parent” is determined by the FLA.
 |

## Determining Parentage

### ART Conceived Children

**Where the parties require the assistance of donors for human reproductive genetic materials, embryo and/or the assistance of surrogates and/or fertility treatments. Assisted Reproduction Technology = (ART).**

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| **Donors** | **FLA SECTION 24** - Where there is assisted reproduction used to conceive a child, donors of any genetic material (e.g. sperm, egg or embryo) are **NOT** presumed to be the child’s parent | * Default that a donor is not a parent, so technically speaking do not need a donor agreement – however, still good idea to have it so that everyone is on the same page with regard to use of sperm and what happens in different scenarios.
* If a donor wants to be a parent, they have to sign the agreement **pre-conception**
 |
| **Assisted Reproduction** | **FLA SECTION 27** – where a child is conceived by way of assisted reproduction, the child’s birth mother is a parent, even if the birth mother is not genetically related to the child (i.e. donor egg, or donor embryo); * Person who was married to, or in a marriage-like relationship with, the child’s birth mother when the child was conceived is also the child’s parent unless there is proof that, before the child was conceived, the person did not consent or withdrew consent to be a parent.
 |
| **Assisted Reproduction After Death** | **FLA SECTION 28** - If (1) child is conceived through ART, (2) the person who provided the genetic material used in the conception of the child did so for their own reproductive use (i.e. conception of their own child), (3) the person who provided the genetic material died before the child’s conception, and (4) that there is proof that the person: 1. gave written consent to the use of their genetic material after that person’s death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died,
2. gave written consent to be the parent or a child conceived after the person’s death, and
3. did not withdraw the consent referred to in subparagraph (i) or (ii) before the person’s death,

Then, when the child is born the parents are: (a) the deceased person, and (b) regardless of whether he or she also provided genetic material used for the ART, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.  |
| **Surrogacy** | **FLA SECTION 29 –** Surrogate mother is presumed to be the birth mother and parent of a child conceived by this form of assisted reproduction regardless of any genetic connection the surrogate may have to the child. * Intended parents and the surrogate must have a written agreement prior to the conception of the child that confirms that (a) the surrogate will not be a parent to the child; (b) the surrogate will surrender the child to the intended parents; and (c) the intended parents are to be the parents of the child.
 | **No court order required.**  |
| **Other** | **FLA SECTION 30** – Where a child is conceived by ART, people can make an agreement as to who will be a parent. This can include a combination of intended parents, sperm donor, egg donor, and surrogate. * Agreement must be made prior to conception and no parties can withdraw from the Agreement prior to conception for the Agreement to be valid.
 | As a result of these preconception agreements, there may be more than 3 parents of the child.  |

**Under Section 31 of the FLA…**

If there is a **dispute** or any **uncertainty** as to whether a person is or is not a parent, a person can make an application to the court seeking an order declaring whether the person is a child’s parent.

### Non-ART Conceived Children

**Where the parties have sexual intercourse to conceive their children w/o any assistance of donors, surrogates or insemination or transplanting services at fertility clinics.** As long as conception is through sexual intercourse, intention does not matter if they did not intend to be parents together but conceived, they are both still parents in the eyes of the law.

**Under Section 26 of the FLA…**

(1) If child is not born as a result of ART, the child’s parents are the **birth mother** and **biological father;**

(2) A male person is presumed to be a child’s biological father if:

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

 (b) he was married to the birth mother and, within 300 days before the child’s birth, the marriage was ended (i) by his death, (2) by divorce, or (iii) the marriage was voided.

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

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

 (e) he and the birth mother acknowledge that he is the father by signing a statement under section 3 of the Vital Statistics Act;

 (f) he has acknowledged that he is the father by having signed an agreement under section 20 of the Child Paternity and Support Act.

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

# 6. Post-Separation Parenting Framework

**WHAT IS CUSTODY AND ACCESS?** Custody of a child has traditionally been defined as the rights incidental to guardianship of a person, and physical care and control of a child. Access is the time a parent has with a child. Note that the term “***guardianship***” is not mentioned in DA.

## Divorce Act

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| 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 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 of other cause, to withdraw from their charge or to obtain the necessaries of life[Under section 2(2), for the purposes of the definition of “child of the marriage”, a child of 2 spouses or former spouses include: (a) any child for whom they both stand in the place of parents; and (b) any child of whom one is the parent and for whom the other stands in the place of a parent.] |
| **Custody** | Includes care, upbringing and any other incident of custody |
| **Custody Order** | An order made under subsection 16(1)  |
| **Spouse** | Either of two persons who are married to each other  |

**SECTION 16 SETS OUT WHAT THE COURT IS TO CONSIDER WHEN MAKING AN ORDER: THE BEST INTERESTS OF THE CHILD BY REFERENCE TO THE CONDITION, MEANS, NEEDS AND OTHER CIRCUMSTANCES OF THE CHILD; MAXIMUM CONTACT; AND PAST CONDUCT IF RELEVANT TO ABILITY OF PERSON TO ACT AS A PARENT.**

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| Section 16 – Custody Orders |
| **1** | ***Order for custody*** | Court may, on application by either or both spouses or any other person, make an order respecting the custody of or access to any and all children of the marriage.  |
| **2** | ***Interim order for custody*** | When an application is made under (1), the court may on application by either or both spouses or any other person, make an interim order respecting the custody of any or all children of the marriage ***pending*** the determination of the subsection (1) application.  |
| **3** | ***Application by other person***  | A person other than a spouse may **not** make an application under subsection (1) or (2) without leave of the court.  |
| **Types of Orders:**  |
| **4** | ***Joint custody or access***  | Court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.  |
| **5** | ***Access*** | A spouse who is granted access to a child of the marriage has the right to make inquiries and be given information as to the health, education and welfare of the child (unless the court orders otherwise).  |
| **6** | ***Terms and conditions*** | Court can make order for definite/indefinite period of time, and may impose other terms/conditions/restrictions as it sees fit.  |
| **7** | ***Order for change of residence*** | Court may include in the order a requirement that any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least 30 days before the change, any person who is granted **access** to that child, the time at which the change will be made and the new place of residence of the child.  |
| **Considerations when making orders:** |
| **8** | ***Factors*** | When making an order, the Court shall take into consideration **only the best interests of child** of the marriage as determined by reference to the condition, means, needs and other circumstances of the child |
| **9** | ***Past Conduct*** | When making an order, the court shall **not** take into consideration the past conduct of any person unless it is relevant to the ability of that person to act as a parent of the child. |
| **10** | ***Maximum Contact*** | In making an order, court shall give effect to 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 shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.  |

**UNDER SECTION 17 OF THE DIVORCE ACT, THE COURT CAN MAKE AN ORDER VARYING A CUSTODY ORDER OR ANY PROVISIONS THEREOF. THE COURT MUST BE SATISFIED THAT THERE HAS BEEN A “CHANGE IN THE CONDITIONS, MEANS, NEEDS OR OTHER CIRCUMSTANCES OF THE CHILD SINCE MAKING THE ORDER.” THE BEST INTERESTS OF THE CHILD AND MAXIMUM CONTACT PRINCIPLE ARE THE GOVERNING FACTORS.**

* There has to be a “material change in circumstances” – i.e. something that you could not anticipate when the original order was made – aging of the child is **not** a material change in circumstances, but can sometimes include a review clause based on when the child reaches a certain age
* A child deciding that they do not want to spend time with one parent **is considered a material change in circumstance**

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| Section 17 – Variation, Rescission or Suspension of Orders  |
| **1** | ***Order for variation, rescission, suspension*** | Court may make an order varying, rescinding or suspending, prospectively or retroactively, (a) a support order or any provision thereof on application by either or both former spouses; or (b) a custody order or any provision thereof on application by either or both former spouses or any other person  |
| **2** | ***Application by other person*** | Person other than a former spouse may not make an application under (1)(b) without leave of the court  |
| **3** | ***Terms and Conditions*** | Court may include in a variation order any provision that could have been included in the order under this Act |
| **4** | ***Factors for child support order*** | Before making a variation order in respect of child support, the court shall satisfy itself that a change of circumstances in the applicable guidelines has occurred since the making of the child support order  |
| **5** | ***Factors for custody order*** | Before making a variation order in respect of custody, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage since the making of the custody order or last variation. In making the variation order, the court shall take into consideration **only** the best interests of the child as determined by reference to that change. |
| **5.1** | ***Variation order*** | For purposes of (5), a former’s spouses terminal illness or critical condition shall be considered a change of circumstances of the child of the marriage, and the court shall make a variation order of access that is in the best interests of the child.  |
| **6** | ***Conduct*** | When making an variation order, court shall not take into consideration any conduct that could not have been considered in making the order in the first place.  |
| **9**  | ***Maximum Contact*** | When making a variation order of a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with **the best interests of the child.** Where the variation order would grant custody to a person who does not currently have custody, the court shall consider the willingness of that person to facilitate contact.  |
| **11** | ***Copy of order*** | When making a variation order in respect of a support or custody order made by another court, the court must send a certified copy of the variation order to that other court.  |

**Master Joyce Model**

***Joint Custody/Guardianship*** model under ***FRA and Divorce Act***. If either party dies, the other will be the sole guardian of person & estate of the child. Custodial parent must inform the other parent of any significant matters affecting the child. The custodial parent must discuss with other any significant decisions about the child’s health (except emergency education, religious instruction, and general welfare). The parent who doesn’t have custody must discuss with the custodial parent and try to agree on those major decisions. If can’t agree, custodial parent has the right to make the decision. Other parent believes not in child’s best interests, has the right under section 32 of FRA, to ask the Court to review the decision. Each parent has right to get inform about the child directly from 3rd parties.

## Family Law Act

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| **Section 1 – Definitions**  |
| **Child** | Except in Parts 3 [Parentage] and 7 [Child and Spousal Support] and section 247 [regulations respecting child support], means a person who is under 19 years of age  |
| **Family Violence** | 1. physical abuse of a family member including force confinement/deprivation of necessities of life, but not including the use of reasonable force to protect oneself or others from 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
5. in the case of a child, direct or indirect exposure to family violence
 |
| **Guardian** | Means a Guardian under section 39 [parents are generally guardians] and Division 3 [Guardianship] of Part 4  |
| **Parent** | Parent under Part 3 [Parentage] |

### Who is a Guardian?

**UNDER SECTION 39 OF THE FLA, PARENTS ARE GENERALLY CONSIDERED GUARDIANS:**

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| FLA – Guardianship  |
| **Guardians that Reside**  | **39(1)** Parents are presumptively guardians while living together and after separation, unless there is an agreement or order which provides otherwise  |
| **Guardians that DO NOT Reside w/ Child** |  **39(3)** A parent who has **never resided w/ the child** is **NOT** a guardian unless one of the following applies: 1. A person is a ***parent under section 30*** *(agreement w/ potential birth mother or donor re: parentage)*
2. The parents and guardians make an agreement that the **parent** is also a guardian
3. The parent regularly cares for the child
 |
| **Step Parents**  | **39(4)** If a child’s guardian and person who is not a guardian marry or enter into a marriage-like relationship, the person does not automatically become a guardian by reason of the relationship *(they can only become a guardian by way of section 51 or if they adopt and become a parent)* |

*Note: person who has custody of a child under ss 54.01(5) or 54.1 of the Child, Family and Community Service Act is deemed to be a guardian under the FLA s 51(5)*

### APPOINTING A GUARDIAN

Under **SECTION 50**, a person cannot become a child’s guardian by agreement unless (a) the **person is the child’s parent**, or (b) as provided for under the **Adoption Act** or Child, Family and Community Service Act. However, under **SECTION 51(1)(A)** the court may appoint a person as the child’s guardian. This applies to non-parents and parents who have not lived w/ the child and have not had regular care of the child. Under **SECTION 51(2)**, in order for the court to give a guardianship order, the applicant must provide the following **EVIDENCE** to the court:

* The Provincial Court Family Rules (Rule 18.1) and the Supreme Court Family Rules (Rule 15-2.1) set out evidential requirements for the appointment of a non-parent or parent w/o regular care as the guardian of a child under Section 51
	+ The affidavit must be prepared for guardianship applications, to which must be attached criminal record checks and record checks from MCFD and the Protection Order Registry
	+ The affidavit must set out the Applicant’s relationship w/ the child; any incidents of family violence affecting children; any involvement in court proceedings under the CFCSA, FRA, FLA or DA concerning children in the applicant’s care; any history of criminal convictions of existence of current criminal charges
* Further, this evidence must respect the BIOC as outlined in Section 37.

Under **SECTION 51(4), if a child is 12 years old or older,** the Court must not appoint a person as a guardian w/o the child’s **written approval.** Finally,under **SECTION 52(1) notice must be given to all parents, guardians and others who provide care** for the child or with whom the child lives.

### ASSIGNING GUARDIANSHIP

A guardian may **appoint** a person to act as a guardian in 3 events:

* **(1)** **Testamentary Guardian -** under **Section 53**, in the event of the **guardian’s death** – that person takes on the same responsibilities as the guardian (not more, not less); so, the surviving guardian does not become the sole guardian.
* **(2)** **Standby Guardian** – under **Section 55** – a guardian may appoint a person to be a standby guardian, by execution of a prescribed form, to act in case of terminal illness or permanent mental incapacity on the party of the guardian
* **(3)** **Temporary Guardian** – Under **Section 43(2),** if a guardian is unable to exercise any parental responsibilities, the guardian may authorize, in writing, a person to exercise, in the BIOC, one or more of the guardian’s parental responsibilities
	+ *Note: a guardian* ***cannot*** *assign to a temporary guardian their responsibility in relation to residence; cultural, linguistic, religious and spiritual upbringing and heritage; or starting, defending or settling a proceeding.*
	+ *This is really meant to be if someone goes on vacation, out of town, etc.*

In order for a **TESTAMENTARY OR STANDBY** appointment to take effect, under **Section 57** the person must expressly or impliedly **accept the appointment**.

### TERMINATING GUARDIANSHIP

***BECAUSE THERE IS PRESUMPTIVE PARENTAGE, THERE IS NO SOLE GUARDIANSHIP UNLESS YOU GET AN ORDER TO TERMINATE.*** This matters because even if the guardian isn’t in the picture, they still have some decision-making rights. The court can order the termination of guardianship for **both parents and non-parents**. The CL has held that termination of guardianship is only appropriate in ***extreme situations*** and in the ***rarest and clearest of cases***:

* **D v D [2013, BCPC]** – Extreme Situations – it is important to give parents “maximum opportunity to remain a significant part of the child’s life”
* **STH v RMG [2013, BCPC]** – Only in rarest and clearest of cases where cancelling guardianship is clearly in the child’s best interest

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| **FLA – Terminating Guardians**  |
| **Guardians that are Live-In Parents**  | **39(2)** - an agreement or Order may be made after separation, or when about to separate, that one parent is not the child’s guardian *(use this provision for presumptive guardians)* |
| **Guardians that are Non-Parents or do not reside** | **51(1)(b)** – the Court may terminate a person’s guardianship of the child, except when the director is guardian under the Adoption Act or the Child, Family and Community Services Act. *(Use this provision for appointed guardians, e.g. grandparents)* |

Note: It is difficult to get guardianship terminated. It might be easier to try to get all parental responsibilities instead.

### Parenting Arrangements and Responsibilities

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| FLA – Parenting Arrangements  |
| **Definitions** | **(1)** “***parenting arrangements***” defined as arrangements for parental responsibilities and parenting time  “***parental responsibilities***” means one or more of the parental responsibilities in **section 41** “***parenting time***” parenting time as described in **section 42** |
| **Who can have a parenting arrangement?** | **40(1)** Only a guardian can have parenting responsibilities and parenting time  |
| **No Presumptions about Arrangements** | **40(4)** No particular arrangement is presumed to be in the BIOC. In particular, there is no presumption that (a) responsibilities should be allocated equally; (b) parenting time should be shared equally; or (c) decisions should be made separately or together *But Note: the FLA essentially sets up a “joint” guardianship regime as each guardian is entitled to exercise parenting responsibilities unless an agreement or Order provides otherwise.*  |
| **Court Orders**  | **45 (1)** Court can make orders for: 1. Allocation of parental responsibilities;
2. Parenting time;
3. Implementation of a parenting order;
4. That parties participate in dispute resolution

**45(2)** These court orders cannot be made if the child’s guardians are the parents and are not separated  |
| **Informal Parenting Arrangements**  | **48** If the parents do not have a formal parenting arrangement but have had in place an informal parenting arrangement for a period of time for a length of time that has allowed the arrangement to become a “normal” part of the child’s routine , the informal arrangement cannot be changed w/o consulting the other guardian(s), unless consultation would be unreasonable or inappropriate in the circumstances.  |
| **FLA – Parental Responsibilities**  |
| **What are parental responsibilities?** | **41** Parental responsibilities concern the following: * Day to day decisions affecting the child;
* Where the child will reside;
* With whom the child will live with and associate;
* Child’s education and extra-curricular activities;
* Child’s cultural, linguistic and spiritual upbringing and heritage;
* Child’s medical, dental and other health related treatments;
* Applying for passport, license, permit, benefit or privilege for child;
* Giving or refusing consent;
* Receiving notice entitled to by law;
* Requesting information from a 3rd party;
* Starting or defending a proceeding involving the child; and
* Exercising any other responsibilities reasonably necessary to nurture the child’s development
 |
| **BIOC** | **43** Guardian must exercise their parental responsibilities in the BIOC |
| **Consultation w/ Other Guardians** | **What Section?** Guardians must exercise parental responsibilities in consultation with all other guardians unless there is an agreement or Order to the contrary, or unless consultation would be unreasonable or inappropriate  |
| **Allocation of Responsibilities**  | **44(1)(a)** Parental Responsibilities may be allocated among guardians by agreement **45(1)(a)** Parental responsibilities may be allocated by order *(So, basically starts with the presumption that all guardians get to do these things and then can change that); can give one person “sole authority;” can parse them out; or can have duty to consult, but if unable to agree then one party makes the decision or both go to mediation)* |
| **Separation Required**  | **44(2) and 45(2)** Orders for parenting arrangements (and thus, parenting responsibilities) cannot be made unless the parents are separated.  |

### Parenting time and Contact

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| **PARENTING TIME** | **CONTACT** |
| **“PARENTING TIME” IS THE TIME THAT A CHILD IS W/ A GUARDIAN, AS ALLOCATED UNDER AN AGREEMENT OR ORDER [Section 42(1)]**During parenting time, a guardian may exercise day-to-day decisions affecting the child, unless an agreement or Order says otherwise **[Section 42(2)]** | **“CONTACT” IS THE TIME SOMEONE WHO IS NOT A GUARDIAN HAS W/ A CHILD [Section 1].** An agreement for contact is only binding if all of the child’s guardians, who have parental responsibility decisions respecting whom the child can associate (see 3rd bullet, section 41), are party to the agreement **[Section 58(2)]**  |

**UNDER SECTION 59, ORDERS FOR CONTACT MAY INCLUDE TERMS AND CONDITIONS, INCLUDING SUPERVISION REQUIREMENTS:**

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| LAMG v CS [2014] BCPC  |
| **A** | **SUPERVISION OF CONTACT PRINCIPLES:** 1. Supervision orders are, as 59(3) clearly states, made so as to serve the best interests of children having regard to the considerations specified in family law legislation and not to serve other purposes;
2. Long-term supervision orders are generally discouraged, but in some circumstances they can be justified as serving the BIOC. In even rare circumstances, supervision orders of indefinite duration can be justified in the same way;
3. Factors which can legitimately arise for consideration when a court entertains the possibility of making a supervision order – all of which demonstrably tie into the enumerated “best interests” considerations set out in 37(2) – include but are not limited to, the following (in no particular order):
4. Children’s general right to know and have relationships w/ both parents;
5. Any limitations that may constrain the ability of the parent said to require supervision to employ good parenting judgment and perform parenting functions competently;
6. The level of commitment of the parent said to require supervision to the children;
7. The nature of the relationship between the parents and its impact on the children;
8. The need to protect the children from physical, sexual or emotional abuse;
9. Whether the children are being introduced or re-introduced into the life of a parent after a significant absence;
10. The existence of substance abuse issues for the parent said to require supervision;
11. The existence of clinical issues for the parent said to require supervision;
12. A history of harassment, violence, and other harmful behaviour directed toward the primary caregiver by the parent said to require supervision;
13. A history of parental alienation;
14. Ongoing denigration of the primary caregiver by the parent said to require supervision;
15. Evidence of abuse or neglect of the children by the parent said to require supervision; and
16. The wishes and preferences of the children themselves (mainly when they are older).
 |

# 7. Specific Issues in Parenting

## Failure to Exercise Parenting Time

**SECTION 63 DEALS WITH WHAT HAPPENS WHEN A PARENT FAILS TO EXERCISE PARENTING TIME/CONTACT WHEN THERE IS AN ORDER IN PLACE AND PROVIDES LIMITED REMEDIES. THE PRESCRIBED REMEDY MUST NOT BE AGAINST THE CHILD’S BEST INTEREST (E.G. FORCING A RELATIONSHIP W/ AN UNINTERESTED ADULT). FLA ALSO GIVES JUDGES DISCRETION TO ALLOCATE THE COST, IF ANY, REQUIRED TO FACILITATE PARENTING TIME/CONTACT OR THE FAMILY DISPUTE RESOLUTION/COUNSELING.**

* The key to 63 is that the person **repeatedly** **fails to exercise** their parenting time or contact
* It is up to the court to decide what constitutes “repeatedly”
* If the court finds that the person has repeatedly failed, it does not matter what their excuse is or how reasonable

**FAILURE TO EXERCISE PARENTING TIME OR CONTACT**

**63 (1)** If a person **repeatedly fails to exercise** the parenting time or contact that they are entitled to under an agreement or order, whether or not reasonable notice was given, the court (on application) may **make an order** to do 1+ of the following:

 (a) require 1+ of things in ***61(2)(a), (b) or (e);*** [***SEE BELOW***]

 (b) require the person to **reimburse** the other person for expenses reasonably and necessarily incurred by the other person as

a result of the failure to exercise, including travel expenses, lost wages and child care expenses;

 (c) if the court believes that the person may not comply w/ an order under this section, they may order that person to do 1+ of

things described in 61(2)(f) [***SEE BELOW***].

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

## Denial of Parenting Time or Contact

**SECTION 61 OF THE FLA ESTABLISHES AN ENFORCEMENT REGIME FOR JUDGES TO ENSURE PARTIES RESPECT EACH OTHER’S PARENTING TIME AND CONTACT ARRANGEMENTS. IT PROVIDES A RANGE OF PREVENTATIVE AND PUNITIVE REMEDIES THAT A JUDGE CAN ORDER WHEN THERE IS A DENIAL OF PARENTING TIME OR CONTACT. ALSO GIVES JUDGES DISCRETION TO ALLOCATE COSTS OF THE REMEDIES. APPLICATIONS MUST BE MADE WITHIN 12 MONTHS OF THE DENIAL.**

**DENIAL OF PARENTING TIME OR CONTACT**

**61(1)** Application under this section can only be made by a **person entitled under an agreement or order** to parenting time or contact, and **within 12 months** after the denial.

**61(2)** If the court is satisfied that an applicant has been ***wrongfully denied parenting time or contact*** by a child’s guardian, the court can make an order for any of the following: *(\*These remedies are also used for failure to exercise parenting time, above)*

 **(a)** Require 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 **counseling**, 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.

**61(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, counseling, service, program or transfer *(\*Discretion for court to order costs)*

### When Denial is Not Wrongful

**Section 62 provides examples of circumstances in which denial is not wrongful. Most remedies for denial of parenting time or contact are only available when the parenting time or contact was wrongfully denied. Even where the denial was not wrongful, the court may order compensatory time to the guardian to make up for the missed time w/ the child (if appropriate and in BIOC).**

**WHEN DENIAL IS NOT WRONGFUL**

**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:

(a) guardian **reasonably believed the child might suffer family violence** if exercised;

(b) 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;

(c) **child was suffering from an illness** and guardian has a **written statement, by medical practitioner or nurse practitioner**;

(d) in previous 12 months, applicant **failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact;**

(e) the applicant

(i) informed the guardian beforehand that it was not going to be exercised, and

(ii) did not subsequently give reasonable notice to the guardian that the applicant intended to exercise 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.

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| DNL V CWS [2014] BCSC  |
| **F** | 12 y.o. child who refused to spend time w/ dad. Dad sought to enforce parenting time and mom was seeking to terminate parenting time w/ dad. In VCR, child reported that she did not want to spend time with dad because of anger, accusations against mother, and refuses to let her go to mom’s house when she is upset, insults mom and maternal g-ma and blames her for his behaviour. Dad claimed mom turned child against him, but psychologist found that his own conduct turned child against him.  |
| **A** | Court considered section 37 factors in relation to father’s conduct and found it is in BIOC to terminate court-ordered parenting time.  |

## Child Abduction

**THE FLA PROVIDES FOR 2 TYPES OF ORDERS W/ RESPECT TO REMOVAL OF A CHILD IN SECTION 64:**

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| FLA – Section 64 – Orders to Prevent Removal of Child  |
| **Restrict Area** | (1) On application, the court can restrict a person from taking a child out of a certain geographical area*\*\*Note: this generally concerns parenting together and ensuring that each guardian knows where the child is. Idea behind this is to assist parents in making sure that their ability to parent isn’t impacted by the other moving away.*  |
| **Concern of Remove and Not Return** ***(Abduction)*** | (2) On application, if the court is satisfied that a person proposes to remove and **not return a child** to BC, the court may order that person to do 1+ of the following: (a) give security in any form the court directs; (b) surrender passports and other travel records (c) transfer specific property to a trustee(d) if there is an order/agreement for child support, to pay the child support to a trustee  |
| **Does Not Apply to Relocation** | (3) This section does not apply in relation to the relocation of a child within the meaning of Division 6 *[Relocation]* of this Part. |
|  | (4) A person required by an order made under this section to hold passports, travel records or other property delivered under the order must do so in accordance with the directions set out in the order. |

**SECTION 80 OF THE FLA ADDRESSES THE *HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION*. Under this convention, the removal or retention of a child is considered wrongful if it breaches the rights of custody under the law of the jurisdiction in which the child was habitually resident immediately before the removal/retention, and those custody rights were actually being exercise. Article 3 dictates that a court must order return of the child “forthwith” unless one of the narrow exceptions under Articles 12, 13 or 20 apply** *(\*Applies when children are brought here from outside Canada and only applies when the other country is a signatory to the Convention)*

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| FLA – Section 80 – International Child Abduction  |
| **Definitions** | (1) “convention” means the **Convention on the Civil Aspects of International Child Abduction** signed at the Hague (2) definitions in the convention for custody and access apply for purpose of applying the Convention (3) For the purpose of the convention, the **Attorney General** is the central authority for BC  |
| **Application of Convention in BC** | (4) Subject to subsection (5), the provisions of the **convention have the force of law** in BC; (5) Gov’t not bound to assume any costs in relation to applications submitted under the Convention, except to the extent that those costs are covered under BC’s legal aid program(6) Subsections (1)-(5) and the convention in general apply respecting a child who was **habitually resident** in a contracting state immediately before a breach of custody or access rights, but do **not** apply respecting a child described in subsection (7). (7) **Division 7** [Extraprovincial Matters Respecting Parenting Arrangements] applies respecting,(a) a child who is in Canada and who, immediately before a breach, was habitually resident in Canada, (b) a child who, immediately before a breach, was habitually resident in a state other than a contracting state, (c) a child who, immediately before a breach, 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) and the convention apply  |

*\*Essentially, the Hague Convention does not have force when you are dealing with 2 provinces. Also applies when the other state is not a signatory.*

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| Kubera v Kubera [2008] BCSC  |
| **F** | Father was seeking return of his 8 y.o. child to Poland  |
| **A** | **Court explains the application of the Convention: Effect is given to the Hague Convention by provincial statute.** * In considering whether a child should be returned to a contracting state under the HC, the Court is not given the task of considering the BIOC as they would in a custody hearing
* HC says that the relevant concern is the interests of children **generally,** not the particular child before the court

**Under Article 3, child was wrongfully retained – even though they were granted convention refugee status, this was after the wrongful retention – the decision of the tribunal as to refugee status cannot trump Canada’s international obligations** * The removal is only wrongful under HC if the other parent had rights of custody at the time – whether this right exists is determined according to the law of the state of the child’s habitual place of residence – found that he had rights of custody based on law of Poland at the time of wrongful retention

**Exception under Article 12** says that where a child has been wrongly retained and at the time of the judicial proceedings, it has been less than 1 year since the date of the wrongful retention, the court shall order the return of the child immediately. OR, after the expiration of the 1 year, the court shall also order the return of the child **unless it is demonstrated that the child is now settled in its new environment.** * Onus is on the parent who wrongfully retained the child to demonstrate that the child is now settled in its new environment
* Because it had been more than 1 year since retention, Ms. K had to demonstrate that child was now settled
* Now settled refers to whether the child is settled at the time of the hearing
* Child’s status as refugee is one factor to consider in determining whether she is now settled (but cannot be deciding factor)

***Considerations and objectives of the HC when analyzing facts:*** *(1) general deterrence of international child abduction; (2) need for prompt return; (3) desire to restore the status quo; and (4) objective of entrusting to the courts of the child’s place of habitual residence, the ultimate determination of what the child’s best interests require* |
| **H** | Child was wrongfully detained in Canada, but should not be returned because she was now settled in her new environment.  |

*\*The Convention does not prima facie talk about BIOC, but that is really what this case says Article 12 is saying*

## Mobility/ Relocation

**IN SUMMARY, THE LAW IS THAT: (1) PARENT APPLYING FOR MOVE MUST MEET THE THRESHOLD REQUIREMENT OF MATERIAL CHANGE; (2) FRESH INQUIRY ON BEST INTERESTS OF THE CHILD; (3) EVIDENCE OF NEW CIRCUMSTANCES; AND (4) NO LEGAL PRESUMPTION, ALTHOUGH CUSTODIAL PARENT’S VIEWS ENTITLED TO RESPECT.**

* Under the DA, there was not much spelled out in terms of relocation, so **Gordon v Goertz** developed to be used under the DA.
* If they are CL or under the FLA generally, the DA does not apply:
	+ To determine location in this case figure out WHETHER THERE IS AN AGREEMENT OR ORDER.
	+ If there is **no agreement or order**, then go to **Section 46.**
	+ If there is an **agreement or order,** go to **Division 6**.

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| Gordon v Goertz [1996] SCC |
| **F** | Parties resided in Saskatoon until their separation in 1990. Mom petitioned for divorce and was granted permanent custody of their young child. Dad received generous access. When Dad learned that Mom intended to move to Australia to study orthodontics, he applied for custody, or in the alternative an order restraining the mother from moving the child from Saskatoon. Mom cross-applied for variation of custody order to allow her to move to Australia w/ child. TJ dismissed Dad’s application and varied access provisions of the custody order to allow mom to move to Australia w/ child. Dad granted generous access w/ one month’s notice in Australia only. |
| **A** | **Parent applying for a change in the custody or access order must meet threshold requirement of demonstrating a material change in the circumstances affecting the child.** To meet this threshold, judge must be satisfied that: 1. a change in the condition, means, needs or circumstances of the child or in the ability of the parents to meet the needs of the child,
2. which materially effects the child, and
3. which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

**If the threshold is met, the judge inquires into the BIOC, having regard to all of the relevant circumstances relating to the child’s needs and the ability of respective parents to satisfy them.** * Focus is not on the interests or rights of the parents – only issue is the BIOC.
* There is no legal presumption in favour of the custodial parent, but the custodial parent’s views are entitled to great respect

**Once the applicant has discharged the burden of showing a material change in circumstances, both parents should bear the evidentiary burden of demonstrating where the BIOC lie. In assessing BIOC, judge should particularly consider:** 1. Existing access arrangement and the relationship between the child and the custodial parent;
2. Existing access arrangement and the relationship between the child and the access parent;
3. Desirability of maximizing contact between the child and both parents;
4. Views of the child;
5. Custodial parent’s reason for moving, only in the exceptional case where it is relevant to the parent’s ability to meet child’s needs;
6. Disruption to the child of a change in custody;
7. Disruption to the child consequent on removal from family, schools, and community they know

**Maximum Contact principle** is mandatory but not absolute; judge is only obliged to respect it to the extent that such contact is consistent with BIOC.**ULTIMATE QUESTION: what is the BIOC in all the circumstances, old and new?** |
| **H** | Custody order for Mom upheld and access order varied to provide for access to be exercisable in Canada.  |
| **R** | ***2 part test: (1) threshold requirement of demonstrating a material change of circumstances affecting the child (a change, which materially affects the child, and was unforeseen or not reasonably contemplated at time of previous Order; (2) the application must establish that the proposed move is in the BIOC, given all the relevant circumstances, the child’s needs, and the ability of the respective parents to satisfy those needs.***  |

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| FLA – Section 46 – Changes to Child’s Residence if No Agreement or Order |
| **Application** *\*Basically, you can apply to prevent moving if there is no agreement* | (1) This section applies if: 1. There is no agreement or order respecting parenting arrangements;
2. Application is made for an Order (under section 45); and
3. A guardian plans to change the child’s residence and that change can reasonably be expected to have a significant impact on that child’s relationship w/ another guardian.
 |
| **Determining Arrangement in BOIC** | (2) To determine the parenting arrangement that is in BIOC in the circumstances under subsection (1), the court 1. Must consider section 37 factors AND the reasons for the change in the location of the child’s residence, and
2. Must NOT consider whether the guardian who is planning to move would do so w/o the child.
 |

**THE GOAL OF DIVISION 6 OF THE FLA IS TO INTRODUCE CERTAINTY TO THIS AREA OF THE LAW BY MANDATING NOTICE OF A PROPOSED MOVE, DEFINING WHAT CONSTITUTES RELOCATION, AND DIRECTING COURTS ABOUT BOTH CIRCUMSTANCES THAT SHOULD BE CONSIDERED AND THOSE THAT SHOULD NOT.**

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| FLA – Division 6 – Relocation – Sections 65-71 |
| **Definition and Application** | **65(1)** “relocation” means a change in the location of the residence of a child or child’s guardian that can reasonably be expected to have a **significant impact** on the child’s relationship with (a) a guardian, or (b) one or more other persons having a significant role in the child’s life. *\*\*Change of residence within a metropolitan centre does* ***not*** *qualify as a “relocation”* ***[Berry v Berry, 2013]*****65(2)** Applies if there is a written agreement or order respecting the parenting arrangements or contact, and the guardian plans to relocate themselves or the child, or both  |
| **Notice**  | **66(1)** Guardian who plans to relocate must give to all other guardians and persons having contact w/ child **at least 60 days written notice** of (a) date of relocation, and (b) name of the proposed location. **66(2)** Court may grant exemption from notice requirement if: 1. Notice cannot be given w/o risk of family violence; or
2. There is no ongoing relationship between the child and other guardian/person

**66(3)** Application for exemption can be brought *ex parte*.  |
| **Resolving Relocation Issues** | **67(1)** After notice is given and before date of relocation, guardian and persons having contact must use best efforts to cooperate w/ one another for purpose of resolving issues relating to proposed relocation **67(2)** However, nothing prohibits (a) a guardian from making an application under section 69, or (b) a contact person from making an application under section 59 or 60 for an Order Respecting Contact, for the purpose of maintaining the relationship between the child and the person having contact if relocation occurs.  |
| **Objecting to Relocation** | **68** If a guardian has given proper 60 day notice, the relocation may occur on or after the date in the notice UNLESS the other guardian objects to the relocation by filing an application for an Order to prohibit relocation within **30 days** after receiving the notice |
| **Who can challenge?** | **69** Only **GUARDIANS** have the right to challenge a relocation; *\*E.g. Grandma can be considered under 65(1), but they cannot bring an application unless they are a guardian.* |
| **Orders and Considerations** | **69(1)** “relocating guardian” means a guardian who plans to relocate a child; **69(2)** On application by a guardian, a court may make an order permitting/prohibiting the relocation of a child by the relocating guardian**69(3)** In making an order, court must consider section 37 factors AND those in 4(a) of this section. **69(4) If relocating guardian and another guardian DO NOT have substantially equal parenting:**1. The *relocating guardian must satisfy* the court that:
2. The proposed relocation is made in good faith, and
3. The relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the other guardian(s), persons who are entitled to contact, and others who have a significant role in the child’s life, and
4. If the court is satisfied in (a), the relocation must be considered to be in BIOC unless another guardian satisfies them otherwise (\*\*i.e. onus switches to non-relocating guardian)

**69(5) if the relocating guardian and another guardian HAVE substantially equal parenting time,** the relocating guardian must satisfy the court: 1. of the factors described in (4)(a) and
2. that the relocation is in the BIOC

**69(6)** To determine **whether there is good faith**, court must consider all relevant factors including: 1. the reasons for the proposed relocation,
2. whether the proposed relocation is likely to enhance the general quality of life of the child and the relocating guardian, including increasing emotional well-being or financial/educational opportunities,
3. whether notice was given under section 66,
4. any restrictions on relocation contained in a written agreement or order.

**69(7)** Court must **not consider** whether a guardian would still relocate w/o the child  |

*\*Note that if a party decides that they are going to move w/o the child, nobody is going to stop that parent from doing so even if it is not in BIOC. The remaining parent will have full parenting of the child and the moving parent will lose their say.*

## Parental Alienation

**THERE IS NO LEGISLATION IN THIS AREA, BUT LOTS OF CASE LAW. IMPORTANT TO UNDERSTAND THE DIFFERENCE BETWEEN ALIENATION AND ESTRANGEMENT.**

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| NRG v GRG [2015] BCSC  |
| **A** | **The difference between an estranged and alienated child lies in the cause:** * **ESTRANGEMENT** applies when the child understandably refuses contact w/ a parent because of the parent’s behaviour (i.e. physical/emotional abuse, rigid/restrictive parenting, immature/self-centered behaviour, dysfunctional conduct arising from parent’s psychological/psychiatric issues).
* **ALIENATION** applies when there is little or no objectively reasonable cause for the child’s rejection of the parent, particularly when it is the product of the other parent’s hostility and antipathy towards their former spouse and the intentional undermining by the former of the child’s relationship w/ the later.

Mechanisms often used by courts include: * Detailed case **management and parental co**nduct orders with cost consequences for non-compliance;
* Judicial exhortation urging compliance and emphasizing the emotional harm caused to the children (generally only effective in less severe cases of alienation);
* Court-ordered **therapeutic intervention** where appropriate, while recognizing **“force-marching”** a child to reunification may in some cases be unrealistic and harmful;
* Ordering supervised access/parenting time to allay any child anxiety and possibly pave the way for further strategies to achieve positive relationships;
* Suspension of child or spousal support as a sanction to enforce more engagement with the other parent;
* Transferring custody from the alienating parent to the 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 the alienated parent when the alienation is so entrenched that the **“cure is worse than the illness”,** recognizing that children do sometimes resume a relationship with a rejected non-custodial parent after a long period without contact, albeit perhaps only in later years.
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# 12. Child Support

**THERE ARE 3 FUNDAMENTAL PRINCIPLES THAT APPLY TO ALL CHILD SUPPORT APPLICATIONS: (1) PARENTS HAVE A JOINT AND ONGOING LEGAL OBLIGATION TO SUPPORT THEIR CHILDREN; (2) SUPPORT IS THE RIGHT OF THE CHILD; AND (3) SUPPORT PAYMENTS ARE BASED ON EARNING CAPACITY, THAT IS, NOT ONLY ON WHAT THE PARENT DOES EARN, BUT ALSO WHAT THE PARENT CAN EARN.**

* Even if you make less than the spouse with custody, you pay child support because **it is the right of the child**
* Support payments are based on earning capacity – not only what the parent earns, but what they can earn

## Definition of Child and Legal Obligation to Support

**UNDER BOTH THE DA AND FLA, A CHILD ENTITLED TO CHILD SUPPORT IS EITHER: (A) UNDER THE AGE OF MAJORITY AND HAS NOT WITHDRAWN FROM THE PARENT’S CHARGE, OR (B) IS THE AGE OF MAJORITY OR OVER AND UNDER THE PARENTS CHARGE BUT IS UNABLE, BY REASON OF ILLNESS, DISABILITY OR OTHER CAUSE, TO WITHDRAW FROM THEIR CHARGE OR OBTAIN THE NECESSARIES OF LIFE.**

Child support is payable between parents – don’t directly pay child anything, so if child moves in with their BF, have withdrawn their charge

### Divorce Act

“**child of the marriage**” means a **child of 2 spouses or former spouses** who, at the material time,

**(A)** is **under the age of majority** and 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 necessities of life

#### Child Support Orders

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| DA – Section 15.1 – Child Support Orders  |
| **Child Support Orders**  | **(1)**A court of competent jurisdiction may, on application by either or both spouses, make an **order requiring a spouse to pay for the support of any or all children of the marriage.** |
| **Interim Support Orders**  | **(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 pay for the support of any or all children of the marriage,** pending the determination of the application under subsection (1). |
| **Guidelines** | **(3)** Court making a final or interim child support order must do so in accordance with the guidelines  |
| **Length and Conditions**  | **(4)** An order under (1) or (2) may be for a definite/indefinite period of time, until a specified event occurs, and may impose terms/conditions/restrictions as court sees just and fit. |

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

**Hansen v Hansen [1997]** – divorce application was stayed because the separation agreement did not have satisfactory child support payable under the guidelines.

### Family Law Act

**“child”** includes a person who is over 19 and unable, because of illness, disability or other reason, to obtain the necessities of life or withdraw from the charge of their parents or guardians [Section 146]

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| FLA – Section 147 – Duty to Provide Support for Child  |
| **Who Needs Child Support?** | **(1)**Each **parent and guardian** of a child has a duty to provide support unless the child(a) is a spouse, or (b) is under 19 years of age and has **voluntarily withdrawn\*** from their parents/guardians’ charge, except if the child withdrew because of family violence or the child’s circumstances were objectively intolerable.  |
| **Duty Resumes**  | **(2)**If a child from 1(b) returns to their parents/guardians’ charge their duty to provide support resumes  |
| **Guardian Duty Secondary**  | **(3)** If a **guardian who is not a parent** has a duty to provide support, the guardian’s duty is **secondary** to that of the child’s parents |

**Interpretation of “Voluntary Withdrawal” under FLA**

* Removal of children by the state is NOT voluntary withdrawal intended by the FLA **[DZM v SM, 2014]**
* Child’s refusal to visit does NOT amount to voluntary withdrawal **[Henderson v Bal, 2014]**
* Child who is incarcerated for more than a year HAS voluntarily withdrawn **[MA v FA, 2013]**

**Interpretation of “Other Cause” Under DA and FLA**

Should a payor be paying child support for a child over 19 who is still in school? If they are under 19, there is an automatic right to child support. Over 19, must consider these factors to determine whether there should still be child support. The onus is on the parent who is seeking to have child support continue to show that it is needed, and often involves the child giving evidence about their goals, marks, income etc. If the child is not willing to give the info, the court will not order that there be child support. OTHER FACTORS: If there is no relationship between the child and parent, whether there was a history of abuse or fracture caused by the parent is big consideration. Cost of the education relative to the income of the parents is also important.

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| Farden v Farden [1993]  |
| **A** | **Whether a child over the age of majority remains a child of the marriage for purposes of child support depends on:** * Whether child is studying part-time or full-time
* *\*Generally, 3 classes is enough*
* Whether child has applied for, or is eligible for, student loans or other financial assistance
* *\*Child has obligation to apply for these*
* Whether child’s career plans are reasonable and appropriate
* The child’s ability to contribute to her/his own support through part-time employment
* *\*Child is expected to work if they are not in school, they can have a PT job that contributes but are not expected to spend every $ they earn on tuition*
* The child’s age
* *\*This only arises when one parent no longer wants to contribute. If the child is mid-late 20’s, the court may be done.*
* The child’s past academic performance and whether the child is demonstrating success in the chosen course of studies
* The parents’ plan for the education of their children, particularly where those plans were made during cohabitation, and
* *\*E.g. If originally when the parents were together the plan was for the kid to live at home but they wouldn’t pay for tuition (e.g.), the court will not deviate from the original plan. Court may also consider the career paths of the parents. If the parents are Drs., they may have reasonably expected their child to go for a 2nd post-secondary degree.*
* In the case of a mature child, whether the child has unilaterally terminated the relationship with the parent from whom support is sought
* *\*If your child refuses to have any contact with you, should you have to continue to pay?*
 |

## Federal Child Support Guidelines

**Applicable in BC due to implementation through regulation. 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) reduce conflict and tension between spouses by making the calculation of child support more objective; (3) 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) ensure consistent treatment of spouses and children who are in similar circumstances.**

* When a child is over the age of majority under 3(2) of the FCSG, the court considers a number of factors. They consider the amount paid by the tables if they were under the age of majority, whether this approach is inappropriate, and if it is they will consider what is appropriate with regard to condition, means, needs of child and the ability of each spouse to contribute to support of the child.
* “condition, means, needs of child” = important for discretion

### Income Over $150,000

**(4) Where the income of the payor spouse is over $150,000 the amount of the child support is:**

 (a) the amount determined under s. 3 (\*the table amounts), or

 (b) If the court considers that amount inappropriate, then

 (i) In respect of the first $150k, the table amount, or

 (ii) In respect of the balance of the spouse’s income, the amount the court considers appropriate having regard to the conditions, means, needs and other circumstances of the children, and the financial ability of each spouse to contribute to the support of the children

 (iii) The amount, if any determined under section 7.

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| Francis v Baker [1999] SCC |
| **F** | Parties were married in 1979 and had 2 children. B was a lawyer in a large Toronto firm, F was a high school teacher. They divorced in 1987 and reached a separation agreement wherein F was paid $30k in child support a year. In 1988, F applied for an increase in child support. The matter reached trial 9 years later, at which time she amended her pleadings to claim child support under the FCSG. At time of trial, B earned $945k per year with a net worth of $78 million. F earned $63k per year. TJ ordered child support of $10k a month, CA dismissed B’s appeal.  |
| **I** | *What is the meaning of “inappropriate” under 4(b) of the Guidelines?* |
| **A** | * A proper construction of (4) requires objectives of predictability, consistency and efficiency on one hand, be balanced with those of fairness, flexibility and recognition of the actual “conditions, means, needs and other circumstances of the children” on the other
* “Inappropriate” must be defined to mean “unsuitable” rather than merely “inadequate”
* Parliament intended there to be a presumption in favour of the table amounts, so there must be an articulable reason for displacing the guideline figures, with relevant factors differing from case to case
 |
| **R** |  ***Downward variation of the guideline figure is permissible*** |

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| Metzner v Metzner [2000] BCCA |
| **A** | * Presumption of table amounts
* Can only be increased or decreased if party has rebutted the presumption
* Clear and compelling evidence for departing from Guidelines
* Factors for determining appropriateness or inappropriateness listed in 4(b)(ii)
* Focus is on the centrality of the actual situation of children – requires a balance
* The objective is the maintenance of children rather than household equalization or spousal support
* Court needs necessary information to determine inappropriateness
* Onus is on paying parent to show an expense is not reasonable (i.e. too high)
 |
| **R** |  ***Summary of Francis v Baker*** |

### Determining Income

**Spouses can agree in writing on annual income (as long as this is a reasonable agreement), otherwise the court will determine a souse’s annual income using sections 16 to 20. Note that each source of income under section 21 is added together.**

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| FCSG – Determining Income  |
| **Calculation of Annual Income**  | **(16) –** Based on “total income” in T1 Income Tax form |
| **Pattern of Income**  | **(17) –** If determination under (16) would not be the fairest determination, court may look at the **pattern of income** using the last 3 years and determining what is fair and reasonable, including in light of fluctuations and non-recurring amounts *\*If you are self-employed or your income regularly fluctuates due to bonuses and other non-recurring things, should not count* |
| **For SHs and DIRs of Corps**  | **(18) –** For SHs or DIRs of corps, court can consider all or part of pre-tax income and amount commensurate with the service the payor receives from the corporation *\*Can increase income if using business to pay for car, phone, or leave money in the company**\*Will not have to make an argument to determine someone’s income on exam, just might be asked what are some things that are considered in determining income.*  |
| **Imputing Income** | **(19) –** See below |
| **Non-Residents** | **(20) –** for non-resident payor, as if person were resident of Canada  |

### Imputing Income

**Income may also be imputed where there has been a failure to comply with the disclosure obligations (under section 21). Courts are especially likely to impute if they feel that they are deliberately lazy or avoiding working to avoid child support.**

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| FCSG – Imputing Income  |
| **Imputing Income**  | **(19)** the Court can impute income as it considers appropriate in the circumstances, including (a) payor is intentionally under-employed or unemployed *(\*See Koch v Koch, below)*(b) payor is exempt from paying federal/provincial income tax (c) payor lives in a country with lower tax rate (d) it appears income has been diverted which would affect level of child support payable *(\*Income splitting with a new spouse is the most common – there is nothing illegal about this)* (e) spouse’s property not reasonably used to generate income (f) payor failed to provide income information (g) payor unreasonably deducts expenses from income (h) payor derives significant portion of income from dividends, capital gains or other sources taxed at a lower rate or exempt from tax (i) payor is a beneficiary under a trust and is or will receive income from the trust  |

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| Koch v Koch [2012] BCCA |
| **A** | * Parents who are healthy and can work have a duty to seek employment
* Reasonable income-earning capacity will be based on parent’s age, education, skills, health, and on the job experience
* Limited experience and skills do not justify a failure to pursue employment
* Persistence in un-remunerative employment or unrealistic career aspirations will not be an excuse
* Self-induced reduction in income will not justify the avoidance of child support obligations
 |
| **R** |  ***Capacity and what you are capable of earning is what matters.***  |

### Section 7 Expenses

**(1) The Court may order that the parents pay for all or any portion of the following expenses. Court takes into account the necessity of the expense in relation to the child’s best interests, reasonableness of the expense given spouses’ means, and family spending pattern prior to separation:**

* Child care to facilitate parent in working or going to school
* Medical and dental insurance premiums
* Health related expenses, not covered by plan
* Extraordinary expenses for primary or secondary school that meets a child’s particular needs
* Expenses for post-secondary education
* Extraordinary expenses for extracurricular activities

**(2) With regard to 7(1)(d) and (f), “extraordinary expenses” means expenses that exceed those that the requesting parent can reasonably cover, or expenses the court considers extraordinary taking into account:**

* (i) the amount of the expense in relation to the income of the requesting spouse;
* (ii) the nature and number of educational programs and extracurricular activities
* (iii) any special needs or talents of the children
* (iv) the overall cost of the programs and activities
* (v) any other similar factors the court considers relevant

*\*Basically, the court has discretion to decide whether each parent will contribute.*

### Shared Custody/Split Custody

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| **Shared Custody (Section 9)** | **Split Custody (Section 8)** |
| Where a spouse exercises a right of access to, or has physical custody of, a child for **not less than 40%** of the time over the course of a year, the amount of the child support order must be determined by: 1. Amounts set out in the applicable tables for each of the spouses
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

*\*This provision has generated significant amounts of litigation (see below)* | Where each spouse has custody of one or more children, the amount of a child support order is the **difference between the amount that each spouse would otherwise pay** if a child support order were sought against each of the spouses. * Split custody is uncommon because it is often in best interests of the child to keep siblings together
* More common where you have step-kids or the children are older and have a particular preference
 |

**To trigger section 9, access or parenting time of 40% or more over the course of a year must be met. This section has been criticized as being arbitrary and as a possible discouragement from the primary care parent from allowing “liberal and generous access.” The onus is on the parent seeking to invoke (9) to establish care of >40%.**

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| Contino v Leonelli-Contino [2005]  |
| **R** |  ***There is a 2 step test to determine child support in shared custody situations: (1) does the parent cross the 40% threshold (if not, no shared custody)?, and (2) what amount of child support should be paid given the factors under section 9?***  |

**CALCULATING SHARED CUSTODY TIME**

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| Moulstaid v Blair [2009] BCCA |
| **I** | *How is the 40% threshold time calculated?* |
| **A** | Although courts have bemoaned the imprecision of the section and expressed concerns over the consequences for children, the court is **not free to disregard the language or section 9 and the criteria for its application** (no discretion)* There is no single method in determining the amount of time, but some methods of calculating time include:
* Counting the hours each parent has with the children over a 2 week period
* Counting the hours over a year, including during school and holidays
* Counting the number of hours in a typical week
* Counting the number of days
 |

**CALCULATING SHARED CUSTODY QUANTUM**

Section 9 requires court to determine the amount of child support in accordance w/ (a), (b), and (c) once the 40% threshold has been met.

* The specific language of the section warrants emphasis on flexibility and fairness to ensure that the economic reality and particular circumstances of each family are properly accounted for.
* The weight given to each factor depends on the particular facts of each case.
* There is **no presumption of reducing or increase the amount payable under the Table amounts**; there is no conclusive formula

### section 10 - Undue Hardship

**(10)(1)** The court can award a different amount of child support if the Court finds the amount would cause “**undue hardship” to the payor**. **(10)(2)** Circumstances that **may cause undue hardship** include:

1. Payor has responsibility for an unusually high level of debts incurred to support children or spouses prior to separation or to earn a living
2. Payor has unusually high expenses to exercise access
3. Payor is under a legal duty to support any person
4. Payor has a legal duty to support another child, other than a child of the marriage
5. Payor has a legal duty to support any person who is unable to obtain the necessaries of life due to illness or disability

**(10)(3) Standard of living** must be considered in determining whether to reduce child support on the basis of undue hardship

# 9. Spousal Support

**SPOUSAL SUPPORT IS A PAYMENT BY ONE SPOUSE (PAYOR) TO ANOTHER (THE RECIPIENT), TO HELP WITH THEIR DAY-TO-DAY LIVING EXPENSES OR TO COMPENSATE THE RECIPIENT FOR THE FINANCIAL CHOICES THE SPOUSES MADE DURING THE RELATIONSHIP.**

1. There is **NO AUTOMATIC RIGHT** to receive support just because of the relationship
2. Whether spousal support will be paid and how much depends on the particular circumstances of each couple
3. Spousal support should not be considered to be indefinite **[Messier v Delage, 1983 SCC]**
4. Same-sex spouses have the same statutory rights/obligations regarding spousal support **[M v H, 1999 SCC]**

**Applicable Legislation – Choosing a Statute**

- Married couples can **elect** to have spousal support arrangements pursuant to **either** the FLA **or** the DA

- Common law (un-married) couples **must** seek spousal support under the FLA.

**THE OBJECTIVES OF SPOUSAL SUPPORT** are the same under both the **FLA** **(Section 161)** and **DA (Section 15.2[6])**, and include: **(a)** to recognize **economic advantages or disadvantages** to the spouses arising from the relationship or its breakdown; **(b)** to **apportion between the spouses any financial consequences** arising from the care of their child, beyond the duty to provide support for the child; **(c)** to **relieve economic hardship** arising from the breakdown of the relationship; and **(d)** as far as practicable, to promote **economic self-sufficiency** of each spouse within a reasonable time period.

**THE RIGHT TO SPOUSAL SUPPORT IS STATUTORY. HOWEVER, FIRST NEED TO ESTABLISH THAT THERE IS AN ENTITLEMENT TO SPOUSAL SUPPORT PURSUANT TO CASE LAW. THERE ARE THREE CONCEPTUAL GROUNDS: (1) CONTRACTUAL, (2) COMPENSATORY, AND (3) NON-COMPENSATORY.**

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| DA Section 15.2 – Spousal Support Orders  |
| **Spousal Support Order**  | **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. |
| **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. |

## Contractual Grounds

**APPLIES IN SITUATIONS WHERE THE PARTIES HAVE ENTERED INTO A MARRIAGE OR SEPARATION AGREEMENT, OR A CONTRACTUAL OBLIGATION IS IMPLIED.**

### Varying Support Agreements – Divorce Act

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| Miglin v Miglin [2003] SCC  |
| **A****R** | The threshold established by the Pelech trilogy that departing from agreements requires a “radical change in circumstances” is no longer relevant under the broader Divorce Act* The grounds for ordering support in an amount that **differs** from an agreement are broader – agreements on support are still entitled to deference

There is a **2 STAGE TEST** for approaching an **originating application for support where there is an existing agreement on support:** **STAGE ONE:** Court must look at (1) the circumstances in which the agreement was made to determine whether the agreement was obtained fairly, and (2) whether the agreement substantially complied with the objectives of the DA. * An agreement that was not obtained fairly or that departed substantially from the objectives of the Act will be given little weight

**STAGE TWO:** If the agreement satisfies the first stage, then the court must consider whether the agreement **still** reflects the original intentions of the parties and remains in substantial compliance with the objectives of the Act; * If there has been a material change of circumstances not reasonably anticipated by the parties that has led to a situation which cannot be condoned, the court may give little weight to the agreement;
* “It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight [para 91]”
 |

*Note*: foreseeable means that you have to be able to account for it when you are making the agreement.

### Varying Support Agreements – FLA

First step is to look at the agreement and decide whether a **portion or all of the agreement should be set aside**. Under **Section 165(3),** the court cannot make an order for spousal support in the face of agreement unless all or part of the agreement is set aside. **Section 164** then provides for **when a court can make an order that replaces all or part of an existing agreement** for spousal support. There are 2 tests that, if met, will allow the court to set aside or replace an agreement with an order:

**THERE ARE TWO TESTS IN SECTION 164 THAT, IF MET, WILL ALLOW THE COURT TO SET ASIDE OR REPLACE AN AGREEMENT WITH AN ORDER:**

|  |  |
| --- | --- |
| **SECTION 164 – TEST ONE** | **SECTION 164 – TEST TWO** |
| **Concerns procedural fairness in making the agreement.** If ***any*** of the following circumstances existed when the parties entered into the agreement, the court may set it aside: 1. a spouse **failed to disclose** income, significant property or debts, or other information relevant to the negotiation of the agreement;
2. a spouse took **improper advantage** of the other spouse’s **vulnerability**, including the other party’s ignorance, need or distress;\*
3. a spouse did not **understand the nature or consequences** of the agreement;
4. other circumstances that would under the common law cause all or part of a **contract to be voidable**.

\*Other person’s vulnerability can include /physical/mental vulnerability | **The court may set aside an agreement if it is satisfied that the agreement is significantly unfair.**In determining significant unfairness, the court may consider the following factors: 1. the ***length of time*** that has passed since the agreement was made;
2. any ***change*** since the agreement was made in the condition, means, needs, or other circumstances of a spouse;
3. the ***intention*** of the spouses, in making the agreement, to achieve certainty;
4. the degree to which the spouses ***relied*** on the terms of the agreement;
5. the degree to which the agreement ***meets the*** ***objectives*** set out in section 161 of the FLA.
 |

Note: The replacement can **ONLY REPLACE** what has actually been set aside.

## Compensatory Grounds

Applies where a spouse has **forgone opportunities or endured hardships** as a result of the marriage. Relied on most frequently in situations where one spouse remains at home to care for the home/children, and any **economic disadvantage** to that spouse flowing from the shared decision should be compensable.

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| Moge v Moge [1992] SCC |
| **A** | The purpose of spousal support is to **relieve economic hardship** that results from marriage or it’s breakdown Whatever the respective advantages to the parties of a marriage in other areas, the **focus of the inquiry** when assessing spousalsupport after the marriage has ended must be on ***the effect of the marriage in either impairing or improving each party’s economic prospects*** * A division of functions between marriages partners where one is a wage-earner and the other remains at home will almost invariably create an economic need in one spouse during marriage. The spouse who stops working in order to care for the children and manage a household usually requires financial provision from the other. On divorce the law should ascertain the extent to which the withdrawal from the labour force by the dependent spouse during the marriage (including loss of skills, seniority, work experience, continuity and so on) has adversely affected that spouse’s ability to maintain himself or herself. The need upon which the right to maintenance is based, therefore, follows **from the loss incurred by the maintained spouse in contributing to the marriage partnership.**
* If the functions of financial provision, household management and child care are divided in any particular way between a husband and wife, the law should characterize this as an arrangement between the spouses for accomplishing shared requirements of the marriage partnership according to their preferences, cultural beliefs, religious imperatives or similar motivating factors. **A spouse who does one of these things should be seen as freeing the other spouse to perform the remaining function.**
* However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.
* The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution (which the Act promotes) seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. **Significantly, it recognizes the work within the home had undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative.**
* A spouse may be (also) compensated if they decline a promotion, refuse a transfer, leave a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities/incurs economic loss
* The financial consequences of the end of the marriage include the loss of future earning power, loss of seniority, missed promotions and lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance. Persons who are not in the work force also cannot take advantage of job retraining and the upgrading of skills provided by employers.

The spouse entitled to support is not guaranteed the same standard of living, but the longer the relationship, the closer the economic union, the greater will be the presumptive claim to equal standards of living  |
| **R** | ***Defined the concept of compensatory support and provided that all 4 factors were of equal weight.*** |

**TRADITIONAL VS. MODERN MARRIAGES**

“It would appear that the courts have recognized a substantial change in the nature of marriages and the roles played by the parties. At the one end of the scale we have the traditional marriage where one spouse is the breadwinner and the other the child-rearer, often entitled to be supported for life. At the other end we have the type of marriage where both spouses participate in the economic advancement of the family unit and although one may be disadvantaged for a period of time during the marriage by deserting career opportunities, this can be balanced upon dissolution by provisions promoting the self-sufficiency of that spouse and thereafter both parties go their own ways. In between these two extremes we still find a variety of marital arrangements that must be fairly dealt with upon dissolution…

In my opinion, a judge today in approaching a maintenance order should continue to recognize the distinction between the traditional and the modern marriage. Upon dissolution of a modern marriage the goal should be the placing of both parties in a position of economic self-sufficiency at the earliest possible time…Temporal limits on maintenance should be utilized to accomplish this end, and illness and other factors not related to the marriage should not be used to justify the continuation of maintenance which otherwise should cease” **(*Heinemann v. Heinemann*, 1989 CanLII 196 (NS CA))**

THERE IS AN EXPECTATION THAT WHEN EXERCISING **JUDICIAL** **DISCRETION**, JUDGES WILL EXAMINE THE **OBJECTIVES** OF SPOUSAL SUPPORT **(SECTIONS 161 AND 15.2),** AND TAKE A **BROAD APPROACH** TO SPOUSAL SUPPORT. NOT ALL ELEMENTS OF THE OBJECTIVES WILL BE **EQUALLY IMPORTANT** IN ALL CASES – THEY ARE ASSESSED ON A CASE-BY-CASE BASIS.

## Non-Compensatory Grounds

Applies in situations where the recipient spouse’s need exceeds the entitlement to be compensated. In such situations, the obligation to provide support derives from the “basic social obligation” of the marital relationship.

* Very discretionary - court can combine non-compensatory with compensatory grounds to increase the amount of spousal support awarded.
* Just because one party has a need does not mean that the other spouse will be able to pay to satisfy that need or be required to

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| Bracklow v Bracklow [1999] SCC  |
| **I** | *May a spouse have an obligation to support a former spouse over and above what is required to compensate the spouse for loss incurred as a result of the marriage and its breakdown (or to fulfill contractual support agreements)?*  |
| **A** | **Determining Entitlement** * “In cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other can, 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”
* Where compensation is not indicated and self-sufficiency is not possible, a support obligation may nonetheless arise from the marriage relationship itself
* The **ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves** suggests a concern with need that transcends compensation or contract – **even if a spouse has foregone no career opportunities or has not otherwise been handicapped by the marriage, the court is required to consider that spouse’s actual ability to fend for himself or herself and the effort that has been made to do so, including efforts after the marriage breakdown**
* Similarly, economic circumstances invited broad consideration of all factors relating to the parties’ financial positions, not just those related to compensation
* Economic hardship arising from the breakdown of the marriage is capable of encompassing **not only health or career disadvantages** arising from the marriage breakdown, but the mere fact **that a person who formerly enjoyed intraspousal entitlement to support now finds herself or himself without it**
* Self-sufficiency does not have to be just through employment – a spouse’s lack of self sufficiency may be related to foregoing career and educational opportunities, but may also arise from different sources like the disappearance of the kind of work the spouse was trained to do, or ill health.

**Determining Quantum** * The same factors that go to entitlement have an impact on quantum – but useful to first establish entitlement and then make adjustments through quantum;
* The quantum awarded, with respect to both amount and duration, will vary with the circumstances and the practical and policy considerations affecting particular cases
 |

## Variation of Support Orders

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| **Divorce Act** | **Family Law Act** |
| **17(4.1)** Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself **that a change in the condition, means, needs or other circumstances** of either former spouse has occurred ***since the making of the spousal support order*** or the last variation order made in respect of that order, and in making the variation order, the court shall take that change into consideration.  | **167(1)** On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.**(2)** Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:(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. |

## Quantum and Duration of Support

**After you have established that the recipient is entitled to SS, have to determine the Quantum (“Q”) and Duration. The Q and duration of SS are determined using the Spousal Support Advisory Guidelines (“SSAG”). The SSAG suggests appropriate ranges of support in a variety of situations *for spouses who are entitled to support*. They do not provide guidance on whether a spouse is entitled to support. SSAG is NOT legally binding – they are advisory only. SSAG provides two formulas: (1) with children, and (2) without children. However, it only works within the income ceiling ($350k) and income floor ($20k).**

* $350K is the ceiling – at this point judges have greater discretion in determining what the Q will be but the guidelines still apply
* Can exchange monthly SS payments for a lump sum or assets (e.g. recipient keeps the marital home)

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| W v W [2005] BCSC  |
| **R** | ***SSAG is consistent with the law in BC – they are just guidelines and advisory, but one useful tool to lawyers.***  |

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| Yemchuk v Yemchuk [2005] BCCA |
| **R** | ***The guidelines are intended to reflect the current law (rather than change it) and build upon the law as it exists. They are not official law, but neither do they constitute evidence or even expert evidence that needs to be proven in Court.***  |

*Note: Even though they are not binding, it is generally expected that you will use them to determine Q. You do not need to substantiate the calculations from SSAG.*

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| Redpath v Redpath [2006] BCCA |
| **H** | Court increased award from $3.5k to $5k per month even though the TJ considered all of the factors and did not misapprehend the evidence. |
| **R** | ***If a particular award deviates substantially from the Guidelines with no exceptional circumstances to explain it, could be a grounds of appeal.***  |

### Without Child Formula

Two crucial factors: (1) the **gross income difference** between the spouses; and (2) the **length** of the relationship. The Q and duration increase incrementally with the length of the relationship.

* **Example**: A and E have separated after a 20 year marriage and one child. During the arriage, A finished his commerce degree, worked for a bank, rose through the ranks and became branch manager. He was transferred several times through course of the marriage. His gross annual income is now $90k. E worked for a few years early in the marriage as a bank teller, then stayed at home until their son was in school full time. E worked PT as a store clerk until he finished HS. Their son is now independent and E works FT as a receptionist earning $30k gross per year. Both are in their mid 40’s.
* **Answer**: Entitlement is both compensatory and non-compensatory. Amount of support (calculated) = $1.5k to $2k per month

### With Child Support Formula

Priority **must** be given to child support – what drives support in these cases is not the length of the marriage, merging of assets, or dependency, but the presence of **dependent children** and the need to provide **care and support for those children.** Must first determine child support, and **then** determine SS.

* The **with child formula**: **(a)** uses the **net incomes** of the spouses, not their gross incomes; and (b) divides the pool of **combined** **net incomes** between the 2 spouses, not the gross income difference;
	+ I.e. (a) determine the individual net disposable income (INDI) of each spouse by subtracting child support, taxes and deductions from gross income, and (2) add the INDI’s and determine range of SS amounts that would leave the lower income recipient with between 40-46% of the combined INDI.
* The upper and lower percentage limits of net income division do not change with the length of the relationship (???)

**Intersection of Property and Spousal Support**

**Section 95** of the **FLA** permits the court to order an unequal division of family property or debt, or both, if it would be significantly unfair to equally divide them. One of the factors that the court can consider is: **(3)** the extent to which the financial means and earning capacity of a spouse has been affected by the responsibility and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 have not been met.

## Role of Spousal Misconduct

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| --- | --- |
| **DA – Section 15.2(5)** | **FLA – Section 166 and 167(1)(c)** |
| **15.2(5)** In making an order under subsection (1) or an interim order under subsection (2), the courts **shall not take into consideration any misconduct** of a spouse in relation to the marriage.  | **166** In making an order respecting SS, the court must not consider any misconduct of a spouse, **except conduct that arbitrarily or unreasonably (a)** causes, prolongs or aggravates the need for SS, or **(b)** affects the ability to provide spousal support. * E.g. purposely drag out litigation, make arbitrary decisions, misuse family assets, quit their job so that they don’t have to pay SS

**167(1)(c)** allows a court to change a support order in certain circumstances, including lack of financial disclosure  |

*Note: the court will sometimes impute income to a person if they are purposely underemployed or not disclosing their income*

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| Leskun v Leskun [2006] SCC |
| **F** | 20 year marriage – W worked and financially contributed to H’s continuing education, and had a child. She suffered a significant back injury and was laid off. Soon after, H told her he wanted a divorce to marry another woman. They divorce in 1999. At trial, the wife was found to be entitled to support and was granted $2,250 per month until she returned to work, at which point support would be reviewed. H filed application in 2003 to discontinue support on basis that he was now unemployed and in financial difficulty. Application was denied because J found that W was not self-sufficient and remained in need. Appellate court affirmed.  |
| **A** | * Behaviour of H at separation was labeled as misconduct
* The **DA** does not prevent consideration of a failure to achieve self-sufficiency as being the result, at least in part, of the emotional devastation caused by the other spouse’s misconduct
 |
| **H** | Dismissed  |
| **R** | ***Spousal misconduct is not relevant to SS, but consequences of spousal misconduct may be relevant insofar as they affect self-sufficiency.***  |

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| Peterson v Lebovitz [2013] BCSC  |
| **R** | ***A payor’s failure to take meaningful steps towards employment and repeated applications to terminate support are arbitrary actions adversely affecting the ability to pay.*** |

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| --- |
| Bateman v Bateman [2013] BCSC  |
| **R** | ***The cause of the failure of the relationship is not a factor to be considered***  |

**OVERALL, SPOUSAL MISCONDUCT WILL ONLY BE CONSIDERED AS FAR AS IT AFFECTS CERTAIN THINGS (E.G. CREATES SITUATIONS THAT MAKE THEM UNABLE TO PAY).**

## Securing Spousal Support

You can secure spousal support either through the estate or life insurance of the payor:

* Estate – making the payments binding on the estate of the payor, by agreement or court order
* Life Insurance – life insurance on the life of the payor whereby the recipient is the irrevocable beneficiary for the duration of the support obligation; by agreement or by court order
	+ \*Preferred method
	+ If they do not already have life insurance, expected to go out and get it
	+ Payor pays the premiums, and cannot give the policy to another person down the road
	+ Have to have a certain value of insurance depending on the lump sum support that is payable

# 10. Division of Property and Debt

**THE FLA MADE A NUMBER OF CHANGES THAT ARE PARTICULARLY IMPORTANT FOR PROPERTY AND DEBT DIVISION, INCLUDING THE APPLICATION TO CL AND MARRIED SPOUSES, REDEFINING FAMILY PROPERTY, AND ETC. ANY ISSUES RELATING TO PROPERTY AND DEBT OCCUR AT THE BCSC LEVEL BECAUSE PROVINCIAL COURTS DO NOT HAVE JURISDICTION OVER PROPERTY AND DEBT.**

### Who Can Make a Claim?

**ONLY A SPOUSE CAN MAKE A CLAIM TO PROPERTY AND DEBT DIVISION UNDER THE FLA.**

**Under Section 3 of the FLA, “SPOUSE” is defined as:**

(a) Married Individuals;

(b) Those that have lived together in a **marriage-like relationship** for a continuous period of ***2+ years***;

 *\*Note that “living together” is not always necessary – there are other indicia of a marriage-like relationship*

(c) Those who have had a child together (but this is **only for the purposes of child support, and does not apply to property and debt division**); and

(d) A spouse includes a **former spouse.**

### Entitlement and Responsibility

Under **SECTION 81** of the FLA, upon separation parties have **equal** entitlement to family **property** and equal responsibility for family **debt**, ***regardless of their use or contribution***. The exception to this presumption is when one party can show that this equality would be **SIGNIFICANTLY UNFAIR.** Under **SECTION 95** of the FLA, a court may order **unequal division** of family property and/or debt if it would be **significantly unfair to equally divide** these between the spouses.

* **Onus** is on the party bringing the claim to show that it is significantly unfair
* Both ***Sections 81 and 95*** apply equally to CL and Married Spouses

## Determining Date of Separation

**SECTION 3(4) OF THE FLA DETERMINES WHEN SPOUSES ARE SEPARATED.** Generally, living separately may not be sufficient to indicate intention to separate. May not be considered separated even if they live in two homes. Vice versa, they may be considered separated despite continuing to live in the same home. Clients should communicate their intention to separate as stated in (b)(i):

**FLA – Section 3(4)**

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

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

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

 (ii) an action, taken by a spouse, that demonstrates the spouse’s intention to separate permanently

**UNDER SECTION 83(1) OF THE FLA, SPOUSES ARE NOT CONSIDERED SEPARATED IF THEY RECONCILE WITHIN ONE YEAR.** Under 83(1)(a), the primary purpose **HAS TO BE RECONCILIATION.** Under 83(1)(b)…

**FLA Section 83(1)**

Spouses are **not** considered to have separated if, within one year after separation,

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

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

**Determining the date of separation is important** because it acts as a **triggering event** for the point in time when the joint financial unit of the spouses is **divided into 2 individual financial units**. If a person takes debts after the separation, for example, that are not for the benefit of the family, the other spouse is not liable for those debts. If you continue to incur reasonable family debt for the purposes of family, that is still a joint responsibility. **You should advise clients to deliver written notice of intention to separate,** so that there is no dispute about this date.

## Identifying Family Property/Debt

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| **FAMILY PROPERTY** | **FAMILY DEBT** |
| **SECTION 84** Includes **all real and personal property,** unless it is excluded property, then only the increase in value of the asset during the relationship is family property. Includes:* Property at was **owned by** **at least one spouse** at the date of separation, or in which at least one spouse has a beneficial interest,\* and/or
* Property that was **acquired after separation** by at least one spouse or in which at least one spouse has a beneficial interest,\* that is **derived from family property**

\*Ownership is not necessary, only need beneficial interest  | **SECTION 86** includes all financial obligations incurred by **either spouse** during the relationship (date of cohabitation/marriage 🡪 date of separation) as family debts subject to equal division. Excluded from this are: * Debts incurred post-separation, unless incurred for the purposes of maintaining family property
* Pre-relationship debts

*\*Note that it may be possible to argue that debt incurred for non-family purpose during relationship is significantly unfair, but this will be difficult* |
| **Examples of Family Property:** Real estate/land; share or interest in a corp; money of a spouse in a bank account (income becomes an asset when you put it into a savings account and accumulate it, but income **itself** is not an asset); spouse’s entitlement under an annuity, pension, RRSP or income plan; part of trust property contributed to by a spouse in which (a) the spouse is a beneficiary and has a vested interest in that part of the trust property that is not subject to divestment, (b) the spouse has a power to transfer to himself or herself that part of the trust property, or (c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.  |

### Excluded Property

Under **SECTION 85,** excluded property includes:

* Property that existed prior to the relationship;
* Gifts or inheritances to a spouse;
* Settlement or award of damages to a spouse as compensation for injury or loss;
	+ *Unless a portion is compensation for income because income is a family asset.*
	+ *If you invest your damage award the award is excluded but the capital gains are not.*
* Money paid or payable under an insurance policy;
* Property held in a discretionary trust
	+ To which the spouse did not contribute,
	+ Of which the spouse is a beneficiary, and
	+ That is settled by a person other than the spouse;
* Property derived from excluded property or the disposition of excluded property.
	+ *If you used your pre-relationship saving to buy a condo, that condo is yours and the spouse only has entitlement to the increase in value*

**EXCEPTION:** The increase in value of excluded property is family property. Calculated from the later date of: (a) the relationship between the spouses began, or (b) the excluded property was acquired.

* *E.g. If you begin the relationship w/ debts, and pay them down before the separation than your spouse, who has helped you pay them down, has no way to recoup that*
* *However, if the debt still exists at the time of the separation, then you walk away w/ the remainder of the debt*

### Valuation

**SECTION 87** states that 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**
* The value of family property and family debt must be determined as of the **date of:**
	+ (i) an agreement dividing the family property and family debt is made, or
	+ (ii) of the hearing before the court respecting the division of property and family debt.

## Unequal Division

**UNDER SECTION 95(1) the BCSC may order an unequal division of family property or family debt, or both, if it would be significantly unfair to (a) equally divide family property or family debt, or both, or (b) divide family property as required under Part 6 [Pension Division]. Factors to consider in deciding “significantly unfair” are in subsection (2).**

*Note: we are not dealing with pensions – just know that pensions are family property, Part 6 deals with the division of pensions, and that there are numerous provisions which detail how to divide pensions.*

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| FLA – Unequal Division  |
| **Unequal division if significantly unfair**  | **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 (a) equally divide family property or family debt, or both, or (b) divide family property as required under Part 6 [Pensions].  |
| **Factors in significant unfairness**  | **95(2)** – For the purposes of subsection (1), the Supreme Court may consider one or more of the following: (a) the duration of the relationship between the spouses; (b) the terms of any agreement between the sposues, other than an agreemend described in section 93(1) [*setting aside agreements respecting property division*]; (c) Spouse’s contribution to the career or career potential of the other spouse; (d) whether family debt was incurred in the normal course of the relationship between the spouses; (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt (*this is really for situations where one may be unable to pay spousal support, so balance by giving them more property);*(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends; (g) the fact that a spouse, other than a spouse acting in good faith, (i) substantially reduced the value of family property, or (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse’s interest in the property or family property to be defeated or adversely affected; (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order; (i) any other factor, other than the consideration referred to in subsection (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 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 section 161 [*objectives of spousal support*] have not been met.  |

## Temporary and Interim Orders

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| FLA – Temporary Orders for Property  |
| **Interim Distribution**  | **89** 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 to provide money to fund: 1. Family dispute resolution,
2. All or part of a proceeding under this Act, or
3. Obtaining information or evidence in support of family dispute resolution or an application to a Court

*Note: relatively easy orders to get, especially when you need money to hire an expert. The court will consider the amount of $ that you are asking for, versus the total value of the assets because they cannot give you an interim order for a majority portion of the family assets (e.g.). If you are asking for money to pay for your lawyer, this will count against your portion of the final distribution of assets.*  |
| **Temporary Family Residence**  | **90** 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)** But this does not authorize the spouse to materially alter the family residence or personal property, grant a proprietary interest, or grant a right that continues after the rights of the other spouse have been terminated. *Note: these are a bit more difficult to get because the court has to consider factors like the ability of the person asking to stay in the family residence to actually maintain the property. These are temporary, not final orders.*  |
| **Protection of Property**  | **91(1)** On application by a spouse, Supreme Court must make an order restraining the other spouse from disposing of any property at issue until or unless the other spouse establishes that a claim will not be defeated or adversely affected by the disposal of the property  |
|  | **91(2)** Court my make an order: 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 property in, or in trust for, the applicant.
 |

# 11. Conduct Orders

**PART 10 OF THE FLA (COURT PROCESSES) PROVIDES AUTHORITY FOR THE COURT TO MAKE ORDERS RESPECTING PROCEDURAL MATTERS, ORDERS TO MANAGE THE CASE OR THE PARTIES, AND ORDERS FOR ENFORCEMENT.**

Unless otherwise stated, these powers are given to both the Provincial and Supreme Court.

## Orders for Conduct of Proceeding

**ESSENTIALLY, HOW TO MAKE PEOPLE PLAY NICER.**

**Section 199**

(1) A court must ensure that a proceeding under this Act is conducted:

(a) with as little delay as possible,

(b) in a manner that strives to

 (i) minimize conflict between, and if appropriate, promote cooperation by, the parties, and

 (ii) protect children and parties from family violence

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

 (a) consider the impact of the proceeding on the child, and

 (b) encourage the parties to **focus on the best interests of the child**, including minimizing the effect on the child of conflict between the parties

### Exclusion of Public or Publication

**Section 206** *\*Not a lot of publication bans unless high profile case- normally court just initializes*

A court may make an order

1. **excluding any person**, other than a party, from attending a hearing *(\*witnesses also excluded from courtroom until it is their turn),* 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

**IF CASE IS PARTICULARLY HIGH PROFILE, CAN APPLY FOR THIS.** Supreme Court Practice Direction 35 – sets out the procedure for applying for an order sealing all or part of the court file, and the specific form of Order; a party can as to seal the entire file, specific documents (e.g. an affidavit), the clerk’s notes, an Order

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| Aquilini v Aquilini [2012]  |
| **F** | H sought a sealing order (including for reasons for judgment, orders, affidavits, transcripts). H said the proceedings attract media attention and there is a real risk to the 4 children and the family business interests, and of confidential financial information being released. W opposed the sealing order saying the public interest of having an open court outweighed public interest of the H, and the children are accustomed to public interest in the family.  |
| **A** | Test is the same as for injunctive relief: (1) serious issue, (2) irreparable harm, (3) balance of convenience |
| **H** |  Court granted a sealing order for affidavits and transcripts but not reasons for judgment and court orders  |

### Disclosure Orders

**Section 212**

1. A court, at any time, may make an order to disclose information in accordance with the Rules (Supreme Court or Provincial Court)
2. The court may order a party to pay the cost of complying with the order
3. A person who receives the disclosure must not use the information except as necessary to resolve a family law dispute

**Cunha v Cunha [1994]**

“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 simply to 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 a tendency to deprive children of proper support.” ***\*\*\*Always cite for non-disclosure.***

**Enforcing Disclosure**

**Section 213**

If a person fails to comply with an order or requirement (under the Rules or Child Support Guidelines) for disclosure, the court may:

1. make a disclosure order *(\*give another disclosure order)*
2. draw an adverse inference, including imputing income
3. Require a party to pose security
4. Require a person to pay
	1. For expenses reasonably and necessarily incurred as a result of non-disclosure or incomplete, false or misleading disclosure, including fees and expenses related to family dispute resolution
	2. An amount not exceeding $5k for the benefit of a party, or a spouse or a child whose interests were affected by the non-disclosure
	3. A fine not exceeding $5k
5. Any other order the court considers appropriate

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| TJB v BAF [2014] BCPC |
| **F** | Applicant father brought application to recalculate child support on basis that his parenting time increased to over 40%. Respondent mother opposed and sought order that Father pay her legal fees for his failure to disclose and for providing incomplete, false or misleading information.  |
| **A** | * Father had “continually provided the Court with incomplete and misleading disclosure. The disclosure required was not onerous or complex.” None of his financial statements were complete or accurate. The father claimed to be in dire financial circumstances, but his bank records showed purchases in August at liquor stores totaling $482.
* Father’s financial materials were incomplete, inaccurate and misleading and that “this is a highly aggravating factor”
* Father breached 213(1) and he must be “penalized for his abuse of the court process and wasting of court time and (the Mother’s resources)”
 |
| **H** |  Father subject to fine of $13,617 pursuant to 213(d)(i) to compensate Mother for her legal expenses  |

### Misuse of Court Process

**Section 221** *(\*basically this is a vexatious litigant)*

1. A court may make an order prohibiting a party from making further applications w/o leave if the court is satisfied the party has made an application that is trivial, conducted a proceeding in a manner that is a misuse of the court process, or is otherwise acting in a manner that frustrates or misuses the court process
2. If the court makes an order under subsection (1), the court may also set a specified period for the order, impose terms and conditions for obtaining leave, or require a party to pay the expenses incurred by the other party, or an amount or a fine up to $5k

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| Williams v Williams [2015] BCSC  |
| **F** | The proceeding started 15 years prior. The trial before Justice Punnett concerned child support. Between 2010 and 2014, there were more than 21 applications resulting in about 27 orders. Each party sought an order preventing the other from initiating further applications. Two judges had previously restricted the parties access to the courts for a set period of time. |
| **A** | * The issue was not which party brought the most applications, but “rather the relative merits of those applications, and whether the conduct of either party necessitated the bringing of the applications” (para. 135).
* Found that the defendant husband’s conduct in the proceedings “amounted to attempts to control and harass the plaintiff wife” (para. 147). The husband even filed an application to dispute the indigent status order obtained by the wife.
 |
| **H** |  Made an order that neither party file applications without leave the court, for the next five years. |

## Orders Respecting Conduct

Division 5 of the FLA provides a court with a wide range of tools to help judges manage behaviour, de-escalate tensions, promote compliance, and facilitate the settlement of disputes. It includes a collection of tools and remedies that range from preventive measures, such as sending people to counseling or programs to punitive measures, such as fines or payment of expenses to encourage compliance. Conduct orders will allow a judge to tailor processes to the needs of a particular family.

* These measures are available to both Supreme and Provincial Court. This will ensure more consistency between tools and remedies available between the 2 levels of court and ensure that Provincial Court, whose authority to act must be provided for in legislation, has the tools they need to effectively manage family law cases.

### Purpose of Conduct Orders

**Section 222** – The Court may make an order under this Division for one or more of the following purposes:

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

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| VEA v ARG [2013] BCPC  |
| **A** | * In the context of section 222(b), “resolution” means the imposition by the court of a set of rights and obligations which will govern the parties’ future conduct in relation to one or more of the issues in the proceeding
* The court is empowered by sections 222 and 227 of the FLA to order A to modify her behaviour to avoid a frustration of the court’s authority to adjudicate disputes about E’s mobility
 |
| **H** |  Order that A sign E’s passport application and deliver the completed application to G |

### Case Management

**Section 223** – A court may make an order to:

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

### Dispute Resolution, Counseling

**Section 224** – A court may make an order

1. Requiring the parties to participate in family dispute resolution; *(\*have to consider whether they can afford it)*
2. Requiring one or more parties, or a child (with or without consent of the guardians) to attend counseling, specified services or programs

### Restricting Communications

**Section 225** – Unless a protection order is more appropriate, a court may make an order setting restrictions or conditions re communications between parties, including when/how they may be made (e.g. communication only by text/email, prohibit direct communication, restrict communication to child-related subjects)

### Residence Orders

**Section 226** – A court may make an order

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

*\* may be made in conjunction w/ orders for exclusive occupancy of the family residence*

### Conduct Orders

**Section 227** – a court may make an order requiring a party to

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

## Enforcement

### Enforcing Conduct Orders

**Section 228**

(1) In a party fails to comply with an Order under Division 5, the court may

1. make a further order
2. draw an adverse inference
3. make an order requiring a party to pay
4. for expenses reasonably and necessarily incurred as a result of non-compliance, including fees and expenses related to family dispute resolution
5. an amount not exceeding $5,000 for the benefit or a party, or a spouse or a child whose interest were affected by the non-compliance
6. a fine not exceeding $5,000

(d) may any other order necessary to secure compliance

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

### Enforcing Orders Generally

**Section 230 *(\*If you cannot find another section to enforce your order, use this one)***

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
2. The court on application by a party may
	1. Require a party to post security;
	2. Require a person to pay
		1. For expenses reasonably and necessarily incurred as a result of the party’s actions, including fees and expenses related to family dispute resolution
		2. An amount not exceeding $5k for the benefit of a party, or a spouse or child whose interests were affected by the party’s actions
		3. A fine not exceeding $5k

*\*This section does not apply to Protection Orders (Section 188 applies there), and it is not necessary to prove service of the order being enforced (s 229)*

## Extraordinary Remedies

**Section 231 – Extraordinary Remedies**

1. This section applies if a person fails to comply with an order made under this Act, and the court is satisfied that no other order under this Act will be sufficient to secure the person’s compliance.
2. The court may make an order that a person be imprisoned for a term no more than 30 days.
3. Person must be given a reasonable opportunity to explain non-compliance; the court may issue an arrest warrant
4. (4/5) For wrongful denial of parenting time (s. 61) or contact, the court may order a police officer to apprehend the child and take child to the person

(6) In order to locate and apprehend a child, a police officer may enter and search any place where the child is believed to be. *(\*police will often not help unless there is this specific clause)*

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| JRB v JHF [2015] BCPC |
| **F** | 11 days after trial ending in May 2014, Respondent Mother awarded guardianship and Applicant Father denied any contact until he demonstrated he can successfully devote himself to therapy to deal with his psychological issues. Mother sought a fine (under s. 228) and imprisonment (under s. 231) for failure to comply with orders. Protection Order previously granted; Father breached on countless occasions, led to criminal harassment charges – Father pled guilty; conditional sentence. At the end of trial, Judge Bond had ordered a publication ban. Father sent emails to Mother’s lawyer saying he has told church elders of mother’s propensity for violence, calling the Mother and her husband “nutjobs”, attaching a naked photo of the Mother, and so on. |
| **A** |  Judge Bond stated that the Father was motivated to continue to attempt to harass the Mother. Judge Bond concluded a fine would not secure compliance; Father was already $12,000 in child support arrears. Considered the Father’s extended history of harassing the Mother, his failure to address his anger, and his sending of offensive materials to others. |
| **H** |  Ordered father be jailed for 10 days.  |

# 12. Drafting Agreements

## Types of Agreements

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| Family Law Act  |
| **“Agreement” Definition** | **6** - Agreements are made between 2+ ppl, resolve family law disputes (separation agreements) **or** respecting a matter that may be a future family law dispute (cohab/marriage agreement)  |
| **Parenting Agreements (limits)** | **44(2) -** Limits on agreements regarding parenting arrangements (only binding after separation or when parties are about to separate)*Note: If you are in an intact relationship that does or does not have children, you cannot make an agreement for how your children will be supported if you split up – they are not enforceable. Also, cannot contract out of child arrangements.* |
| **Property Agreements** | **92 –** Agreements re: property division  |
| **Child Support Agreements** | **148 -** Agreements re: child support (limitations) *Note: only binding if they are made after separation or in anticipation of imminent separation.*  |
| **163 -** Agreements respecting child support are only binding if they are made after separation, or in anticipation of imminent separation |
| **Agreements upon death**  | **171** – Agreements silent as to impact of support on death of payor |

## Setting Aside Agreements

**UNDER SECTION 93 OF THE FLA, AGREEMENTS WILL BE SET ASIDE FOR LACK OF PROCEDURAL FAIRNESS, CL PITFALLS, OR IF (WHEN APPLIED) THEY ARE “SIGNIFICANTLY UNFAIR.”** *However, we do not know what exactly significantly unfair means.* **THESE ARE IMPORTANCE CONSIDERATIONS WHILE DRAFTING AGREEMENTS. MAKE SURE THAT YOUR CLIENT(S) UNDERSTAND THE SIGNIFICANCE OF SIGNING THE AGREEMENT, THAT YOU HAVE MET YOUR DUTY, AND THAT THEY ARE UNDERSTAND WHAT THEY ARE SIGNING.**

* **93(3)** – can set aside part or all only if satisfied that **one or more** of the following circumstances existed **when the Agreement was entered:**
	+ (a) non-disclosure;
	+ (b) improper advantage of ignorance, need or distress;
	+ (c) did not understand the nature or consequences of the agreement;
	+ (d) other circumstances that would, under the CL, cause all or part of a K to be voidable (unconscionability, fraud, etc.)
* **164(5)** (93.5?) – Even if none of the circumstances in (3) exist, the court can set aside/replace w/ an order if the agreement is significantly unfair having regard to:
	+ **(a)** the length of time that has passed since the agreement was made;
	+ **(b)** any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
	+ **(c)** the intention of the spouses, in making the agreement, to achieve certainty;
	+ **(d)** the degree to which the spouses relied on the terms of the agreement;
	+ **(e)** the degree to which the agreement meets the spousal support objectives of s 161.

**IT IS ALSO POSSIBLE TO SET THE AGREEMENT ASIDE BY POINTING TO CONTRACT REMEDIES: (A) MISTAKE, (B) FUNDAMENTAL BREACH, OR (C) CAPACITY ISSUES.**

* **Elements of a Mistake** 🡪 (1) a mistake, (2) on a material term, (3) known actually or constructively by the non-mistaken party; and (4) an unconscionable result if the settlement agreement is enforced;
* Material Non-Disclosure = misrepresentation of fact that causes a person to enter into an agreement on terms that they would not have otherwise agreed to had the material fact been disclosed;

***Note: Screen, Scrutinize, and Cover Your Ass***

When writing agreements, it is important to ask if there is any chance that their relationship could be construed as becoming CL earlier than the official move-in date. This could indicate that you need the agreement before the traditional 2-year CL mark.

**IT IS ALSO POSSIBLE TO BLAME THE PROCESS (OR PRACTITIONER) IN ORDER TO HAVE THE AGREEMENT SET ASIDE BY POINTING TO: (A) DURESS, (B) UNDUE INFLUENCE, (C) UNCONSCIONABILITY, (D) FRAUDULENT NON-DISCLOSURE, (E) LACK OF INDEPENDENT LEGAL ADVICE, OR (F) RECONCILIATION.**

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| Newman v La Porta [2008] BCJ |
| **A** | The objective standard of unconscionability in the commercial context should not be adopted in family matters, and the court should take greater account of the parties’ subjective sense of equitable sharing.  |
| **R** |  ***Summarizes the tests for unconscionability:***(1) There was an inequality in the position of the parties due to the ignorance, need or distress of the weaker party that would leave him/her in the power of the stronger party; and (2) Proof of substantial unfairness in the bargain.  |

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| Rick v Brandsema [2009] SCC |
| **F** | Husband wrote a cheque to himself from a joint account, and didn’t deposit it until after the divorce. He advanced money to a close friend, but later redeemed it and deposited into his own account (funds totaling nearly $250k).  |
| **I** | *Unconscionability in the context of negotiating separation agreements.*  |
| **R** | ***Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. There is a duty to make full and honest disclosure of all relevant financial information to protect the integrity of negotiations. The extent of defective disclosure and the degree to which that non-disclosure is deliberate will impact a court’s decision to intervene.***  |

## Cohabitation/Marriage Agreements

**PRACTICE TIPS OF DRAFTING COHAB/MARRIAGE AGREEMENTS:**

* **THE PROCESS:** Do your homework and ask: what is at stake (value assets/debts)? How much financial entanglement is anticipated? What assets are hoped to be left off the table? What is open to be shared? What assets, if any, are expected to be jointly acquired (and how)?
* **IMPORTANT TO REALLY HASH THINGS OUT W/ YOUR CLIENT** and ask a lot of what-if questions: what do you anticipate life looking like in the short/medium/long term future? What life events/circumstances might change the financial outlook of either party? What might trigger a review of the agreement? Does your client benefit from review language in the agreement?
* **CONSIDER UNCONSCIONABILITY/VULNERABILITY/EMOTIONS** by recognizing emotional difficulties and limitations: ask how conflict is resolved in the relationship? Evaluate financial pressure (how are you meeting your expenses? How are you going to afford that house you just bought?) How will client feel in 6 weeks/months/years?
* **TERMS OF THE AGREEMENT TO CONSIDER:**
	+ Recitals – important IDs/definitions (big assets, significant dates, relationship breakdown, separate property)
	+ Separate Property – compensation in lieu, tracing for contributions into joint assets?
	+ Joint Property – presumption of ownership?
	+ Personal debts, joint debts, spousal support, housing allowance, estate rights
	+ Not all assets have have to be treated alike. Business assets may be left entirely off the table for division but other assets like RRSPs, Investments may be shareable
	+ Try not to use the language of the Act unless you are referring to the Act
	+ Waiver of or limited spousal support – consider including work history, income earning capacity, or leaving spousal support off the table
* **ENCOURAGE PARTIES TO MAKE FULL DISCLOSURE:** non-disclosure is the cancer of family litigation. Clients sometimes do not want to state values of accounts, shares, trusts, for fear that it will prompt the spouse to seek an interest. If you are waiving an interest in something, the value of which is not known to you, it is likely that you could later argue that you didn’t realize what you were giving up. So, state the minimum expected values, set out as much information as you can so that when a spouse agrees to give something up, they have as full a sense as possible as to what they are giving up.

**Even where clients are opting into the full FLA framework, consider if it may be appropriate to draft an agreement anyways. Agreements can: crystallize values of assets/debts, set out pertinent dates (state of cohabitation, property purchase dates, etc.), establish a process for dividing property, establish dispute resolution mechanisms consistent w/ the FLA and meant to avoid court.**

## Separation Agreements

**PRACTICE TIPS FOR DRAFTING SEPARATION AGREEMENTS:**

* **THE PROCESS:** Draft from scratch or build on client’s previous legal work (mediation, DIY templates, parenting plan, prior cohab agreement or pre-nup)
	+ Consider what has already been discussed/agreed, what transactions have already taken place since separation, and whether there are any missing gaps
* **TOPICS TO COVER:**
	+ **Recitals** – set backdrop, give context, identify excluded property
	+ **Parenting Arrangements** –responsibilities and schedule (beware of vague agreements regarding “goodwill” or “to be agreed upon” arrangements), set expectations and review periods, avoid unenforceable clauses
	+ **Child Support** – “special provisions,” be specific about section 7expenses (what they are, how/when they will be reconciled, post-secondary education), set out expectations re: imputation of income, set triggers for review of support
	+ **Disposition of Family Residence** – terms of conduct of sale, ongoing payments/maintenance pending sale, allocation of sale proceeds
	+ **Division of Assets** – real property; bank accounts and investments; RRSPs; pensions; insurance policies (consider security for spousal/child support, if applicable); 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, set deadlines for repayment
	+ **Spousal Support** – review triggers
	+ **Security for Support** – insurance for the spousal support
	+ **Extended Medical Coverage** – sometimes divorced spouses can still be covered
	+ **Dispute Resolution Clauses** – how is the issue going to be dealt w/ if a dispute arises from the agreement?
* **TIE UP LOOSE ENDS**: When/who applies for the divorce? Shared costs? Timelines for making payments and exchanging information? Who applies for CPP equalization?

# 16. Parenting Coordination and Arbitration

## Parenting Coordination

**PC IS A CHILD-FOCUSED DISPUTE RESOLUTION PROCESS FOR SEPARATED FAMILIES.**

* Parenting Coordinators (PR-or) are experienced family lawyers (10+ years) or mental health pros who have special training in mediating and arbitrating parenting disputes - when deciding on a PC-or you can choose either a lawyer or a psychologist
* PC-or is appointed **after an ORDER OR AGREEMENT has been made for custody and guardianship,** and a parenting plan has either been agree to or ordered by the court
* PC is meant to help implement and work w/ a final parenting plan
* Parents sign agreement that outlines role, objectives and scope of PC-or services, as well as the rights/obligations of each parent
* PC-or will usually be retained for a fixed period of 1-2 years

### Components of Parenting Coordination

Before starting the work, make sure that there is a parenting plan in place. It is important to have a clear and comprehensive parenting plan because otherwise may increase the amount of work required on an ongoing basis.

**(1) EDUCATION**

**(2) CONSENSUS BUILDING**

The PC-or facilitates and participates in collaborative and interest-based interaction in order to try to resolve differences together and improve communication.

* The parents resolve the issue by consent
* The PC-or will give their opinion about whether what the parents propose is a reasonable solution
* PC-or should then confirm the Agreement in writing (often done by e-mail)

**(3) DETERMINATION MAKING**

There is a clear distinction between the Consensus Building Phase and the Determination Making Phase. There is a distinct shift that is necessary before moving from one to the next. Thus, you must be very clear when you are moving from consensus to determination;

* PC-or is required to be the decision-maker and neutral observer
* Decisions are based on the evidence and submissions presented by the parents
* Issue is resolved by the PC-or
* This phase is **not** as flexible as the consensus building phase because the decision of the PC-or has to be made **pursuant to the law** and the PC-or must follow the rules of natural justice
* Procedure followed in this phase need not be as formal as a litigation process

***Once the determination has been completed, must file the PC determination w/ the court.***

### Statutory Jurisdiction of Parenting Coordinators

**FLA PART 2, DIVISION 3 IS THE LEGISLATION THAT PROVIDES FOR AND LIMITS THE JURISDICTION OF THE PC-OR.** It determines when a PC-or can be involved, the information they can provide, and how they make the determination, etc. **KEY IS THAT**: ***PC-or has authority to make decisions, and the court likes them.*** Note that PC can be ***ordered*** because it is in the FLA (arbitration, e.g. cannot)

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| FLA – Sections 14-19  |
| **Qualifications**  | **(14)** Must meet requirements set out in regulations |
| **When PC-or May Assist** | 15(2) – may assist only (a) if there is a parenting coordination agreement in place and (b) for the purpose of implementing an agreement or order for parenting arrangements, contact with a child, or other prescribed matters. 15(3) and (4) – Authority ends 2 years after agreement is made, unless extended by the parties15(6) – agreement may be terminated by both parties or through court order  |
| **Info Sharing for PC-or**  | (16) Parties must provide requested info and authorization to request and receive info  |
| **Assistance from PC-or**  | (17) May assist the parties by creating guidelines for how the agreement or order will be implemented, guidelines for communication, creating strategies for resolving conflict, providing information on resources to improve communication or parenting skills.  |
| **Determinations of PC-or** | (18) May make determinations respecting prescribed matters only, and cannot make decisions on division of property or debt  |
| **Setting Aside**  | (19) Court may change or set aside if the PC-or acted outside of authority or made an error of mixed law and act  |

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| **PC-or HAS Jurisdiction** | **PC-or HAS NO Jurisdiction** |
| * Parenting arrangements;
* Contact w/ a child;
* Child’s daily routine;
* Education, including in relation to the child’s special needs;
* Participation in EC activities and special events;
* Temporary care by a person other than a guardian;
* Provision of routine medical, dental or other health care;
* Discipline of a child;
* Transportation and exchange of a child;
* Parenting time or contact w/ child during vacations and special occasions
* Any other matters by agreement provided it is within jurisdiction
 | Overall, PC-or cannot make major substantive changes to the parenting plan. * Change to guardianship;
* Change to the allocation of parental responsibilities;
* Giving parenting time or contact w/ a child to a person who does not have parenting time or contact w/ a child;
* A substantial change to the parenting time or contact w/ a child; or
* Relocation of a child

***Note****: cannot normally make decisions that require making a party or parties spend money (e.g. private school)* |

### Termination of Parenting coordination

* If **appointed by agreement**, the PC can be terminated **by agreement** of the parties or upon application to the court
* If **appointed by an order**, the PC may be terminated **by order of the court** upon application by either party
* PC-or may withdraw by ***giving notice*** to the parties and to the court, ***if appointed by Court order***

## Arbitration

**ARBITRATION IS A DISPUTE RESOLUTION PROCESS WHERE THE PARTIES HIRE A NEUTRAL 3RD PARTY – FAMILY LAW ARBITRATOR – TO MAKE A DECISION RESOLVING THEIR DISPUTE BY WHICH THEY AGREE TO BE BOUND.**

* Unlike mediation where the mediator’s job is to help 2 ppl work towards a solution that they create for themselves, an arbitrator acts **as a privately hired judge and imposes a resolution** after hearing ***evidence*** and listening to the ***arguments*** of the parties
	+ Unlike mediation, this is an **imposed** resolution
* Arbitration is integral to family law – the FLA provides that ***resolution of family law matters outside court is preferred***
* Arbitrators must meet the FLA minimum training and practice standards:
	+ (1) Must be a lawyer, psychologist, or social worker,
	+ (2) With at least 10 years experience in family-related field,
	+ (3) Have taken specified training in arbitration, family law, decision-making, skills development, and family violence
* Arbitration Lawyers can conduct arbitrations on **ALL** family issues including child-related, property and spousal support, while psychologists or social workers may only arbitrate child-related issues and “straightforward” child support *\*\*But note that straightforward child support is not common, and the ability to recognize straightforward child support requires legal training*

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| **Advantages** | **Disadvantages** |
| * Quicker (fewer days compared to trial)
* Flexible scheduling
* More-cost effective
* Less formal/more streamlined
* Simplified rules of procedure (flexible re: evidence)
* Specialist “judge” (decision-maker)
* Confidential (results not made public)
* More client control of process (e.g. evidence, rules, timing, decision-maker)
 | Critics say that Arbitration is: * More costly
* Not (procedurally) as “easy” to appeal
* Creates a lack of case law
* Deprives participations of ability to craft their own solutions
* Does not promote ongoing relationships between parties
 |

### Arbitration Processes and Procedures

**(A) WHEN CHOOSING A FAMILY LAW ARBITRATOR, CLIENTS SHOULD CONSIDER:**

* **(a)** experience and relevant qualifications with regard to both the subject matter of their issues and arbitration in general; **(b)** unique skills and experience; **(c)** ability to control the process; **(d)** timing and availability; **(e)** language; and **(f)** trust, because impartiality and someone that you know is neutral is **key**.

**(B) ARBITRATION RETAINER AGREEMENTS (ARA)**

ARA is a **written** K in which parties agree to use an arbitrator to determine a dispute outside of court;

* It **(1)** contains the **terms and conditions** of the agreement between the parties and arbitrator, and **(2)** **confirms** **the rules** governing the conduct of the arbitration
	+ If you are silent on deciding the procedural rules in the ARA, then the BCACIC rules apply – these rules are very tedious and complicated w/ requirements for discovery, evidence, and etc., that are far more complicated than what the parties often want.
* Gives arbitrator the jurisdiction necessary to make a decision. The document must be **exact** on what issues are going to be decided.
* It is important that both parties have independent legal advice before signing the agreement because the arbitrator **cannot give advice before/during the process**

**Specifically, the ARA should contain clauses stating:**

* Provision for independent legal advice is advisable [Section 2.1(3) of the Arbitration Act)
* The arbitrator is not acting as legal counsel for the parties (Section 3 of Appendix B of the Law Society of BC Code of Conduct)
* Confirmation that the arbitrator meets the requirements under the *Family Law Act* to act as an arbitrator (Section 5 of the *Family Law Act Regulations*)
* Rules of Procedure (default, per s.22(1) of the *Arbitration Act*, are the BCICAC Rules)
* What specific issues are to be submitted to arbitration (arbitrator’s jurisdiction comes from the contract; not from statute)
* Document disclosure – when, what, by whom (s. 5 of the *Family Law Act*; s.5 of the *Arbitration Act*)
* Must screen for family violence under Section 8 of the Family Law Act

**After the ARA is signed:**

* After the ARA is signed, can have the pre-hearing conference w/ counsel. The matters for this hearing include determining: (1) when & where, limits on openings and cross-exam; (2) recording; (3) evidence (i.e. affidavits, witnesses, agreed statements of facts); (4) Decision (when, written or oral w/ written reasons);

**(C) DECISION-MAKING**

The timing of the Arbitration Award is generally within 60 days. The arbitrator can award costs, but whether they can do this has to be discussed and agreed upon early on so that there are no surprises

* Section 2(2) of the *Arbitration Act* states that “a provision of an arbitration agreement that removes the jurisdiction of a court under the *Divorce Act* *(Canada)* or the *Family Law Act* has no effect.”
* Section 23(2) of the *Arbitration Act* states that “a provision or award that is inconsistent with the *Family Law Act* is not enforceable.”
* Decision enforced under Rule 2-1.2 of the SC Family Rules
* Appeal of decision under sections 31 & 42 of the Arbitration Act

**USING ARBITRATION AS PART OF OTHER PROCESSES**

* **Litigation**: (a) when there is no judge available; (b) when you need a decision immediately; (c) when you have a discrete issue to be decided; (d) when parties wish to maintain confidentiality; (e) when trial has been adjourned (e.g. for mediation/arbitration)
* **Mediation**: (a) when you reach an impasse; (b) to decide all issues that cannot be resolved at mediation
* **Collaborative**: for all discrete issues

# 14. Alternative Dispute Resolution

## Collaborative Divorce

CD IS A NON-ADVERSARIAL APPROACH TO FAMILY LAW PROBLEMS AND INTER-DISCIPLINARY WAY OF RESOLVING CONFLICT. PROVIDES A TEAM-BASED APPROACH UTILIZING (1) LAWYERS, (2) DIVORCE COACHES, (3) CHILD SPECIALISTS, AND (4) FINANCIAL ADVISORS, IN INTEREST BASED NEGOTIATIONS. IT STARTS WHEN SPOUSES DECIDE THAT THEY WANT TO PROCEED COLLABORATIVELY. MOST OF THE WORK IS DONE IN 4 WAY MEETINGS WITH AN AGENDA.

* **Ways that CD is the same as litigation:** (1) each party has legal advice and is aware of their rights and obligations, (2) full financial disclosure is required, and (3) at the conclusion of the process, the parties will have their dispute fully and finally resolved.
* **Ways that CD is different from litigation:** (1) agreement not to go to court, (2) open communication and transparent negotiations, (3) four-way meetings, (4) team approach, and (5) each party is represented.
* **Benefits:** (1) No certainty in court; retain control over outcomes, (2) Maintain goodwill, (3) Preserve privacy, (4) Enhanced participation, (5) More timely and cost-effective than litigation, (6) Parties develop their own solutions, (7) Emotional support and legal guidance, (8) Protects dignity, integrity, long-term interests of families.

|  |  |
| --- | --- |
| **WHEN IT WORKS** | **WHEN IT DOESN’T WORK** |
| * When all parties are committed to the process
* When there is open communication
* When full disclosure is made promptly
 | * When there is a history of fraudulent behaviour
* When there are personality disorders/mental illness
* When clients misrepresent information
 |

### Participation Agreements

1. Communications – Must be respectful and constructive, and focus on the issues;
2. No Threats to Go to Court – neither party nor their lawyers will threaten to go to court as a means to get what they want;
3. The Children – parties agree that settlement issues will not be discussed in the presence of their children, or that communication with the children regarding these issues will occur only if it is appropriate and done by mutual agreement, or with the advice of a child specialist; they also agree that they will not move the residence of the children without the agreement of the other parent;
4. Will not take advantage – parties shall not take advantage of inconsistencies or miscalculations of the other, but shall disclose them and seek to have them corrected;
5. Full disclosure – must provide all documents and information (there is no formal discovery);
6. No court action – nor will any other motion or document be prepared or filed which would initiate court intervention;
7. Disqualification of lawyers – neither collaborate lawyer can act if one of the parties leaves the process, if one party withdraws and hires a litigation lawyer, the other collaborative lawyer must withdraw
8. Provision for hiring joint experts – hire joint and neutral experts that can support the team when necessary and financially affordable
9. Without prejudice – all communication exchanged will be confidential and without prejudice
10. Lawyer must withdraw – must withdraw in the event they learn that their client has withheld or misrepresented information or taken unfair advantage of the collaborative process
11. Obligations pending settlement – during the process, neither party will unilaterally dispose of assets, change beneficiary’s of wills, pensions, RRSP, insurance or investments; alter insurance policies; move the residence of the children; sever any joint tenancy on property; incur additional debts for which the other would be responsible.

## Mediation

A CONFLICT RESOLUTION PROCESS WHERE 2+ PPL VOLUNTARILY ATTEMPT, WITH THE ASSISTANCE OF AN IMPARTIAL AND NEUTRAL PERSON, TO NEGOTIATE AND FORMULATE THEIR OWN CONSENSUAL RESOLUTION TO MATTERS IN ISSUE BETWEEN THEM.

* Mediation is **“interest based negotiation”** to get at the needs, desires, concerns, fears and aspirations of the parties
* It is less adversarial and formal of a process, with focused issues – it is entered into w/o conditions and an agreement to remain involved, in good faith, in the process
* The mediator is objective/impartial – it is not their role to provide legal advice, but can inform **of** the law, the consequences of legal positions, and general legal information to provide a baseline knowledge
* Overall, it is about finding a workable solution that meets the participant’s needs and concerns, in good faith and with less conflict

### The 5 Steps/Stages of Mediation

**1. Pre-Mediation Meeting** – meet with each party **separately** and do a “conflict check” to see if mediation is right for the couple, get some background information and note any A/D issues, mental health issues, abuse and power imbalance issues, etc.; also provide parties with info about the process, appropriateness, communication, guidelines, and a draft of “agreement to mediate.” Discuss confidentiality/limits.

**2. Opening** – explain roles and process to parties, discuss and agree upon guidelines for conduct, obtain commitment to the process, and finally review and sign the “Agreement to Mediate.”

**3. The Issues** – ensure equality of time, perspective and attention; summarize, restate, rephrase parties comments using language of impartiality; collect facts related to the dispute and link issues; fractionalize complex issues; frame issues in a neutral and consensual way; watch for common ground, hidden agendas, assumptions, positional orientations, clues from behaviour.

**4. Interests** – open questions to uncover and explore interests; exchange of information to find common interests; acknowledge and keep track of proposals/areas of settlement and note them for future reference; if appropriate, formulate goal statement

**5. Work back and forth** between 3 and 4, developing more issues, getting at interests, going back to explore more sub-issues, and so on.

**6. Reach Agreement** – summarize areas of agreement; generate options with brainstorming, hypothetical questions; seek solutions; convert consensus to written format; closure.

**It is necessary to terminate mediation** when a party: **(1)** does not fully understand the process; **(2)** is unwilling to honour mediation guidelines; **(3)** does not have ability to identify or express interests; **(4)** is so deficient in information that agreement is not based on informed consent; **(5)** indicates agreement is under duress or fear, as opposed to free will; **(6)** one or both say they want to end the process; or **(7)** you feel agreement is illegal, grossly inequitable, based on false information, resulted from bad faith bargaining, impossible to enforce, or clearly will not hold over time.