Table of Contents

[I. INTRODUCTION: THE FAMILY AND FAMILY LAW 9](#_Toc279689154)

[A. SOCIAL AND HISTORICAL FRAMEWORK 9](#_Toc279689155)

[1. Histories: Adults, Children and Communities 9](#_Toc279689156)

[Miron v. Trudel (1995) [insurance benefits to married but not cohabiting couples] 9](#_Toc279689157)

[M. v. H. (1999) [support rights and obligations on common-law spouses] 9](#_Toc279689158)

[2. Religion, Culture and Family Law 9](#_Toc279689159)

[Bruker v. Marcovitz (2007) 9](#_Toc279689160)

[B. THE LEGAL FRAMEWORK 10](#_Toc279689161)

[1. Federal Powers 10](#_Toc279689162)

[Divorce Act: 10](#_Toc279689163)

[Constitution Act, 1867 10](#_Toc279689164)

[Indian Act, 1985 10](#_Toc279689165)

[Charter of Rights and Freedoms 11](#_Toc279689166)

[2. Provincial Powers 11](#_Toc279689167)

[Family Relations Act 11](#_Toc279689168)

[Marriage Reference (1912) 11](#_Toc279689169)

[3. Conflict of Laws 11](#_Toc279689170)

[ Convention on Rights of Child 12](#_Toc279689171)

[4. Which Level of Court 12](#_Toc279689172)

[A. Cohabitation and Marriage 12](#_Toc279689173)

[How to Create Legally Recognized Adult Relationships 12](#_Toc279689174)

[1. Traditional Private Law (ex. Contract) 12](#_Toc279689175)

[2. Ascription 12](#_Toc279689176)

[3. Registration 12](#_Toc279689177)

[4. Marriage 13](#_Toc279689178)

[History of Marriage in Canada 13](#_Toc279689179)

[Effects of Legal Marriage vs Cohabitation 13](#_Toc279689180)

[Annulment vs Divorce 13](#_Toc279689181)

[How to Contract a Legal Marriage 13](#_Toc279689182)

[Customary Marriage and Same Sex Marriage 14](#_Toc279689183)

[1. Aboriginal Customary Marriage 14](#_Toc279689184)

[Connolly v Woolrich (1867) Quebec 15](#_Toc279689185)

[Manychief v Poffenroth (1994) ABQB 15](#_Toc279689186)

[Casimel v Insurance Corporation of BC (1993) BCCA 15](#_Toc279689187)

[2. Same-sex Marriage 15](#_Toc279689188)

[EGALE Canada Inc. V. Canada (Attorney General) 2001 BCCA 15](#_Toc279689189)

[Halpern v. Canada (Attorney General) Ont CA 15](#_Toc279689190)

[Reference re Same Sex Marriage (2004) SCC 15](#_Toc279689191)

[Smith & Chymyshyn v Knights of Columbus 16](#_Toc279689192)

[3. Polygamous Marriage in Canada 16](#_Toc279689193)

[CHILDREN 16](#_Toc279689194)

[1. What is a Legal Parent? 16](#_Toc279689195)

[Gill v. Murray [2001] BCHRT 17](#_Toc279689196)

[White Paper Changes: 18](#_Toc279689197)

[Trociuk v. British Columbia (Attorney General) [2003] SCC 18](#_Toc279689198)

[Rypkema v British Columbia (2003) BCSC 18](#_Toc279689199)

[White Paper Changes: 18](#_Toc279689200)

[2. Adoption 18](#_Toc279689201)

[Adoption Act 18](#_Toc279689202)

[Private Adoption 19](#_Toc279689203)

[King v. Low (1985) SCC [Best Interests Test trumps Parents’ Wishes] 19](#_Toc279689204)

[Race and Adoption/Child Protection 19](#_Toc279689205)

[Racine et al v Woods (1983) SCC 19](#_Toc279689206)

[Sawan v Tearoe (1993) BCCA 20](#_Toc279689207)

[DH v HM (1999) SCC 20](#_Toc279689208)

[Customary Adoption in BC 20](#_Toc279689209)

[Casimel v. Insurance Corp. of BC (1993) BCCA [Adoption Act s 46] 20](#_Toc279689210)

[Who Can Apply to Adopt? 20](#_Toc279689211)

[Whose Consent is Required? 21](#_Toc279689212)

[In the Matter of a Female Infant, British Columbia Registration No. 99-00733 (2000) BCCA 21](#_Toc279689213)

[Registration Number 06-014023 (Re) (2007) BCSC 21](#_Toc279689214)

[Step Parent Adoptions and Consent 21](#_Toc279689215)

[BC Birth Registration No. 023969 (Re) (1998) 21](#_Toc279689216)

[CHILD PROTECTION 22](#_Toc279689217)

[Gove Report/Hughes Report 22](#_Toc279689218)

[L.J. et al. V. Director of Child, Family and Community Services (2000) BCCA [CCO case] 22](#_Toc279689219)

[If Child must be Removed: 22](#_Toc279689220)

[Presentation Hearing: 23](#_Toc279689221)

[Protection Hearing [s 40]: 23](#_Toc279689222)

[Child Protection – Familial Autonomy, Culture and Religion 23](#_Toc279689223)

[S.J.B. (Litigation Guardian of) v. British Columbia (Director of Child, Family and Community Service) (2005) BCSC 23](#_Toc279689224)

[BC Sextuplets: Parents’ Rights in Making Children’s Medical Decisions 24](#_Toc279689225)

[Canadian Foundation for Children, Youth and the Law v Canada (AG) (2004) SCC 24](#_Toc279689226)

[First Nations and Child Protection 24](#_Toc279689227)

[Statistical Overview 24](#_Toc279689228)

[Domestic VIOLENCE 25](#_Toc279689229)

[Statistics 25](#_Toc279689230)

[Impact of Domestic Abuse on Children 25](#_Toc279689231)

[Custody and Access Decisions and Domestic Abuse 25](#_Toc279689232)

[HH v HC (ABQB) 26](#_Toc279689233)

[Criminal and Civil Responses 26](#_Toc279689234)

[Civil Restraining orders under the BC Family Relations Act 27](#_Toc279689235)

[Alternative Dispute Resolution and Violence 27](#_Toc279689236)

[FAMILY BREAKDOWN: DIVORCE, SEPARATION, AND COROLLARY ISSUES 27](#_Toc279689237)

[A. DIVORCE 27](#_Toc279689238)

[1. The Legal Framework 27](#_Toc279689239)

[Same-sex Divorce 27](#_Toc279689240)

[Fault Based Divorce 27](#_Toc279689241)

[Adultery 28](#_Toc279689242)

[Orford v Orford (1921) 28](#_Toc279689243)

[P. (S.E.) v. P. (D.D.) 28](#_Toc279689244)

[Cruelty: 28](#_Toc279689245)

[“Living Separate and Apart” 28](#_Toc279689246)

[Bars to Divorce 29](#_Toc279689247)

[Procedural Issues 29](#_Toc279689248)

[(A) Collaborative Lawyering 30](#_Toc279689249)

[(B) Divorce Mediation 30](#_Toc279689250)

[Enforceability of Marriage Contracts 30](#_Toc279689251)

[Legislative Framework [Divorce Act] 31](#_Toc279689252)

[Hartshorne v. Hartshorne (2004) SCC 31](#_Toc279689253)

[Johnstone v. Wright, S.M.J. v. R.H.C.W. (2005) BCCA [deals with cohabitation] 32](#_Toc279689254)

[CUSTODY AND ACCESS 32](#_Toc279689255)

[History 32](#_Toc279689256)

[White Paper: 33](#_Toc279689257)

[Jurisdictional framework 33](#_Toc279689258)

[Best Interests of Child Principle 33](#_Toc279689259)

[Young v. Young (1993) SCC [“Best interests of the child”] 33](#_Toc279689260)

[Relevance of Race 34](#_Toc279689261)

[Palmore v Sidoti US Supreme Court (1984) 34](#_Toc279689262)

[Ffrench v Ffrench (1994) NSSC 34](#_Toc279689263)

[Camba v Sparks (1993) NSFC 34](#_Toc279689264)

[Kassel v Louie (2000) BCSC 35](#_Toc279689265)

[Van de Perre v. Edwards (2001) SCC 35](#_Toc279689266)

[White Paper 35](#_Toc279689267)

[Past conduct/violence 35](#_Toc279689268)

[Carlson v. Carlson (1991) BCCA 36](#_Toc279689269)

[T.S. v. A.V.T. (AB Court of Queen’s Bench) 36](#_Toc279689270)

[“Lifestyle” (Sexuality) 36](#_Toc279689271)

[N. v. N. (1992) BCSC 36](#_Toc279689272)

[M.M.G. v. G.W.S. (2006) SKQB 36](#_Toc279689273)

[J.S.B. v. D.L.S. (2004) ON Sup Ct J [most hands off approach to sexuality] 36](#_Toc279689274)

[Trends: Joint Custody and Primary Caregiver Presumption 37](#_Toc279689275)

[Stewart v. Stewart (1994) BCCA 37](#_Toc279689276)

[Robinson v. Filyk (1996) BCCA 37](#_Toc279689277)

[Javid v. Kurytnik (2006) BCCA 37](#_Toc279689278)

[Narayan v Narayan (2006) BCCA 38](#_Toc279689279)

[Kaplanis v Kaplanis (2005) Ont CA 38](#_Toc279689280)

[The Access Parent 38](#_Toc279689281)

[The Statistics on Contact 38](#_Toc279689282)

[Young v. Young (1993) SCC 38](#_Toc279689283)

[Johnson-Steeves v Lee (1997) ABQB [access is right of the kid – not the mom’s to bargain away] 39](#_Toc279689284)

[Fullerton v Fullerton (1994) NBQB 39](#_Toc279689285)

[Al-Maghazachi v Dueck (1995) Man CA 39](#_Toc279689286)

[EH v TG (1995) NSCA 39](#_Toc279689287)

[Baggs v Jesso (2007) NLUFC 39](#_Toc279689288)

[H(K) v T(J) (2006) ABPC 39](#_Toc279689289)

[Denied or Frustrated Access 39](#_Toc279689290)

[B(L) v D(R) (1998) Ont Sup Ct 40](#_Toc279689291)

[Cooper v Cooper (2004) Ont Sup Ct [“Parental Alienation”] 40](#_Toc279689292)

[JKL v NCS (2008) On Sup Ct [deprogramming parental alientation] 40](#_Toc279689293)

[Failure to Exercise Access 40](#_Toc279689294)

[Third Party Access 40](#_Toc279689295)

[Bridgewater v Lee (1998) ABPC 41](#_Toc279689296)

[Chapman v Chapman (2001) Ont CA 41](#_Toc279689297)

[Parsons v Parsons (2002) Ont Sup Ct 41](#_Toc279689298)

[SGE v CDL (2005) Sask CA 41](#_Toc279689299)

[Relocation/Mobility 41](#_Toc279689300)

[Gordon v Goertz (1996) SCC 41](#_Toc279689301)

[Nunweiler v Nunweiler (2000) BCCA 42](#_Toc279689302)

[One v One (2000) BCSC 42](#_Toc279689303)

[Karpodinis v Kantas (2006) BCCA 42](#_Toc279689304)

[Matrimonial Property Division 42](#_Toc279689305)

[Murdoch v Murdoch (1970s) 42](#_Toc279689306)

[Walsh v Bona (2002) SCC [upheld exclusion of common law couples] 43](#_Toc279689307)

[Domestic Trusts for Common Law Couples 43](#_Toc279689308)

[Pettkus v Becker (1980) SCC 43](#_Toc279689309)

[Sarochan v Sarochan (1986) SCC 44](#_Toc279689310)

[Peter v Beblow (1993) SCC 44](#_Toc279689311)

[Matrimonial Property under the BC *Family Relations Act* 44](#_Toc279689312)

[(i) Ordinary Use for a Family Purpose 45](#_Toc279689313)

[Jiwa v. Jiwa (1991) BCSC [insurance policies as family assets] 45](#_Toc279689314)

[Martin v. Martin (1992) BCCA [mutual funds – future projection] 45](#_Toc279689315)

[Lye v. McVeigh (1991) BCCA 45](#_Toc279689316)

[Use of Income or Capital of an Asset 46](#_Toc279689317)

[Samuels v. Samuels (1981) BCSC 46](#_Toc279689318)

[Brainerd v. Brainerd (1989) BCCA 46](#_Toc279689319)

[Evetts v. Evetts (1996) BCCA 46](#_Toc279689320)

[Hobbies/Collections 47](#_Toc279689321)

[O’Bryan v. O’Bryan (1996) BCSC 47](#_Toc279689322)

[Tracing: Conversion of a Family Asset into a Different Asset 47](#_Toc279689323)

[Gifts and Inheritances 47](#_Toc279689324)

[(ii) Debts 48](#_Toc279689325)

[Mallen v. Mallen (1992) BCCA [Test for dealing with Debt] 48](#_Toc279689326)

[(iii) Pensions 48](#_Toc279689327)

[(iv) Ventures and Business Assets [s 58(3)(E) & 59] 49](#_Toc279689328)

[(i) Direct Contributions 49](#_Toc279689329)

[Robertshaw v. Robertshaw (No. 2) (1979) BCSC [direct contribution can include paid work] 49](#_Toc279689330)

[(ii) Indirect Contributions 49](#_Toc279689331)

[O’Keeffe v. O’Keeffe (2002) BCSC [“Host Wives” case] 49](#_Toc279689332)

[(iii) Academic Qualifications as Business Asset 50](#_Toc279689333)

[De Beeld v. De Beeld (1999) BCCA 50](#_Toc279689334)

[Caratun v. Caratun (1992) Ont CA 50](#_Toc279689335)

[Seymour (1992) BCSC 50](#_Toc279689336)

[Dividing a Business 51](#_Toc279689337)

[Balic v. Balic (2006) BCCA [apportionment of shares of a business deemed a family asset] 51](#_Toc279689338)

[s.65 Reapportionment and Dissipation of Assets 51](#_Toc279689339)

[Narayan v. Narayan (2006) BCCA 51](#_Toc279689340)

[Date of Valuation of Assets 51](#_Toc279689341)

[Gilpin v. Gilpin (1990) BCCA 51](#_Toc279689342)

[Compensation Orders – First Nations and Provincial Property Law 51](#_Toc279689343)

[Derrickson v. Derrickson and Paul v. Paul 51](#_Toc279689344)

[George v. George (1996) BCCA 51](#_Toc279689345)

[Spousal Support 52](#_Toc279689346)

[Marriage-Like relationship 52](#_Toc279689347)

[Molodowich v Penttinen (1980) Ont Dist Ct 52](#_Toc279689348)

[Gostlin v. Kergin (1986) BCCA 52](#_Toc279689349)

[Model 1: contractual – causal connection and “clean Break” (*Pelech* trilogy) 53](#_Toc279689350)

[Messier v. Delage (1983) SCC 53](#_Toc279689351)

[Pelech 53](#_Toc279689352)

[Caron 53](#_Toc279689353)

[Richardson 53](#_Toc279689354)

[The Compensatory Model 54](#_Toc279689355)

[Moge v. Moge (1992) SCC [rely on for SS question] 54](#_Toc279689356)

[Non-Compensatory Model (Basic Social Obligation) 55](#_Toc279689357)

[Bracklow v. Bracklow (1999) SCC 55](#_Toc279689358)

[Separation Agreements and Variation of Support Orders 56](#_Toc279689359)

[Miglin v. Miglin (2003) SCC 56](#_Toc279689360)

[Rick v. Brandsema (2009) SCC 57](#_Toc279689361)

[Spousal Misconduct and Economic Self-Sufficiency 58](#_Toc279689362)

[Leskun v. Leskun (2006) SCC 58](#_Toc279689363)

[Spousal Support Advisory Guidelines 58](#_Toc279689364)

[W. v. W. (2005) BCSC [SS Guidelines – but decision might be outdated] 59](#_Toc279689365)

[Redpath v. Redpath (2006) BCCA 59](#_Toc279689366)

[CHILD SUPPORT 59](#_Toc279689367)

[(a) Defining the Parent-Child Relationship 60](#_Toc279689368)

[Chartier v. Chartier (1998) SCC [a person who stands in place of a parent can’t unilaterally give up that status] 60](#_Toc279689369)

[Doe v. Alberta (2007) ABCA 61](#_Toc279689370)

[Child Support and Child Protection 61](#_Toc279689371)

[JMS v. FJM (2005) On SCJ Div Ct [for children under 19 but not living with parent] 61](#_Toc279689372)

[Extraordinary Expenses (s 7) 61](#_Toc279689373)

[McCrea v McCrea (1999) BCSC 61](#_Toc279689374)

[Shared Custody (s 9) 62](#_Toc279689375)

[Green v Green (2000) BCCA [CS Guidelines s 9 – 40% access rule] 62](#_Toc279689376)

[Contino v Leonelli-Contino (2005) SCC [CSG s 9 – shared custody agreement] 62](#_Toc279689377)

[Income over $150,000 (s 4) 63](#_Toc279689378)

[Francis v Baker (1999) SCC [CSG s 4 – income exceeds $150,000] 63](#_Toc279689379)

[Post-Secondary Education [DA s 15.1(1); CSG s 3(2)] 64](#_Toc279689380)

[Child of the Marriage 64](#_Toc279689381)

[Farden v Farden [post-secondary education factors for “child of marriage] 64](#_Toc279689382)

[Neufeld v Neufeld (2005) BCCA [student loans/second degree] 64](#_Toc279689383)

[Haley v Haley (2008) Ont SCJ [hiatus in studies] 64](#_Toc279689384)

[Determining the Amount of Child Support for an Adult Child 65](#_Toc279689385)

[Retroactive Child Support [DBS v SRG; LJW v TAR; Henry v Henry; Hiemstra v Hiemstra (2006) SCC] 65](#_Toc279689386)

[Arrears and Variation of Child Support 66](#_Toc279689387)

[Ghislieri v Ghislieri (2007) BCCA 66](#_Toc279689388)

[Earle v Earle (1999) BCSC 66](#_Toc279689389)

[Enforcement of Child Support 67](#_Toc279689390)

[Dickie v Dickie (2007) SCC 67](#_Toc279689391)

[McIvor v The Director of Maintenance Enforcement for the benefit of Marjorie McIvor and Marjorie McIvor (1998) BCCA 67](#_Toc279689392)

# I. INTRODUCTION: THE FAMILY AND FAMILY LAW

FAMILY LAW:  
 - Highly discretionary

- The role of precedent is less important

- Great deal of deferral to expert witnesses (particularly in relation to children)

# A. SOCIAL AND HISTORICAL FRAMEWORK

- Historically family law seen as a static concept

- **Law is trying to catch up to changes in modern concept of family:**

Examples:

- Definition of marriage in Canada has changed – has become gender neutral

- Increasing number of step-families

- Massive increase in common law couples

- Reproductive technologies – issues of who is considered a parent

- Changing family structures (smaller families, women in the workplace, impact on family breakdown)

- Introducing other legal traditions into Canadian law (ex. religious regimes)

- Privatization of elder care

- Child rights movement

- “Discovery” of child abuse and domestic violence

**- It matters who is a legal member of your family: for legal benefits and legal certainty**

## 1. Histories: Adults, Children and Communities

### Miron v. Trudel (1995) [insurance benefits to married but not cohabiting couples]

* Imposing legal disadvantages on unmarried opposite-sex cohabitants relative to their married counterparts violates the constitutional prohibition on marital status discrimination
* Marital status was not a reasonable marker of financially interdependent relationships relevant to achievement of the legislative objective

### M. v. H. (1999) [support rights and obligations on common-law spouses]

* Imposing legal disadvantages on same-sex conjugal cohabitants relative to their unmarried opposite-sex counterparts violates the constitutional prohibition on discrimination on the basis of sexual orientation
* Sexual orientation was not a reasonable marker of the relationships relevant to the statutory objectives – provide equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down; alleviate burden on public purse

Two cases combined created constitutional requirement that government respect a principle of relational equality

## 2. Religion, Culture and Family Law

### Bruker v. Marcovitz (2007)

* The fact that a dispute has a religious aspect does not by itself preclude the civil courts from enforcing it (making it non-justiciable)

# B. THE LEGAL FRAMEWORK

## 1. Federal Powers

### Divorce Act:

- only applies to married couples; must have applied for a divorce to invoke DA

- only area of family law not covered by federal law is matrimonial property division – must use *Family Relations Act*

- make provision for divorce, but confers jurisdiction to grant divorce to superior courts of the provinces

- **If client has applied for divorce – can use DIVORCE ACT**

### Constitution Act, 1867

**s 91(26)** – Federal power over marriage and divorce

Federal powers over “essential elements of marriage”

Including capacity to marry: consanguinity and affinity, law prescribing capacity for divorce people to remarry, age and consent

**Includes corollary relief in divorce proceedings such as:**

Spousal support (***Zacks v Zacks***)

Child support (***Zacks v Zacks***)

Custody and access orders (***Papp v Papp*** – if corollary issue w/ a divorce, custody is valid fed issue)

Variation of custody orders (***Skjonsby*** – DA still applies even after divorce is over)

Interim orders (***Papp v Papp***)

**For fed jurisdiction to apply:**

1. parties have to have been legally married

2. have to be applying for a divorce

3. order sought must be rationally and functionally connected to the divorce

**“rationally and functionally connected”** – applied liberally; where divorce applied for, everything is connected

### Indian Act, 1985

**Generally:** provincial legislation applies to status Indians to the extent that it does not conflict with *Indian Act*

**s 88** – all prov laws are applicable to Indians except to extent inconsistent with *Indian Act*

* **Court may not order division of property rights conferred by the *Indian Act* on basis of FRA**
* No court may order one party has exclusive possession of Indian reserve property – prov legislation cannot apply to real property on a reserve (***Derrickson; Paul***)
  + Because no Indian individual can own reserve lands in fee simple as reserve lands are set aside for the bands as a whole under the *Indian Act*
* Court may divide family assets that do not consist of interest in reserve land (***Baptiste***)
* Court can make an order for compensation for purpose of adjusting division of family assets between spouses (***George***)

**s 89** – property can be seized by a band or by another Indian from that community

* Property law resolution cannot be enforced by an outside body but can be by a member of the band

### Charter of Rights and Freedoms

Charter rarely applies to family law – little government involvement

Has impacted three areas:

1) where legislation has been reviewed and amended to ensure compliance with Charter

2) constitutional challenges to statutory provisions have been brought on basis that they violate Charter

3) Charter has been argued indirectly to require judges to take into account fundamental values enshrined in the Charter

## 2. Provincial Powers

**s 92(12) –** Provincial powers over solemnization of marriage

**s 92(13) –** property and civil rights in the province

Most statutes relating to marriage are provincial

### Family Relations Act

* Both married and common law couples
* Married couples who haven’t filed for divorce
* **Married couples – property matters**
* **Common law couples cannot rely on provincial law for property matters** [FRA s 120.1: if common law couples make agreement it is covered by FRA property division section (Part 5, 6)]
  + ***Walsh v Nova Scotia*** – it is constitutional to treat unmarried couples differently than married couples in relation to property

Marriage Reference (1912) **– Federal law stating marriage validly performed in one province was valid anywhere in Canada was found invalid**

Province is solely to deal with marriage solemnization and formal administrative aspects – **formal elements** of marriage:

Issuing marriage license or publication of banns

Stipulation of qualifications of person performing ceremony

Requirements relating to witnesses

Requirement of parental consent

Federal is solely to deal with matters going to the central validity of marriage

## 3. Conflict of Laws

* Where fed and prov orders for custody or support are inconsistent = fed law prevails
* Where a foreign order exists a prov is allowed to make an inconsistent order because welfare of child is paramount consideration in custody issues
* A prov court has no jurisdiction to vary a custody order made under the DA in another province (***Re Hall and Hall***)
  + Prov courts generally respectful of other prov courts; but no issues overruling foreign orders
* Where divorce granted but no corollary relief under DA – prov order probably valid
  + If a valid order is then made under DA – will render prov order inoperative
* An order made under prov law (before commencement of divorce proceedings) can be varied by a subsequent order under the DA (***Gillespie v Gillespie***)
* Once you start a corollary issue under DA – can’t change to FRA (also have to pursue any other corollary relief under DA)
* Convention on Rights of Child – adopted in Canada 1989
  + Significant influence worldwide (only 2 countries haven’t adopted it)
  + Best interests of child as fundamental principle
  + Current BC legislation – allows consideration of children’s views (at 7 – should consider; at 12 – should be seriously listened to)

## 4. Which Level of Court

* DA = BCSC
* Matrimonial property matters = BCSC
* Support and custody/access = BCSC or provincial court
* Adoption = BCSC
* Child protection = provincial court

# A. Cohabitation and Marriage

## How to Create Legally Recognized Adult Relationships

Law Commission of Canada: four legal models of regulation of personal relationships:

To some degree each of these models exists in Canada

### 1. Traditional Private Law (ex. Contract)

* Allows individuals to define the relationship themselves
* Doesn’t support the idea of “romantic marriage”
* Limited autonomy – how can you adequately contract for the future
* Potential for issues of power dynamic and control
* **Best for:** lawyers, wealthy people, those whose relationships aren’t necessarily covered by existing law

### 2. Ascription

* Default arrangement
* Acts as safeguard for vulnerable parties; reduces exploitation of vulnerable parties
* Good in situations with children – prevents inequity based on parents’ marital status
* Imposes legal responsibility without choice
* Captures parties who might not intend to be captured
* Government limits this to a certain category of people (doesn’t include non-conjugal relationships)
* Infringes on autonomy

### 3. Registration

* Certainty and voluntariness
* Have to take positive action (doesn’t require wealth, legal advice) – presumably only captures those who choose to register
* Can recognize a broader group of relationships – if they are allowed to register
* Not forced to marry to gain benefits associated with marriage
* Good alternative if you have political opposition to marriage

### 4. Marriage

* Preserves autonomy and choice
* Creates certainty (one unified system, specific legislation, you can predict outcomes, probably protects more vulnerable parties)
* Recognized institution that carries weight in society
* Religious affiliation; associated with patriarchy and oppression
* Historically discriminatory system
* Expensive to divorce (and requires some contact with legal system)

## History of Marriage in Canada

* ***Hyde v Hyde* (1866)** – was legal definition of marriage in Canada until 2005
* Marriage was originally a **private customary** **contract** (Roman law).
* Rise of the Christian church turned marriage into a **religious** **institution**.
* Marriage is now returning to its secular roots.
* In Canada, both the church and state have the authority to solemnize a marriage for the purposes of legal recognition.

## Effects of Legal Marriage vs Cohabitation

* *Modernization of Benefits and Obligations Act* (2000): extended almost all benefits of marriage to common law couples.
* Matrimonial property (***Walsh v. Nova Scotia*, SCC, 2002**): provinces can treat common law couples differently with regards to post-separation property distribution.

## Annulment vs Divorce

**Annulment:** as if the marriage never existed; historically no obligations arise; currently unclear effects of annulment

*FRA* definition of “spouse” – referring to obligations from marriage even with annulment

**Divorce:** marriages exists but is terminated; gives rise to certain obligations

**Void ab initio**: marriage that has no legal veracity; nonexistent even if not annulled

**Voidable**: marriage that stands until it has been annulled

## How to Contract a Legal Marriage

Four requirements of valid marriage:

[Strong bias of the law in favour of maintaining marriages]

**1. Capacity** (void; federal and common law)

**a. Age** – parental consent and age of consent

Must be over 16

Marriage involving kid under 7 = void

Marriage involving kid over 7 = voidable

***BC Marriage Act*** add limitations:

**s 28** – under 19 requires consent of parent/guardian; under 16 requires leave of the court

**s 30** – failure to get consent doesn’t mean marriage is invalid (ex. if party seeks annulment after long period of marriage, won’t be granted)

**b. Consanguinity & Affinity (*Marriage (Prohibited Degrees) Act*, S.C. 1990)**

Too closely related by blood or marriage = **void** marriage

Treats relationship with adoptive person as though they were blood relative

Eliminated prohibition on marrying step-family

**c. Single –** cannot be party to another marriage (not single = **void**)

[Exception: DA s 22 – recognizes foreign polygamous marriage as valid for purpose of divorce]

**d. Opposite Sex (historically) –** no longer the case in Canada

For transsexual – court will not look beyond birth certificate in determining sex (irrelevant now that we have same-sex marriage)

**e. Sanity** – being able to understand the nature of the marriage contract

Very hard to show you too insane to marry

Mental illness is insufficient on its own

Failure to comply = void (but can be ratified if continue to cohabitate after recovery)

**2. Consent** (void)

**a. Duress**

Very strict test to show duress – must prove that you entered marriage with view that if you didn’t your life, health or liberty will be threatened

Has to be genuine and reasonable fear of that threat

Subjective analysis: consideration of age, emotional state, vulnerability, lapse of time between duress and marriage, whether marriage has been consummated

**b. Mistake or Fraud**

Both must go to nature of ceremony or identity of one party

Lies about name, status, wealth alone are insufficient

Must think you are marrying someone else (ex. twin) or don’t understand that you are getting married

[Questionable immigration marriage – won’t be annulled; have to divorce]

**3. Formalities** (void; provincial domain)

*Marriage Act* (B.C.), ss. 20, 28, 29, 30

s 20 – what has to happen at the ceremony; failure to meet these requirements = void

s 30 – more age rules; court can allow marriage to be valid despite age

**4.** **Consummation** (voidable)

Have to prove:

1. “practical impossibility of consummation”

2. this impossibility is caused by physical or psychological defect

Psychological defect: must be an invincible aversion or repugnance to the act of consummation and must be unconquerable

To make voidable marriage valid – can continue the marriage (courts generally don’t want to annul)

Even where marriage would be void – court have said that length has ratified the marriage despite it being considered void from the outset

# Customary Marriage and Same Sex Marriage

## 1. Aboriginal Customary Marriage

\*\*If you can show some element of Aboriginal tradition, custom, then the court will recognize the validity of the marriage despite failure to meet all provincial and federal requirements\*\*

### Connolly v Woolrich (1867) Quebec

* Marriage that met the elements of Aboriginal customary marriage was upheld even though it didn’t meet all other requirements for civil marriage in Quebec
* In general Canadian law has accepted the validity of Aboriginal customary marriages where there is: **validity in the community, voluntariness, exclusivity and permanence**
* Has been applied since to: other Aboriginal customary marriages, Inuit marriages and customary adoptions

### Manychief v Poffenroth (1994) ABQB

* For s 35 of the Constitution to apply – there needs to be an “Aboriginal quality” to the marriage
  + Need to determine what in the community was required for a valid customary marriage and ensure those elements are met

### Casimel v Insurance Corporation of BC (1993) BCCA

* does not deal directly with the constitutional status of aboriginal customary marriages, but seems to lay the groundwork for recognition of their constitutional status as s.35 rights
* However, the current policy of the Ministry of Health is only to register those marriages which are witnessed and registered by one of the categories of officials provided for in the BC *Marriage Act*
  + This policy doesn’t explicitly exclude custom aboriginal marriages, but its effect is to prevent the registration of such marriages unless they conform to the criteria in the *Marriage Act*

## 2. Same-sex Marriage

EGALE Canada Inc. V. Canada (Attorney General) 2001 BCCA – s.15 was infringed by restriction of marriage to opposite-sex couples; overruled BCSC in saying this was not justified under s.1; therefore the bar against same-sex marriage was of no force and effect

Halpern v. Canada (Attorney General) Ont CA – upheld lower court decision that s.15 was infringed in a manner that cannot be justified in a free and democratic society

### Reference re Same Sex Marriage (2004) SCC

* Issue of same-sex marriage referred to SCC
* Fed gov proposed to enact legislation that would permit same-sex marriage
  + s 1 of *Proposed Act* – extended definition of marriage to include same-sex
  + s 2 – *Proposed Act* did not prevent religious officials from refusing to perform marriages that were not in accordance with their beliefs

**Q 1: Is the proposed legislation within exclusive fed jurisdiction?**

* **s 1** – found to be within exclusive jurisdiction of fed gov:
  + Referenced ***Persons*** case – centuries ago “persons” only referred to men, now it includes women
  + Marriage used to be only heterosexual, times have changed, now it is recognized as not precluding same-sex marriage
* **s 2** – because the section relates to a subject matter within the competence of the provinces it doesn’t fall within exclusive fed gov jurisdiction
  + Only provinces may legislate exemptions to existing solemnization requirements as any such exemptions necessarily relates to the “solemnization of marriage” under 92(12)

**Q 2: Is extension of capacity to marry to same-sex couples consistent with *Charter* rights**

* The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another
* Potential for collision of rights doesn’t necessarily imply unconstitutionality; collision of rights must be considered on facts of actual conflicts
  + First as whether the rights alleged to conflict can be reconciled; if not = true conflict
  + Then the court will find a limit on religious freedom and go on to balance the interests at stake under s 1 of the Charter
* The potential for collision of rights doesn’t violate the Charter – it was not shown that impermissible conflicts will arise

**Q 3: Does freedom of religion protect religious officials from being compelled to perform same-sex marriages**

* Proposed legislation was limited to marriage for civil purposes
* It would be within prov powers to legislate to protect the rights of religious officials and human rights codes must be interpreted in manner that respects the broad protection of religious freedom under the Charter
* State compulsion of religious officials to perform these marriages would violate the Charter

\*\*Legality of same-sex marriage is now settled in Canada\*\*

***Civil Marriage Act*** codifies that marriage in Canada is the lawful union of two persons to the exclusion of all others

* **s 2** – marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others
* **s 3** – officials of religious groups are free to refuse to perform marriages not in accordance with their religious beliefs

### Smith & Chymyshyn v Knights of Columbus

* Only reported dispute in BC dealing with issue of how to balance equality rights to marriage and rights to religious freedom
* BCHRT: held that it was permissible for the Knights of Columbus to refuse access to the hall on the basis of their core beliefs
  + In denying access have to accommodate complainants in every way possible short of acting contrary to their religious beliefs
  + Must accommodate up to the point at which religious beliefs are violated

## 3. Polygamous Marriage in Canada

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

# CHILDREN

## 1. What is a Legal Parent?

* POLICY: state is concerned about who is going to pay bills; wants to ensure state doesn’t have to pay for these kids
* Canadian law generally gives parental status to those presumed to have a biological connection to the kid
  + In finding “biological” connections – often rely on false assumptions derived from marriage or cohabitation
    - Historically husband presumed to be legal father by virtue of marriage to mother
    - Modern times – extends this to cohabiting couples
  + **See FRA ss 94 and 95**
  + Between 5-10% of husbands aren’t their kid’s biological father
* The act of giving birth gives rise to mothers (see ***Vital Statistic Act* s 1**)
* With IVF – legal presumption that if man consents to wife’s fertilization he is legal father
* ***FRA* s 1 –** “Parent”: includes guardians and step-parents
  + “Birth”: only indication of legal mother – woman who gives birth [woman giving birth is biological mother but may not be genetic mother]
* ***FRA* s 95 –** where a man is denying responsibility for a child (to avoid CS); court will presume paternity
  + If 2 men can be considered father under presumptions – can’t rely on presumptions; will order DNA test
  + Presumptions can be rebutted with paternity test
* ***Adoption Act*** – references who must give consent for adoption; assumes birth parents are biological parents
* ***Law and Equity Act* –** abolishes distinction between legitimate and illegitimate children; child of his or her “natural parents” – reference to biology
* ***Parental Responsibilities Act*** – Act makes parents liable for their kids; includes biological parents, adoptive parents, individual declared a parent under FRA s 95, married to or in marriage like relationship with anyone in first three categories, someone who contributed to support, maintenance, any individual who has custody or access

### Gill v. Murray [2001] BCHRT

**Facts:** One member of lesbian couple was artificially inseminated. On the birth certificate the couple listed her as mother and her partner as father. Vital Statistics refused to accept the birth registrations.

**Issue:** Is this discrimination against the Complainants

* Complainants were denied access to the benefit of verification and documentation of parent/child relationships available to others without the necessity of the adoption procedure
  + Discrimination on the basis of sex, sexual orientation and family status
  + Had the other parent been male they would not have been questioned as to their sex or biological connection to their child, nor would they have been directed to take steps to adopt their child
* The Court ordered the Director to cease this practice and amend the Birth Registration to provide the option of identifying as a parent, a non-biological parent who is the co-parent of the mother or father
* Birth certificate is proof of a relationship between parent and child – but it is rebuttable
  + Someone with better claim to parentage could usurp the person listed
  + Important document used to register child for variety of purposes – without it non-biological parent would be constantly challenged

### White Paper Changes:

* Presumptions in s 95 would apply to women (presumptions of maternity for non-biological mother)
* Proposal of multiple parents – known donor situation
  + In absence of prior agreement – donors (known or anonymous) are not legal parents

### Trociuk v. British Columbia (Attorney General) [2003] SCC

**Facts:** mother refuses to give kids father’s surname, and refuses to acknowledge him on birth certificate (this gives her complete control over naming)

* The act of naming a child holds great significance for many people and is often an occasion for a celebration which can symbolize family bonds across generations
* A birth registration is not simply a public record but a means of affirming biological ties with a child
* The possibility of a father being arbitrarily and absolutely excluded from these processes violates his right to equality under s 15 of the *Charter* and is not saved by s 1

[see ***Vital Statistics Act* s 4.1**]

### Rypkema v British Columbia (2003) BCSC

**Facts:** surrogacy case; no conflict between parties

* The claimant argued that the *Vital Statistics Act* was antiquated for defining a mother as the woman who gives birth to a child.
* Despite definition of “mother” in VSA, judge overlooks this – Rypkema’s are genetic and intentional parents and no other party claiming parental status
  + Important to allow this seamless transfer rather than forcing adoption because that process is long and expensive

### White Paper Changes:

* Creates a series of presumptions:
  + Intentional parents will be parents – if surrogate agrees in writing pre-conception, and after birth gives additional written consent and turns child over
    - Gives surrogate mother an out – if doesn’t give consent after birth intending parents won’t be legal parents
    - Any surrogacy agreement is unenforceable absent later consent
  + Provides for intending parents being listed on birth certificate – if they provide documentation to Vital Statistics

## 2. Adoption

* In Canada adoption is almost entirely statute based
* Historically adoption records were sealed and there was stigma around the notion of adoption
* Now there is an emphasis on open adoption
  + ***Adoption Act*** – permits open adoption
* **Adoption orders must meet the “best interests of the child” test** (*Adoption Act* **s 2**)

### Adoption Act

* **s 2** – best interests test is paramount consideration
* **s 3** – factors court needs to consider in determining what is in best interest
* **s 37(1)(a) & (b) -** An order for adoption results in a child becoming **in law** the child of an adoptive parent
* **s 37(1)(c) –** order for adoption results in a child ceasing to be the child of a birth parent
  + Even with open adoption birth parents’ rights are still severed
  + Exception: second parent adoption (often same-sex couples, step-parents)
* **s 37(7) -** An adoption order does not affect any aboriginal rights the child has
  + in BC about 40% of children in care are Aboriginal

### Private Adoption

* Shift in the 1980s away from public and towards private adoptions
* BC adoption regime:
  + All adoptions regulated through the Ministry or licensed adoption agencies
  + Direct placement of a child once a pre-placement report has been prepared and consents received from:
    - The child if s/he is over 12
    - The birth mother
    - The birth father
    - Any legal guardians
  + No adoption can be completed in BC without the preparation of a post-placement report by the director which advises the court on whether the adoption should take place

### King v. Low (1985) SCC [Best Interests Test trumps Parents’ Wishes]

* **Dominant consideration to which all other considerations must remain subordinate must be the welfare of the child** – best interest test has replaced historic preference for biological parents
* The welfare of the child must be decided on a consideration of all other relevant factors, including:
  + Economic circumstances of the contending parties
  + Physical comfort and material advantages that may be available in one home
  + General psychological, spiritual and emotional welfare of the child
* Courts must aim to choose the course which will best provide for the health growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult
* Parental claims must not lightly be set aside, and they are entitled to serious consideration
  + Where it is clear that the welfare of the child requires it, however, they must be set aside
* [small comment on race: adoptive mother’s Aboriginal ancestry works in her favour – would be able to help the child understand or deal with issues encountered with racism]

### Race and Adoption/Child Protection

### Racine et al v Woods (1983) SCC

**Facts:** dispute between biological mother and foster parents trying to adopt; case where mother invited press to one of her access visits

* Children are not property of natural or biological parents
* Test is best interest of the child
  + In this case child had clearly bonded with adoptive parents (was 7 and well integrated with their family)
* WILSON: When the test to be met is the best interests of the child, the closer the bond that develops with the prospective adoptive parents, the less important the racial element becomes
  + [case precedes ***Adoption Act*** – now required to consider an aboriginal child’s heritage]

### Sawan v Tearoe (1993) BCCA

* Approved Wilson in ***Racine*** – significance of cultural background and heritage as opposed to bonding abates over time
  + Treats this case as same as ***Racine*** even though this kid was only 2 mos old at time of trial, adoptive parents were white, and mother had revoked consent (not in writing)
* **s 19 *Adoption Act*** – birth mother can revoke consent within 30 days of birth; must be in writing and received by Director or adoption agency before 30 days expires

### DH v HM (1999) SCC

**Facts:** White grandparents (adoptive parents of birth mother), Aboriginal birth grandfather, kid is aboriginal and African-American. Kid has lived with birth grandfather for 2 years, he is low income, living off social assistance. Technically a custody dispute but raises same issues

* SCC gives custody to adoptive grandparents – even though kid was living with grandfather for 2 years
* Not nearly as strong a statement about culture abating – this is a complex series of factors, multiple racial identities
  + Best interests of child are to return him to adoptive grandparents

### Customary Adoption in BC

* Normally a court order is required for an adoption to take place and have legal effect
* ***Adoption Act* s 46** – says the court may recognize that an adoption effected by custom of an Indian band or Aboriginal community has the effect of an adoption order made under the Act – Court has discretion to recognize an Aboriginal adoption
  + Look to nature of adoption/relationship; whether other parties considered that child to be child of adoptive parents, etc.

### Casimel v. Insurance Corp. of BC (1993) BCCA [Adoption Act s 46]

* Customary adoption has survived the *Adoption Act* and the *Indian Act*
  + Aboriginal people can continue to rely on customary practices
* There is nothing in the *Adoption Act* which qualifies or regulates the right of aboriginal people to continue their custom of adoption in accordance with the customs, traditions and practices which form an integral part of their distinctive culture
* The federal *Indian Act* includes “a child adopted in accordance with Indian customs” in the definition of “child”

### Who Can Apply to Adopt?

* **ss 5 & 29** – one or two adults who are residents of BC
* The courts have no jurisdiction to expand the group of people qualified to adopt (entirely statutory creature)
* **s 7** – if kid is Aboriginal reasonable efforts must be made to discuss the kid’s placement with a designated representative of the relevant aboriginal community before kid is placed for adoption
  + unlikely that an aboriginal community could successfully adopt a kid – the Act is designed to accommodate person-to-person relationships (***S(SM) v A(JP)***)

### Whose Consent is Required?

See ss.13-20 of the *Adoption Act*

* To adopt you need consent of birth parent (s 13(1))
* Children over 12 must give consent (s 13(1)(a))
* Adoptions through state care:
  + Usually 6 mo placement period – during this time adoptive parents can rescind
  + About 30% of adoptions are frustrated in this period
  + At end of 6 mo child can say they don’t consent to arrangement
* **Practice Standard #32** – requires Ministry workers to encourage mother to name father
  + If mother refuses – worker can’t go forward with adoption without approval of superiors
  + Exception: where mother conceived via sexual assault or incest

### In the Matter of a Female Infant, British Columbia Registration No. 99-00733 (2000) BCCA

**Facts**: order sought dispensing with father’s consent; CA overturns TJ decision to give father custody

* **If factors relating to the best interests of the child are relatively equal between the two families, the biological factors may be used as the decisive factor in the circumstances**
* Biological factor can only be considered as decisive where everything else is equal
  + In this case there were inadequate child care arrangements made
  + Court considered the inherent potential for conflict amongst caregivers in assessing best interests of child - Court is concerned child will be placed in a conflict situation
* DISSENT: father was not aware of adoption and acted as soon as he became aware; father was not a “casual fornicator” who had abandoned the child

### Registration Number 06-014023 (Re) (2007) BCSC

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

### Step Parent Adoptions and Consent

* Where custodial parents has re-partnered and wants new partner to adopt child – required to get consent from other biological parent
  + If there is any access relationship it will be difficult to get consent dispensed with
  + In most cases parties are reluctant to consent because it means severing legal relationship
* ***Adoption Act* s 38** – allows an access order to survive an adoption
  + If it is in the child’s best interest
  + Creating access order before legal relationship is severed is ideal; otherwise to create access order after adoption requires leave of the court

### BC Birth Registration No. 023969 (Re) (1998)

**Facts:** birth mother refused consent to step mother adoption, worried it would weaken her position with regard to access

* Court must determine whether her consent can be dispensed with (***AA* s 17**)
* Father argues mother abandoned child
  + Court – failure to pay child support does not = abandonment
* Court dispenses with mother’s consent because it is in best interest of child (s 17)
  + Allow access to remain in force under s 38

# CHILD PROTECTION

See *Child, Family and Community Service Act* (B.C.)

* *CFCSA* refers to best interest of child occasionally – **paramount factor is child’s safety**
* Majority of CP cases involve neglect, not abuse
* Issue of cost – removing children is costly, might be more cost effective to provide supports for their parents
* Most debate is about degree to which the state should intervene in private families
* Amanda: sometimes SWs feel like they are doing more harm than good; emotional consequences may be greater than physical abuse; many kids AWOL to their parents

### Gove Report/Hughes Report

* Non-interventionist approach prioritized family autonomy over children’s safety
* Introduced Children’s Commissioner – goal to investigate every death that occurred while a child was in protection

Debates:

1. Cost – often cheaper to keep children with their families than remove them

2. Certain families have their children removed at a higher rate than others (aboriginal, poor)

If under scrutiny of the state already, more likely to have children removed

USA study – severity of abuse was not a predictor of removal; only predictor was poverty

\*\*Our existing model is generally categorized as a non-interventionist approach\*\*

### L.J. et al. V. Director of Child, Family and Community Services (2000) BCCA [CCO case]

* To the extent possible courts should strive to keep families together if this is a feasible option (see *CFCSA* s 2)
* Child may be removed from parents if their health or safety is in immediate danger (s 30)
* The process should be kept as informal as possible to ensure that the interests of the children and parents are properly taken into account
* It is always desirable that where possible matters can be worked out to the satisfaction of all concerned – absent a consensual resolution a court will be obliged to make the order it thinks fits based on the state of the current evidence before it
* The whole thrust of the Act is aimed at seeking to provide solutions for unsatisfactory home situations including supervisory orders and the provision of support services to assist parents
* Before making a continuing custody order (CCO) a court has to consider the past conduct of the parents toward the kid, the plan of care, the child’s best interests (s 49(6))

### If Child must be Removed:

1. determine under s 13 whether this is “child in need of protection”

2. if you determine this is a child in need of protection – you can offer services (potential for non-interventionist approach

3. if you decide to remove child and child is not returned within 7 days; hearing process begins:

Children can be returned before 7 days in one of three circumstances (s 33):

a) agreement made with parents that adequately protects the child

b) circumstances change so that child is no longer in need of protection

c) less disruptive means of protecting the child have become available

### Presentation Hearing:

1. Assess whether removal was justified

Involves establishing reasonable and probable grounds that child was in need of protection

Have to show before the court that s 13 was met

2. Determine the best way to care for the child

Gives rise to interim orders only – include: continued removal of child, child’s return under supervision, child returned without supervision

### Protection Hearing [s 40]:

Full blown decision as to whether child is in need of protection

If not – returned to parents

If yes – orders can be made [under s 41]

Following expiration of one of these orders the director can apply for permanent custody order – under Ministry’s custody and available for adoption

Requires another hearing

Parents must be notified; if aboriginal – band must be notified

Permanent orders = continuing custody orders [s 49]

## Child Protection – Familial Autonomy, Culture and Religion

See *Child, Family and Community Service Act* ss.1-4, 29, 39

### S.J.B. (Litigation Guardian of) v. British Columbia (Director of Child, Family and Community Service) (2005) BCSC

**Facts:** 14 year old girl refuses blood transfusion on basis of her faith as a Jehovah’s Witness

**Issue:** whether the court could use the *Child, Family and Community Services Act* to empower the court to authorize the necessary medical treatment of a capable young person (ie. mature minor) who refused to consent to such health care.

* No right at common law that a child who is deemed to be a mature minor, has the capacity to consent to as well as refuse medical treatment – **no common law right entitling child to refuse medical treatment**
* *Charter* s.2(a) – Freedom of religion:
  + The child is free to choose and practice the religion of her choice, but the law is clear that freedom of religion is not absolute
  + The statute does not infringe the child’s rights to hold her beliefs or express or practice them. The statute does ensure that her beliefs do not override her *Charter* guaranteed right to life and security of the person
  + **Right to life and security of the person trumped freedom of religion here**
* *Charter* s.15(1) – Discrimination based on age:
  + Family argued – child was being treated differently than an adult, although she had the ability and capacity to understand the nature and consequences of her decision
  + Court rejected this and held the **legislation was closely tailored to the reality of the affected group** – in this case the group being children who are facing life-threatening health conditions or permanent or serious impairment to their health
    - Even if there was discrimination – it was saved by s 1

### BC Sextuplets: Parents’ Rights in Making Children’s Medical Decisions

* BC government seized 3 of 4 surviving sextuplets from parents’ care in order to administer blood transfusions to the children – under the *Child Family and Community Service Act*
* The parents had refused the blood transfusions on the basis they were contrary to their religious beliefs
* Children were returned to parents’ custody after transfusions were completed
* **The court found that the *CFCSA* as interpreted and applied by the Director in this case did not contravene the parents’ *Charter* rights**

### Canadian Foundation for Children, Youth and the Law v Canada (AG) (2004) SCC

* Criminal Code s 43 – decriminalizes use of force by parents and teachers when it does not exceed that which would be reasonable in the circumstances

**Majority**: upholds provision and imports a series of limitations

* Best interest of child is not a principle of fundamental justice
  + It is a recognized legal principle – not a foundational requirement for justice in Canada
  + Can be subordinated to other concerns in appropriate context (here rights and autonomy of parents)
* **Family is protected zone – parental autonomy is key for guiding children and providing for their needs**
* s 43 seen to accord with needs and circumstances of children
  + Because children depend on parents/teachers for guidance and discipline – protecting parental autonomy provides for guidance and discipline of children
* s 43 protects from abuse because force must be reasonable; but provides for guidance and protects families and educational environments from legal intervention
* Limitations read in: **TEST – minor corrective force of a transitory or trifling nature**
  + Doesn’t apply to kids under 2 – they can’t be corrected
  + Can’t apply to teens – use of force against teens might induce aggression or antisocial behaviour
  + Doesn’t include degrading, inhumane or harmful conduct – including discipline using objects, blows or slaps to the head or force as a result of anger
  + Gravity of precipitating event is not seen as relevant – what kid actually did is not indicator of entitlement to use force

**Dissent:** this is a wide ranging provision, constitutionality must be determined on basis of written law; majority limited text then determined it was constitutional – this is wrong approach

## First Nations and Child Protection

See *Child, Family and Community Service Act* ss.1-4, 29, 39

* The interests of the aboriginal child are inherently tied up with the survival of their community
  + when making child protection decisions about that child there should be consideration of needs of child and needs of child's community and what effects does removal of that child have on that community

### Statistical Overview

* 2008 – Aboriginal children 6X more likely to be taken into care than non-aboriginal child
* Aboriginal children account for 8% of children in BC but make up 51% of children in the province’s care
* September 2002, BC government entered into Memorandum of Understanding (MOU) with Aboriginal communities:
  + Aimed at transferring child welfare services to Aboriginal communities
  + There have also be several delegated enabling agreements created since the early 1990s
    - These agreements have resulted in 24 delegated Aboriginal child welfare agencies
    - 8 agencies have become fully delegated enabling them to perform child apprehension
  + The Ministry continues to provide some child protection services across the province
  + By the end of 2008 – 1832 Aboriginal children were served by one of these agencies, compared to 1500 the previous year
* If possible the Ministry of Child and Family Development will place children with Aboriginal families or within aboriginal communities

# Domestic VIOLENCE

### Statistics

* International agencies have identified violence against women as one of the most widespread and socially tolerated global human-rights violations facing women today
* 2001: 1/4 of all violent crimes reported to police involved family violence
  + 2/3 involved spousal or partner violence
  + 85% of victims were women.
* 15% of all homicide deaths in Canada = spousal homicides
  + 3x as many women as men are killed by their intimate partners.
* Clinical psychologists have identified three phases of domestic abuse:
  + (i) the building tension phase (gradual escalation manifested by verbal abuse and less extreme acts of physical violence)
  + (ii) the acute battering incident
  + (iii) a loving contrition phase (remorse, promises to change, gifts, affection) - This final phase provides positive reinforcement for the victim to remain in the relationship.
* The period of separation may represent the most lethal time in the life of an abused woman when she is most likely to face serious injury and death
* In North America – 90% of “family violence” is directed at women and children
* 29% of all Canadian women report at least one instance of physical and sexual abuse within an intimate relationship over their lifetime
* 48% of women report that a previous partner was abusive

### Impact of Domestic Abuse on Children

* **Children are affected by witnessing violence in their family**
  + Parents tend to underestimate by half, how much their children know
  + In families where there is marital abuse, children have a significant probability of suffering direct physical or sexual abuse
  + Witnessing violence is a form of psychological or emotional abuse that can leave behind the same adjustment problems as the direct experience of physical or sexual abuse

### Custody and Access Decisions and Domestic Abuse

* General idea that violence directed to spouse doesn’t raise same concerns as violence against kid – therefore **spousal violence has little impact in custody/access decisions**
* Courts are directed to determine the child’s “best interests” in deciding custody or access disputes
  + Currently at both provincial and federal level, each parent is generally presumed to be equally entitled to claim custody of his/her children
    - Neither FRA or DA facilitate consideration of domestic abuse
    - Could arguably rely on some factors in FRA s 24(1) to argue access should be curtailed or supervised
  + **s.16(10) *Divorce Act*** – the **maximum contact** and **friendly parent section**:
    - directs the court to give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and the court shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact
  + **s 16(9) – past conduct rule**
    - court can’t consider past conduct of parents in making custody order unless it is relevant to that parent’s ability to parent the child
* International legislative action recognizing the impact between parental violence and custody:

1. some legislation mandates that courts consider domestic violence before a joint custody award can be made

2. some statutes list domestic violence as one factor to be considered in determining the “best interests” of the child or in making a sole custody determination

3. some statutes require that domestic violence be considered in other aspects of the custody/access dispute, such as whether a mother has abandoned her children by fleeing spousal abuse

### HH v HC (ABQB)

**Facts:** history of serious abuse of wife; wife opposes all access; court awards access to husband

* Unlike most courts, the QB did consider the possibility of a no access order
* Court ultimately awards father supervised access:
  + No direct harm towards children
  + Already punished for these acts (they were subject of criminal convictions)
  + Conflict between parents isn’t sufficient base for determining kid’s interests aren’t being served
  + KEY ELEMENT: where access is desired a court should only deny it as a last resort

\*\* Abuse against children has generally also lead to supervised access orders\*\*

### Criminal and Civil Responses

* Peace Bonds - A criminal law remedy which can be issued by a provincial court; Not well enforced and few prosecutions or arrests for breach
* An officer may arrest and detain (at least overnight) a spouse who has assaulted or threatened his spouse with violence
* “Restraining order” or “non-harassment order” – can prohibit the perpetrator of domestic violence from communicating with his victim, attending at her place of employment and residence – such an order should extend coverage both to the adult victim as well as her children
* Failure to protect children from abuse by a partner may constitute grounds for the child protection authorities to apprehend the child from the home
  + Lawyers must warn their clients of their statutory duties in this regard

### Civil Restraining orders under the BC Family Relations Act

* Restraining orders are available to both common-law couples and married spouses
* *FRA* ss.37, 67, 38, 126
* A breach of a *FRA* restraining order is a breach of a civil order which may only constitute contempt of court
  + A breach of a recognizance order is itself a criminal offence
* FRA orders may be backed up with a peace officer enforcement clause – a cop that comes to your home must actively enforce the order and has authority to arrest person for breach of order – **without this clause it is a civil remedy and breach only results in contempt of court**

### Alternative Dispute Resolution and Violence

* Often mandatory or strongly encouraged mediation services – to avoid parties going to court
  + In BC must go through a judicial case conference – to get any interim order
  + WHITE PAPER: suggests an even stronger push for ADR
* Essentially will have to go through at least one face to face with abuser – may have to negotiate with them as well
  + Should try to minimize involvement in ADR of domestic violence couples

# FAMILY BREAKDOWN: DIVORCE, SEPARATION, AND COROLLARY ISSUES

## A. DIVORCE

## 1. The Legal Framework

See the Federal *Divorce Act (DA), 1985*: definitions and ss.3, 8 – 14

* No fault regime since 1987 [**DA s 8**] – a judge must determine that “grounds for a divorce” exist even where it is on consent
* Divorces are largely uncontested – about 85% are by agreement; remaining 15% usually being argued about on fault based grounds
* **Grounds for divorce (need one of the three)**:

1. *Living separate and apart:* the 1 year period will not be considered interrupted or terminated when cohabitation resumes to attempt reconciliation – if the cohabitation period is less than 90 days in total

2. *Adultery:* defined judicially as: voluntary sexual intercourse between a married person and another person of the opposite sex other than his or her spouse; acts of a sexual nature may not suffice

3. *Cruelty:* mental or physical; treatment must be grave and weighty, going beyond incompatibility; issue is not the intention to be cruel, but the subjective effect of the treatment on the other spouse

* Divorce based on cruelty or adultery can occur immediately

### Same-sex Divorce

* definition of spouse in *DA* was amended on July 20, 2005
  + “spouse” means either of two persons who are married to each other

### Fault Based Divorce

* Conduct typically not relevant to property distribution, maintenance of custody/access
* Mostly where looking to remarry
* Fault/conduct might be important for spousal support (***Leskun v Leskun***)

Adultery**:** **s 8(2)(b)(i)** – only the innocent spouse can apply under this ground

* Innocent spouse has to prove opportunity and intimacy – on BoP
* Adulterer spouse has to rebut that evidence

Orford v Orford (1921)

Defined “adultery”: voluntary sexual intercourse between a married person and another person of the opposite sex other than his/her spouse

P. (S.E.) v. P. (D.D.)**(2005 BCSC) [same sex adultery]**

* Expanded the common law definition of adultery to include same-sex acts (in BC)
* Only other province to expand the common law definition to include same-sex adultery is New Brunswick

Cruelty: **s 8(2)(b)(ii)** – conduct at issue must be grave and weighty going beyond incompatibility (***Knoll***); issue is not intention of spouse to be cruel, but subjective effect of treatment on other spouse (***Balasch***)

### “Living Separate and Apart”

* **DA s 8(3)(b)** - for how to calculate
  + If resume cohabitation for less than 90 days to attempt reconciliation, clock doesn’t stop
  + POLICY: encourage attempts to reconcile but not jeopardize entitlement to divorce
* Allowed to live separate and apart in the same house
* One party not wanting to divorce is not a bar – anyone can apply for divorce; only one spouse needs to apply
* **DA s 8(3)** – parties must have mental capacity to form the intention to live separate and apart
  + Where they were already living apart and one spouse becomes incapacitated – court presumes that spouse would have continued to live separate and apart
  + ***Calbert*** – Three levels of capacity: 1) necessary to separate; 2) necessary to divorce; 3) necessary to instruct counsel
    - The lowest level of capacity necessary to separate

***Oswell v. Oswell* (1990 Ont HC)**

* **Factors to consider in determining when spouses who occupy the same premises are living separate and apart:**
  + There must be physical separation
    - Often means separate bedrooms – just because a spouse remains in the same house for reasons of economic necessity doesn’t mean they are not living separate and apart
  + There must be a withdrawal by one or both spouses from the matrimonial obligation with the intent of destroying the matrimonial consortium or of repudiating the matrimonial relationship – not determinative but should be considered
  + Day to day arrangements
    - The meal pattern
    - Discussion of family problems and communication between spouses
    - Presence or absence of joint social activities
  + The absence of sexual relations is a consideration – but is not conclusive
  + Performance of household tasks is a factor – but greater weight should be given to matters which are more closely related to being husband and wife

**Date of Separation: *Riha v. Riha* (2001 Ont Sup Ct J)**

* Ceasing sexual relations and having separate bedrooms were seen as only one indicia and not, on its own, sufficient to establish the date of separation

### Bars to Divorce

**DA s 11**:

**Collusion** – parties work together to create situation of immediate divorce; treated as absolute bar to immediate divorce

**Connivance** – spouse promotes or encourages (even passively) adultery by other spouse; degree of discretion of court

**Condonation** – resumption of cohabitation with guilty spouse following some forgiveness by innocent spouse; significant discretion of court (consider time period)

## Procedural Issues

**Note on *J.G. v. New Brunswick:* The *Charter* and Availability of Legal Aid in Family Law**

* Majority – the state removal of a child from parental custody constitutes a substantial interference with s.7’s protection of security of the person (particularly the protection of psychological integrity)
  + The parental interest was portrayed in deliberately narrow terms – relating it only to constitutional protection against the stigma of being found an unfit parent at a judicial hearing
  + Denial of legal aid to JG by New Brunswick was inconsistent with the principles of fundamental justice
  + Effective legal representation for the parent is only required in order to assure adherence to the “best interests of the child” principle
  + Obligation on the state is to preserve judicial discretion to order state funded counsel rather than to provide a legislative entitlement to legal aid for indigent parents as of right
* Minority (concurring): this case raises issues of gender inequality because women are disproportionately affected by child protection proceedings
  + Broadened s.7 protection by recognizing a liberty interest in parental decision making

**Legal Aid and Child Custody Disputes: Cases since *J.G.***

* Cases have made it clear that *JG* is of limited application
* Only applies to those cases in which the action of the state threatens the security of the person and state-funded counsel is necessary to ensure fairness
* The Charter does not guarantee legal counsel for individuals involved in private civil litigation (***Miltenberger v. Braaten, Mills v. Hardy***)
* A duty to provide state funded representation only arises if the state is the party seeking to interfere with the parent’s custody and not in a private custody dispute (***New Brunswick (Minister of Family and Community Services) v. R.W.***)

## (A) Collaborative Lawyering

* Collaborative law emerged in the early 1990s
* If the process fails to reach agreement and either party then wants to have matters resolved in court, both collaborative attorneys are disqualified from further representation
* under no circumstances will the lawyer represent the client if the matter goes to court
* Experts are brought into the process as needed, but only as neutrals, jointly retained by both parties
  + These experts are also disqualified from continuing work and cannot assist either party if the matter goes to court
* Differences from settlement oriented representation:
  + Both parties commit to selecting counsel on both sides who willingly bind themselves to prearranged ground rules
  + Everyone signs a stipulation about how the process will be conducted, which remains in effect so long as all participants conduct themselves in good faith
  + A core element of the stipulation is that the process continues only so long as no one threatens litigation as a means of conducting negotiations, nor takes any steps to bring the matter into the court’s litigation process
* Collaborative family law is inconsistent with active domestic violence and with certain kinds of mental illness and character disorders

**Other Views on Collaborative Lawyering**

* Many of the negative consequences of divorce for women and children are related to poor substantive results rather than to the process used to resolve disputes
* Many women lack the financial resources to hire a lawyer, which means they cannot participate in a collaborative divorce process that anticipates legal representation for both parties

## (B) Divorce Mediation

* Given that mediation takes place behind closed doors, usually with no advocates present for either party, abuse, intimidation and power imbalances can greatly affect the outcome and even jeopardize women’s safety and well being

**Judicial Case Conferences**

* Another form of alternative dispute resolution – must normally be held before any contested application is heard in a family law case
* JCC is an informal (private) session with a Master of the Court or Judge, disputing parties and their legal representatives
* The goal is to streamline costs and time by identifying and narrowing the issues and encouraging settlement
* When parties cannot come to an agreement, the Court organizes an efficient trial on particular issues
* A Judge or Master is assigned to manage all cases where custody is an issue
  + The aim is for all cases involving children to be concluded within 1 year of commencement of the action

# Enforceability of Marriage Contracts

* Take place in environment of negotiation
  + Parties usually have lawyers
* Allow parties to make private arrangements about:
  + Property division
  + Spousal support
  + Child support, other matters regarding kids
* Trend towards out of court negotiation
* Each province has own standard for setting aside marriage agreements – but ***Hartshorne*** standard is applied across Canada
  + BC technically has lowest standard = if agreement is “unfair”
  + Other provinces require unconscionability

### Legislative Framework [Divorce Act]

**s. 61** – parties to a marriage can enter into a marriage agreement for a specific division of their family assets and property should their marriage breakdown.

**s. 56** – at the end of a marriage each spouse is entitled to an undivided half interest in each family asset. However, that interest is **subject to a marriage agreement** or a separation agreement.

Starting point for property division is 50/50 – unless marriage agreement varies from this

**s. 65** - if the division of property provided for in s. 56 **or under a marriage agreement** is **unfair** with regards to the factors below, a party can apply for judicial reapportionment. The factors are:

(a) the duration of the marriage,

(b) the duration of the period during which the spouses have lived separate and apart,

(c) the date when property was acquired or disposed of,

(d) the extent to which property was acquired by one spouse through inheritance or gift,

(e) the needs of each spouse to become or remain economically independent and self sufficient, or

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

### Hartshorne v. Hartshorne (2004) SCC

Two Part Test:

**1. Ensure that the agreement was entered into without duress, coercion, fraud, or undue influence.**

* If ILA, no duress, fraud, coercion, undue influence – don’t need to be concerned about form of negotiations
* ILA is very persuasive – absence of ILA verges on death of agreement
* **Marriage agreement probably won’t be upheld without ILA**

**2. Apply the “fairness” test under s 65 of the FRA.**

* Fair Agreement = As long as circumstances of parties at time of separation were in contemplation when agreement was formed and that while contemplating them they made adequate arrangements for those circumstances
* **There is a two part test for making this determination (at para. 47):**

**a.** Court must apply the agreement – work out what each party would get under the agreement [**deviation from FRA is ok – doesn’t automatically mean unfairness**]

Remember to include SS if it hasn’t been eliminated by the agreement [court said SS could fill the gap created by unequal property division and deal with economic self sufficiency issue]

**b.** Court must, while considering the factors listed in s 65 of the *FRA*, consider whether circumstances were in their contemplation when making agreement

Where they were within contemplation = fairness established

If they deviated from what they contemplated = establishing fairness is harder

Court should respect private arrangements – particularly where negotiated with ILA

DISSENT:

* Under the FRA, the judge must review the fairness of the marriage agreement at the time of application to the court, considering the parties’ rights, entitlements and obligations at that very moment, in light of the s.65(1) factors
  + The factors do not require an inquiry into whether there was fairness during negotiation or execution of the contract – **is the agreement on its face fair**
  + **Test should be whether agreement is substantively fair, guided by s 65 factors**
* Fairness is independent of any agreement – if a court establishes that a marriage agreement is fair in light of the s.65(1) factors it will stand, if it is not, the court will redress it
  + The parties’ agreement will affect which specific assets can be awarded to a given spouse

### Johnstone v. Wright, S.M.J. v. R.H.C.W. (2005) BCCA [deals with cohabitation]

* If common law spouses make agreement Parts 5 and 6 of FRA apply to agreement (s 120.1)
* ***Hartshorne*** upholds the integrity of private arrangements and permits interference only when things did not turn out the way the parties expected
  + Where parties enter FRA through s 120.1 – ***Hartshorne*** test applies
* Consideration should be whether the agreement is unfair in the actual circumstances existing at the time of distribution – not what could have happened if things were different
* Courts should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime

# CUSTODY AND ACCESS

See *Divorce Act* ss.16 & 17 and *Family Relations Act* Part 2; ss.21, 22, 24, 34-38

**1991:** Mothers awarded sole custody in 73.6 % of cases; Fathers in 11.8%; Joint custody in 14.3%

**1994:** M’s 69.6%; F’s 9.8%; JC 20.5%

**1997:** Ms 61%; Fs 11%; JC 28%

**2000:** Ms 53.5%; Fs 9.1%; JC 37.2%

**2002:** M 49.5%; F 8.5%; JC 41.8%

83% of the sole custodial awards to mothers were by consent (ie, both parents agreed to it).

Dramatic rise in JC arrangements [now the most common] – in large part because of “maximum contact rule”

## History

* Only about 20% of disputes end up in court – tend to be most high conflict
* Initially in favour of fathers – children seen as their property
* Tender Years Doctrine: children under 7 should remain with mothers
  + Physical custody reverted back to father when kid turned 7
  + While mom had custody it was only physical (not legal)
* Canada has never had primary caregiver presumption – that primary caregiver during marriage should get custody
  + Many other jurisdictions did have this presumption
* Best Interests of Child: removes focus on interests of parents and focuses on interests of child
  + Legislation is gender neutral

### White Paper:

* Not going to introduce a presumption of JC
* New FRA will require consideration of domestic violence (under s 24 – best interests test)

## Jurisdictional framework

* If the parties are married and have filed for a divorce then they can rely on either the *Divorce Act* or the *FRA*. However, married couples usually use the DA.
* The only situations in which a married couple wouldn’t use the DA are when: (a) they do not yet wish to obtain an [order](http://www.bcfamilylawresource.com/definition%20pop%20ups.html#order) for [divorce](http://www.bcfamilylawresource.com/definition%20pop%20ups.html#divorce); or (b) they wish to proceed in the Provincial (Family) Court rather than in the Supreme Court.
* If the parties have not filed for divorce, or if the parties are a common law couple then the provisions of the *Family Relations Act* apply.
* The DA and FRA are not dramatically different and are likely to produce the exact same results. Both have the best interests test as the sole criteria for making decisions.
  + DA is more clear; FRA is out of date (hence reform)
  + Courts tend to conflate legislation – cases tend to come to same results
* **Custody:** legal authority over day to day control and care of the child
  + Responsibility over decisions re: education, health and religion
  + ie Legal custody – decision making power; doesn’t mean physical custody of kid
  + JC orders are joint legal custody
  + Concern about joint legal custody – when physical custody not 50/50 one parent has all the rights but none of the responsibility
* **Access:** entitled to spend time with kid; often under access order terms
  + Can be up to 49% of the time
  + When child in care of access parent – that parent can make decisions about them; have some rights when child in their time
* **Guardianship** (only under FRA): gone after White Paper
  + Having right to direct the court of the kid’s life and upbringing
  + Custody = all rights associated with guardianship + rights to physical care and control
  + Guardianship = doesn’t necessarily involve a right to physical care and control

## Best Interests of Child Principle

* Guiding principle in determining child custody and access is the “best interests of the child”
  + UN *Convention on the Rights of the Child* Article 3(1) – in all actions concerning children the best interests of the child shall be a primary consideration
* An approach which prioritizes the contact of children with both parents after family breakdown has become increasingly predominant
  + Reflects greater attention to the role of fathers in childrearing

### Young v. Young (1993) SCC [“Best interests of the child”]

**Facts**: Jehovah’s Witness father making daughters go door to door; mother trying to restrict/attach conditions to father’s access

* Best interests of child is ultimate and sole criterion in determining access and custody
* Court must give effect to statutory requirement that kid should have as much contact with each spouse as possible [**DA s 16(10)**]
  + Includes knowing both parents fully; part of entitlement of relationship is to have essentially unrestricted relationship
* Custodial parent can’t limit or restrict access unless court determines it is in the child’s best interest to do so
* Considering risk of harm is relevant to best interest analysis; risk of harm is not a condition precedent to limiting access – absence of harm suggests unrestricted right of access

DISSENT: custodial parents should have unrestricted rights; access under DA is simply care of kid while in your home – doesn’t include major decision making

## Relevance of Race

See *Divorce Act*, s.16(9) and *Family Relations Act* ss.24(3), (4)

* Race and culture are identified in ***Adoption Act*** and in Child Protection law as something courts must consider
  + Not included in DA or FRA
* s.24(3) *FRA* – the court must not consider conduct of a party unless that conduct substantially affects the best interests of the child
* s.16(9) *DA* – the court shall not take the past conduct of any person into account unless it is relevant to the ability of that person to parent the child
* Race is not currently a legislated best interests factor

### Palmore v Sidoti US Supreme Court (1984)

* Question whether child would face racism being raised in house with mother and her African American partner – biological dad argued child should live with him to avoid racism
* Court:While ethnic prejudice does exist, it is not constitutional to consider society's racial prejudice when determining the best interest of the child
* The child probably will be exposed to prejudice but we can't bow to that prejudice by moving him to the custody of his father
  + **Canada has largely adopted this idea – racism exists, and a mixed race child may face prejudice – but courts in general should not bow to society’s prejudice**

### Ffrench v Ffrench (1994) NSSC

* White mother and African Canadian father (he has significant ill will towards mother)
* Father argues he will be able to prepare child for racism ahead
* Mother argues she has connections to the African Canadian community and will facilitate maximum contact
  + Friendly Parent rule comes into play – she will facilitate contact and he clearly won’t
* Mom wins - Court decides she will maintain relationship with child and community

### Camba v Sparks (1993) NSFC

* African Canadian mother; French Canadian father - Potential for two backgrounds to need maintaining
* Court – Mom had stronger commitment to maintaining background from Dad’s side than Dad had to maintaining background from Mom’s side
  + Mom gets custody

### Kassel v Louie (2000) BCSC

* White mother, Chinese father
* Father gets custody – child looks more like father
* Male heir is important in Chinese families and therefore father maintaining custody was important and culturally significant

### Van de Perre v. Edwards (2001) SCC

**Facts:** white mother, African American father (basketball player)

* Interveners argue for importance of race in these types of custody battles
  + Custody should be awarded to parent who is best able to contribute to healthy racial socialization of the child
  + Included in this is importance that parent maintain a connection where possible between the child and their ethnic community
  + **SCC never resolves this issue – doesn’t say how courts should approach race**
* Consideration should be of person who will be granted custody – can’t award custody because the father’s new wife is a good mother
* **Consideration of Race:**
  + The question is which parent will best be able to contribute to a healthy racial socialization and overall healthy development of the child
  + Main issue is which parent will facilitate contact and the development of racial identity in a manner that avoids conflict, discord and disharmony
  + Evidence of race relations in the relevant communities may be important to define the context in which the child and his parents will function
  + Racial identity is one factor to be considered in determining personal identity – relevancy of this factor depends on context
    - Other factors are more directly related to primary needs and must be considered in priority
  + Because custody and access are both being granted the child will be exposed to both sides of his racial and cultural heritage (differs from adoption considerations where the child may be cut off from their racial heritage)
  + **Race is important factor, but not a determinative factor and its importance will depend greatly on the facts**

\*\*Because of lack of guidance from SCC – courts have returned to lower court approach, looking at each case as it comes before them\*\*

### White Paper

Includes race and culture as one of the best interests factors – court must then mention it; still no guidance on what to do with it

## Past conduct/violence

* Physical violence and abuse are not part of the present legislated “best interest” factors in the *FRA* or the *DA*
* Proposed amendments to the *DA* (which died in November 2003) direct the court to consider family violence as one of the “best interest” factors – including its impact on the safety of the child and other family members, the general well-being of the child, and the ability of the violent parent to care for and meet the needs of the child

### Carlson v. Carlson (1991) BCCA

* Shows ease with which family reports (by court counsellor) become the judgment – heavily relied on by TJs
* **Where one parent has been abusive to the children this is a relevant factor in best interests test**
* Violence is relevant to custody decision-making (though it will rarely result in a “no access” order)

### T.S. v. A.V.T. (AB Court of Queen’s Bench)

* Allegations of serious sexual violence against mother and daughter
* Court awarded primary residence and decision making to the father on basis that he would not alienate daughter from other parent
  + **Best interest of child was to have one primary parent, and for that parent not to alienate her from the other parent**

## “Lifestyle” (Sexuality)

* Sexuality continues to be a factor that courts consider somewhat relevant
* Can’t deny custody/access based on sexuality – unless not in best interest of child; particularly where it affects parent’s ability to parent

### N. v. N. (1992) BCSC

* Court looked at lesbianism as a factor in custody disputes
* Stands for proposition that discrete homosexuality does not interfere with the best interests of the child – **strong suggestion she is only successful because court considers her “discrete”**
  + Evident that mother’s lifestyle choice is not being put above interests of kids
* [seems to suggest moms that aren’t discrete risk losing custody]

### M.M.G. v. G.W.S. (2006) SKQB

* Wife’s decision to leave marriage and start same-sex relationship not viewed as in best interests of children – seen as self focus
* **Being discrete about relationship is viewed negatively** – symptom of wife’s inability to communicate effectively
* Alienation from older children is central to her inability to get custody of the younger children [evidence kids feel alienated from her when they find out about relationship and don’t approve of it]
  + Court doesn’t want to split up family (mother only wants youngest siblings)
  + Children would have to be moved from a rural area to a city
* Court found it better to keep the status quo (children with father) – children remain with father
  + Joint legal custody is granted with frequent access to the wife

### J.S.B. v. D.L.S. (2004) ON Sup Ct J [most hands off approach to sexuality]

* Mother is discrete with lesbian relationship – also says she will tell children about the relationship when time suits
* court awards custody to the mother with regular access to the father
* court mentions that race and sexuality are only factors in analysing the best interests of the child
* **same-sex preference of a parent is merely one of the many factors which a court should consider when determining the best interests of the children**
  + a lesbian relationship conducted with discretion and sensitivity is no more harmful to children than a heterosexual relationship conducted with discretion and sensitivity

## Trends: Joint Custody and Primary Caregiver Presumption

* **Trend towards making JC orders – but *Kaplanis*** **shows there must be some evidence of parties ability to communicate**
* In joint custody awards, both parents are given joint legal custody
  + Affirms both parents decision-making authority – in relation to major decisions with respect to education, healthcare and religious upbringing of the children
  + Presumes relatively equal access to the children
* However parents often do not have joint physical custody
  + Children tend to live with and be primarily cared for by their mothers notwithstanding an award of joint custody
* Joint custody is often presumed by courts to be the optimal arrangement for meeting the best interests of the children
* **Joint Physical Custody** – refers to a divided living arrangement; differs from an agreement for “generous access”:
  + The parents generally both provide homes for the child
  + The time division is more equal than in the traditional access arrangement
* Joint physical custody is much less common than joint legal custody
* Some have advocated for **Primary Caregiver Presumption**:
  + Currently no such presumption in Canada
  + Seen as creating certainty and continuity for kids
  + Argued it is gender neutral – but mostly women fall in this category
  + Emphasizes importance of caregiving in custody orders

### Stewart v. Stewart (1994) BCCA

* TJ ordered joint custody to encourage greater communication and cooperation between hostile and antagonistic parties
* BCCA found nothing in the evidence which would suggest this could work – gave sole custody to the mother with specified access to father
* **Joint custody orders should be made rarely and only under circumstances where the parties are totally in agreement and for all intents and purposes do not need the assistance of the court**
* Reluctance of courts initially to make JC orders for high conflict families who appear unable to cooperate

### Robinson v. Filyk (1996) BCCA

* **Legal and factual presumptions have no place in an enquiry into the best interests of a child** – however much predictive value they may have
  + This means neither presumptions in favour of joint custody, nor presumptions that joint custody is not proper unless parties are in agreement, can be invoked

### Javid v. Kurytnik (2006) BCCA

* Found joint custody would not be in children’s best interest
  + Father had not dealt with anger management problems and attributed all problems to mother
  + Parent’s seen as unable to communicate sensibly and to cooperate in childcare

### Narayan v Narayan (2006) BCCA

* Rejected claim for joint guardianship:
  + This is not appropriate case for JC or JG – clear conflict between parents, and lack of reliability of father

### Kaplanis v Kaplanis (2005) Ont CA

* No evidence parties could ever get along – therefore JC inappropriate
* **An inability to communicate is not a complete bar to JC but hoping that communication will improve simply because JC is ordered isn't a basis for making an order (aspirational orders not appropriate)**
  + **there must be some evidence parents will be able to communicate effectively, otherwise JC not in child's best interest**

# The Access Parent

See *DA* ss.16(5), (10), 17(5); *Criminal Code* ss.280-286; *FRA* ss.42-55

* Access is rarely denied – even if history of abusive behaviour
* More conflict between parties – courts will likely specify terms of access

### The Statistics on Contact

* Of children living with their mothers close to half visited their fathers on a regular basis
  + 30% visit once a week
  + 16% visit once every two weeks
  + 25% saw fathers irregularly
  + 15% never saw their fathers
* Frequency of contact between fathers and children decreased as time since separation increased
* Greater contact between father and kid = more likely to make child support payments
  + CS and access are not linked legally (except 40% rule in guidelines)

***DA* s.16(5)** – unless a court orders otherwise, the access parent has the right to make inquiries and to be given information as to the health, education and welfare of the child

### Young v. Young (1993) SCC

* Test for determining limits on access is the “best interests” test (***DA* s.16(8)**)
  + The judge must consider all factors relevant to determining what is in the child’s best interests
  + A factor which must be considered in all cases is the view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child (***DA* s.16(10)**)
  + The risk of harm to the child may also be a factor to consider
* **The custodial parent has no “right” to limit access**
* ***DA* s.16(5)** – confers on a parent granted access, the right to be informed about the child

### Johnson-Steeves v Lee (1997) ABQB [access is right of the kid – not the mom’s to bargain away]

**Facts:** mother who “contracted” to have baby, then didn’t want dad to be involved

* Key in this case: biological dad contributes significant amounts of money in support
* Expert: “fathers are good for children, especially boys”
* Court:
  + There was no contract – nothing written down – and even if there was, no discussion about access happened
  + Lee is a father and parent by virtue of biological relationship
  + Biological father not automatically entitled to access – access determined by best interests test
* **It is never the mother’s right to bargain access away – access is the right of the child**

### Fullerton v Fullerton (1994) NBQB

* **Judicial consensus is that only clear evidence of the probability of harm to a child will result in denial of access**
* Child’s right to access means access might be ordered even when child doesn’t want it
* Court: only thing Parliament has singled out for consideration in DA is maximum contact
  + Complete denial of access would violate maximum contact

### Al-Maghazachi v Dueck (1995) Man CA

* Upholds refusal to terminate father’s access despite allegations of child sexual abuse and kids indicating they don’t want to see father

### EH v TG (1995) NSCA

* Example of terminating access: allegations of sexual abuse, not confirmed; kid screamed in presence of father and had disclosed abuse to mother on multiple occasions
  + Terminated access on grounds that TJ hadn’t considered psychological impact of father’s actions on his daughter
  + Denied even supervised access

### Baggs v Jesso (2007) NLUFC

* Acquittal for sexual assault against daughter did not mean father was necessarily innocent – violent pattern of behaviour was such that leaving kid with him for extended periods of time was not in her best interest
  + Father was given a month’s unsupervised access and regular access for shorter periods
  + 4 weeks unsupervised apparently didn’t qualify as an overly long “extended” time period

### H(K) v T(J) (2006) ABPC

* Allegations of extreme violence, and father convicted of assault against kids and mom
  + Father was denied access – evidence showed he had been psychologically manipulative and had failed to take responsibility for his actions

No clear pattern for access in cases of significant violence; **cases turn on their facts**

Cases frame it as child’s right to access – only in severe circumstances will access be terminated

KELLY: not helpful to look at this as rights when legislative test is “best interest”

## Denied or Frustrated Access

Remedies: imprisonment, fine, cancellation of driver’s licence, varying custody order, cancellation of spousal support, contempt

No remedy in tort or breach of fiduciary duty (***Frame v Smith***)

***Ungerer v Ungerer* (1998) BCCA [Spousal Support case]**

* Conduct is not supposed to be considered in determining SS
  + This is seen as so outside appropriate conduct that it was used to reduce payments
* **DA s 17(6)** – doesn’t prevent court from considering conduct that occurs after the marriage is dissolved
* **TEST for terminating SS for misconduct**:
  + Where the misconduct is of such a morally repugnant nature as would cause right-thinking people to say that the spouse is no longer entitled to the support of her former husband, or to the assistance of the court in compelling the husband to pay

### B(L) v D(R) (1998) Ont Sup Ct

* Mother jailed for 60 days for contempt of court – for persistently and wilfully denying court ordered access on at least 40 occasions

### Cooper v Cooper (2004) Ont Sup Ct [“Parental Alienation”]

* Father accuses mother of being manipulative, calculating and successful in alienating daughters from him
* Expert – what kids say they want and what they need may be different
* Mother actively frustrates contact with father at every stage
* Court:
  + Fines mother $10,000 for denying access
  + Tries to being process again – threatens 30 days imprisonment for failure to comply with this order
  + Orders joint legal custody (keep in mind earlier discussion of these not being successful in high conflict situations)

### JKL v NCS (2008) On Sup Ct [deprogramming parental alientation]

* Son sent to camp for deprogramming parental alienation

## Failure to Exercise Access

Far more parents who choose not to exercise access than those who frustrate access

**White Paper:** If person has access order and fails to exercise access, court can:

1. Require them to participate in mediation or some other ADR procedure

2. Make an order that the party attend counselling to understand their importance to kid

3. Kid can also be ordered to attend that counselling (consent of custodial parent not required)

4. Make an order recovering costs of custodial parent for failure to exercise access (ex. travel)

## Third Party Access

DA s 16(1) and (4); FRA s 35

**General Rules:**

Court is reluctant to grant third party access where intact nuclear family oppose it

Court (through best interest test) seeks to protect sanctity of nuclear family

**Much higher standard for non parent to get access**

### Bridgewater v Lee (1998) ABPC

* Not required that there is dispute between parents for third party to bring access application; BUT
* Where access order would disrupt kid’s nuclear family, courts must exercise extreme caution in evaluating the effects of access on the best interests of the kid

### Chapman v Chapman (2001) Ont CA

* In theory it was beneficial for kids to have relationship with members of extended family, but it was no in their best interests to be forced to visit their grandmother on a regular basis when they didn’t have positive relationship with her

### Parsons v Parsons (2002) Ont Sup Ct

* Court relying on absence of intact nuclear family as reason to permit grandparent access
* Feels mother has “placed her own need for vindication ahead of her child’s feelings for and close relationship with grandparents.”

### SGE v CDL (2005) Sask CA

* Man who was not biological father or in intimate relationship with mother – granted access
* Access rights can arise in Canada independently of being defined as a legal parent
  + A third party can apply for custody or access [in Sask] if they have some connection or “sufficient interest” in the child
* Access granted due to best interest of kid – significant relationship had been established between man and kid and there was emotional benefit to kid in maintaining relationship

## Relocation/Mobility

* Few moves are allowed: 40-50% allowed (2004)
* Certain factors may be predictor:
  + If access parent has little or no role in kid’s life – almost always allowed to move
  + If access regularly exercised, shared parenting, JC arrangement – almost always denied

### Gordon v Goertz (1996) SCC

Two Part Test:

(1) **Threshold Test**: Demonstrate a material change in circumstances affecting kid

i. Parent seeking to change custody order must show material change

ii. A proposed move is always a material change – gives rise to new best interest analysis

(2) **Best Interest Analysis** taking into consideration:

i. Existing custody relationship and relationship between child and custodial parent

ii. Existing access relationship and relationship between kid and access parent

\*Does kid actually have relationship with access parent that would be hindered\*

iii. Desirability of maximum contact between kid and both parents (this is not absolute)

iv. Views of kid

v. Custodial parent reason for moving only where relevant to ability to meet kid’s needs

Ex. if move was difference between job or no job – could be in BI of kid

vi. Disruption to child of change in custody

vii. Disruption to kid on removal from family, school, community (due to move)

There are no presumptions – sole test is BI of kid

### Nunweiler v Nunweiler (2000) BCCA

* Where no custody/access order in place yet but one party wants to move
* **Threshold requirement of material change is not necessary**
* Go straight to second step of ***Gordon*** test: consider 7 factors set out there

### One v One (2000) BCSC

* Post ***Gordon*** 12 factors that courts have considered in determining BI of child:
  + Parenting capabilities of and kid’s relationship with parents and new partners
  + Employment security and prospects of parents and new partners
  + Access to and support of extended family
  + Difficulty of exercising the proposed access and quality of proposed access if move
  + Effect on kid’s academic situation
  + Psychological and emotional well being of kids
  + Disruption of kid’s existing social and community supports and routines
  + Desirability of proposed new family unit for the kids
  + Relative parenting capabilities of each parent and respective ability to discharge those responsibilities
  + Kids’ relationship with both parents
  + Separation of siblings
  + Retraining or educational opportunities for moving parent

### Karpodinis v Kantas (2006) BCCA

* Mother not allowed to move
* Competing interests of financial security of mother and need for child to have relationship with father
* Court holds father/kid relationship takes precedent
  + Particularly because child is young
  + Close relationship with paternal grandparents important
* Because existing access arrangement in place court is reluctant to permit move

# Matrimonial Property Division

* Only available to married couples – common law couples in BC have to rely on trusts
* Provincial power = use FRA
  + Properties on reserve are not divisible under FRA
  + Because of s 1 definition of spouse – common law couples not included
    - s 120.1 permits common law couples to make agreements
    - if agreements are made they can be reviewed under Part 5 and 6
* In BC start with 50/50 presumption of division

### Murdoch v Murdoch (1970s)

* Wife didn’t get any proprietary interest in farm – she had only done what could be expected from an “ordinary farm wife”
* Triggered fundamental changes in regime – led to every province enacting MP regime

### Walsh v Bona (2002) SCC [upheld exclusion of common law couples]

* Not discriminatory because it reflects differences between married and common law couples and respects personal autonomy and fundamental freedom
* **Emphasis on choice and autonomy**
  + The decision to live together without more is insufficient to indicate an intention to contribute to and share in each other’s assets and liabilities
* DISSENT: initial intentions are irrelevant because purpose of MP regime is to recognize the needs of spouses at the end of the relationship
  + Not being married doesn’t necessarily reflect a personal choice on the part of some parties

[A lot of commentary at the time said the decision was an effort by SCC to show distinction between common law and marriage – to support bid for legalization of same sex marriage]

## Domestic Trusts for Common Law Couples

* Very expensive and lengthy process to go to court and show constructive trust – legislative inclusion of common law couples would make property division process easier/cheaper
* Basic premise: One party (who holds legal title) holds a portion of that property on trust for the other spouse
* **Resulting Trust:** requires financial contribution to purchase asset or common intention to share asset
  + Common intention – point to conversation that was had (preferably overheard)
  + Very difficult to show in an intimate relationship
* **Constructive Trust:** typically a remedy in situations of unjust enrichment
  + Elements of unjust enrichment (***Pettkus; Peter***)**:** 
    - 1. An enrichment to owner of property
    - 2. Corresponding deprivation to party making contribution
    - 3. No juristic reason for the enrichment (must be reasonable and legitimate expectation of benefit)
* Remedies for unjust enrichment include application of constructive trust and monetary award
* For **constructive trust award** must show:
  + 1. That monetary award is insufficient – have contributions created a special link between P and property (***Peter***)
  + 2. Causal connection between contribution and disputed assets – contribution must be “sufficiently substantial and direct” to entitle interest in property (***Pettkus; Peter***)
    - P need not have contributed to *acquisition* of property (***Sarochan***) – but contribution has to be to property itself
* Extent of interest awarded must be proportionate to contribution; unequal contribution = unequal interests (***Pettkus***)
* Assessing value of P’s contribution requires “value survived” approach – what portion of the property can be attributed to P’s efforts (***Peter***)

### Pettkus v Becker (1980) SCC

* Purpose of constructive trust is to address situations of unjust enrichment
* **Three Requirements:**
  + Enrichment
  + Deprivation
  + No juristic reasons – person in relationship prejudices self in interest of enriching property; it would be unjust to allow recipient to retain it
    - Particularly where labour is freely accepted and receiving party knows/or ought to, that other party has expectation
* **Remedy: is there causal connection between contribution and assets themselves**
* Award common law wife 50% interest – equal shares are not automatic (and this is only case where 50/50 was awarded)

### Sarochan v Sarochan (1986) SCC

* Property brought into relationship by common law husband
* **It is sufficient to show a connection to the preservation or maintenance of the property in dispute**
  + Not required to show contribution to acquisition as long as you can show a clear link between contribution and assets

### Peter v Beblow (1993) SCC

* In an intimate relationship there is some expectation that party providing homemaker tasks is receiving some benefit
  + Court notes that household services and childcare services are a great value to the entire family, including spouse
* KELLY: her action is made much stronger because she was caring for his kids (from previous partner)
* **Appropriate remedy:** finding unjust enrichment doesn’t automatically = constructive trust
  + A monetary award must be insufficient
  + Insufficient – requires you show a special link between the party and the property that requires a constructive trust
* Determining value – focus on value survived

## Matrimonial Property under the BC *Family Relations Act*

* During course of marriage property owned by whoever’s name it is in
* **Upon triggering event each spouses entitled to undivided half interest**
  + Interest vests upon trigger event – vests 50/50
  + Only family assets are able to be divided
* **Two step analysis:**
  + **1. Characterization stage** – is it or is it not a family asset?
  + **2. Reapportionment stage** – should the 50/50 division of family assets be reapportioned
* **Four ways in which an asset can be found to be a family asset:**
  + If it meets the “ordinary use for a family purpose” test (OUFP) in **s.58**
  + If it is a right under an annuity or pension, home ownership or retirement savings plan under **s.58(3)(d)**
  + If it is a venture to which the non-owning spouse has directly or indirectly contributed under **s.58(3)(e)**
  + If it is a business asset towards which the non-owning spouse has made a direct or indirect contribution in accordance with **s.59**
    - “direct contribution” - financial
    - “indirect contribution” – permissible to look at homemaker contribution; includes savings through management of household and childcare by non-owning spouse
* **s.60** – onus of proof on applicant
  + exception for OUFP assets – spouse opposing “family asset” designation has onus of proof
* **Family assets are *prima facie* equal division between spouses on occurrence of a triggering event (defined in s.56)**
  + **The equal division may be adjusted by the court to favour one or the other spouse (s.65)**
* In BC scheme – the fact that an asset was acquired prior to marriage is immaterial
  + This may be a consideration supporting reapportionment under s.65
  + Pensions – only portion accrued during marriage can be divided (Part 6)

## (i) Ordinary Use for a Family Purpose

* It is always open to the other party to rebut the OUFP presumption and show that items should be excluded as personal property
  + Ex. ***Fong v. Fong* (1982)** – Rolls-Royce car was found to be personal property of Mr. Fong and not a family asset
* There appears to be a broadening trend in the courts interpretation of OUFP:
  + Intention, s.60 presumption and value of the asset in the context of the family economy seem to be important factors
  + ***Graff v. Graff*** **(1987)** – court held in general a savings account is a family asset
* Characterization of gifts between spouses will often depend on the court’s determination of the nature of the donor intention
  + There is no presumption of intended use – it must be proved in each case
* Inheritances and gifts received by one spouse from parents or third parties may be family assets – depends on whether there was ordinary use for a family purpose or a contribution of some sort
  + ***Campbell v. Campbell* (1991) -** Seen as a family asset where inherited asset formed part of a plan for the future security of the family
  + Even if found to be family asset, s.65 of FRA makes acquisition of an asset through gift or inheritance a factor in considering the fairness of the 50/50 split

### Jiwa v. Jiwa (1991) BCSC [insurance policies as family assets]

* Insurance policies are not pensions – they are not income replacement
* Determination of OUFP turns on conversations about why they were taken out:
  + Policies were expected to be used to aid family in situation of disability
  + Explicitly discussed this as ensuring family security
  + **Part of family planning therefore OUFP**

### Martin v. Martin (1992) BCCA [mutual funds – future projection]

* Needs to be more than general intention that funds were intended for retirement – requires some sort of plan
  + Court determines funds were actually for travel = not family asset
* **Court said parties should be put back in the position they would be in before marriage – so burden of marriage can be shared equally**
  + Distribution heavily favoured husband – this was fine because he brought in most assets, it was short marriage
  + **Seems contrary legislation – no indication in FRA that parties should be put back in position they were in and take out what they put in**

### Lye v. McVeigh (1991) BCCA

* Court creates distinction of **modern marriage versus traditional marriage**
  + Modern marriage – seen as lacking commitment of traditional marriage
    - Choosing not to have kids seen as lack of commitment
    - Pooling funds seen as indication of commitment
    - Characterized by separate accounts
* Assets not considered family assets – no evidence parties intended to share their assets
* [unequal pension distribution – court says she is young she can make it up]

### Use of Income or Capital of an Asset

### Samuels v. Samuels (1981) BCSC

* A house owned by one or both spouses and rented out is not a family asset merely because the rent is used for family purposes
* **s.58(2) is concerned with how property is ordinarily used not with how income derived from it is ordinarily spent**

### Brainerd v. Brainerd (1989) BCCA

* investment fund ordinarily used by the husband for a family purpose – considered a family asset
  + Particularly because husband had drawn on the capital for a family purpose multiple times – made investment fund a family asset
  + [Given that husband inherited and wife didn’t make contribution – reapportioned so he got 80%; she got 20%]
* Lake property – OUFP even though only used infrequently
  + **Shows how little use needs to occur to be considered family asset**

### Evetts v. Evetts (1996) BCCA

* whether a capital asset can be regarded as a family asset where some or all of the income from the capital asset is used to meet household or other family expenses:
  + **cases turn on what constitutes “ordinary use” in the circumstances of each case [case by case analysis]**
* The fact that **income from a capital asset** is used occasionally for a family purpose does not of itself make the capital asset a family asset (***Stuart v Stuart***)
* The fact that **capital from the asset** is used from time to time, when required, for a family purpose may be an indication that the asset is a family asset (***Brainerd v. Brainerd***)
* **Distinction between income being used for a family purpose and capital being used for a family purpose is not, in itself, determinative** (***Starko v. Starko***)
* The use of the asset to provide financial security and protection against erosion of income or other family misadventure in the future may constitute a present ordinary use for a family purpose (***Tezcan v. Tezcan, Folk v. Folk***)

### Hobbies/Collections

\*Will turn on facts of each case\*

### O’Bryan v. O’Bryan (1996) BCSC

* **Test is still OUFP**
* A hobby may not always be carried on for a family purpose – the expenditure of personal time and effort and the accumulation of interest in a hobby can be within the personal as opposed to family realm
* Whether this pursuit results in property ordinarily used for a family purpose is a question of fact in each case
  + The burden of proof that it was not used for a family purpose falls upon the party claiming that it was not
* Often court will consider it family asset and then deal with any unfairness in reapportionment – easier analysis

### Tracing: Conversion of a Family Asset into a Different Asset

* If property is acquired with the proceeds from sale of a family asset, that property can be “traced” back to the original family asset and can be classified as a family asset
  + **Applies to property acquired before and after separation**
  + Covers property acquired in whole or in part by means of a family asset
* If one spouse has an asset that is not used for a family purpose, but was bought with the proceeds from the sale of a family asset, principles of tracing will deem that asset a family asset (***Tratch v Tratch***(1981) BCSC)

### Gifts and Inheritances

**Gifts:** whether family asset will depend on court’s determination of **donor’s intention** (case by case analysis)

**Inheritance:**

If something inherited and used for family purpose it is analyzed like any other family asset

Or if non owning spouse makes some improvement to it

* ***Hauptman v Hauptman* (1981), 32 B.C.L.R. (SC)**
  + Gifts used for family purpose = family asset
* ***Hefti v Hefti*, (1998), 40 R.F.L. (4th) 1 (BCCA)**
  + Case by case analysis
* ***Campbell v Campbell* (1991), 26 R.F.L. (3d) 354 (BCCA)**
  + Inherited property used for rental purposes
  + Non-owning spouse helps to maintain it
  + Later used as the base for a mortgage for second property and non-owning spouse acts as guarantor
  + **By making yourself financially liable you are also providing evidence of use for family purpose**
  + If non owning spouse takes risk regarding asset = family asset

Following finding of family asset still have to consider s.65 factors of fairness - which specifically refer to inheritance/gift

Very few of these items will be subject to a 50/50 split

Allows for an enormous amount of discretion - this is an area where there isn't certainty in the law

## (ii) Debts

* FRA doesn’t refer specifically to allocation of debts – **White Paper** will include explicit reference to debts
* Debts are to be taken into account only under **s.65(1)(f)** [considering fairness of property division]
* ***Young v. Young*** – the court cannot make a spouse jointly liable to a creditor for a debt of the other spouse

### Mallen v. Mallen (1992) BCCA [Test for dealing with Debt]

1. Determine whether something is a “family debt”

* **“Family debt”** – term to designate a liability of either or both of the spouses which has been incurred during the marriage for a family purpose (term has no statutory significance)

2. Should it be divided 50/50 or should the court reapportion it for fairness

* **Only way of relieving unfairness is under s.65(f)** – where such a debt would be included within the scope of “liabilities of a spouse”
  + Liability does not have to be found to be a family asset to exercise discretion to re-apportion
    - If funds were used for an entirely personal purpose – party who has acquired biggest benefit is likely to get biggest burden
* Party responsible for the liability claimed as family debt must show that fairness requires the other spouse to assume an equal or some other share of its burden

***Stein v. Stein* (2008) SCC [contingent liabilities that can’t be valued at time of trial]**

* Generally speaking both assets and debts need to be considered in order to ensure fairness upon the breakdown of a marriage
* In the context of assets courts have concluded that spouses have a right to claim an interest even where the asset itself is inchoate, contingent, immature or not vested (***Rutherford v. Rutherford***)
* The FRA does not place any temporal limits on the division of assets
  + Nor does it state that once assets have been subject to an initial division a reapportionment cannot occur at some point in the future
* **The FRA does not preclude an order dividing between spouses a contingent liability which cannot be valued at the time of trial (court also has option of waiting to divide until liabilities accrue)**
* DISSENT: parties have right to know what their future rights and responsibilities are – this decision makes it difficult for the wife to plan her life (doesn’t know what debt she carries)

## (iii) Pensions

* **Automatically considered family asset [s.58(3)(d)] – don’t have to use OUFP test**
* Two ways to divide:
  + 1. Wait until member retired and require the member to pay a portion of each payment received from the plan to the spouse (benefit split)
  + 2. Satisfy the spouse’s interest in the pension by the payment of money or the transfer of other property (compensation payment under s.66)
* Confines pension division mechanisms to the portion of the pension that accrued during the marriage (and not those that accrued before the marriage)
* Any division must leave the member spouse with at least ½ the value of the pension; or at least ½ the periodic benefits that would have been paid under the pension on retirement

**Agreements Concerning Pensions**

* Part 6 allows the spouse and member to agree on dividing a pension in different proportions [s.80]
* Spouses may waive a division of pension entitlement [s.80(1)(b) and (c)]

## (iv) Ventures and Business Assets [s 58(3)(E) & 59]

* **In order to characterize venture or business assets as family assets, onus is on the non-owning spouse to show that she has made either a direct or indirect contribution**
* Direct contributions, have included:
  + Paid or unpaid work in the business
  + Contributing family assets
  + Permitting the use of family assets to acquire or maintain the business asset
  + Assuming risks by mortgaging a family asset or guaranteeing a loan
* Indirect contributions can include contributions other than the household management and child rearing mentioned in s.59(2)

### (i) Direct Contributions

### Robertshaw v. Robertshaw (No. 2) (1979) BCSC [direct contribution can include paid work]

* Business includes a professional practice
* **Fact that wife was paid for her work in the medical practice is irrelevant to whether she made a contribution [s.58(3)(e)]**
  + Nothing in the wording of the sections indicates any intention on the part of the Legislature that her contribution should not be considered because it was made by her as an employee
* Medical practice was found to be family asset – but reapportioned and she got 0% interest

Other circumstances that may = direct contribution:

Payment of money towards business

Acquisition of business

Working in unpaid position

Contributing family assets

Mortgaging a family asset

### (ii) Indirect Contributions

### O’Keeffe v. O’Keeffe (2002) BCSC [“Host Wives” case]

* There is no evidence to support that the wife contributed directly or indirectly to the company in the sense that she was involved in the business venture
  + **She made both direct and indirect contributions to the acquisition of the property, both in managing the home and in her involvement in the company**
  + Her participation was minimal but she did contribute
* Short marriage, minimal indirect and direct contributions = 10% interest
* KELLY: this is normal, interest given is generally 10-20%

***O’Bryan v. O’Bryan* (1996) BCSC**

* primary responsibility was homemaking, entertaining, childcare and companionship. Her contribution to the business was floral arrangements in the family restaurant – business was a family asset

***Piercy v***. ***Piercy* (1991) BCSC**

* Husband said he wanted someone to cook, clean, take care of kids and dog – court said he got what he wanted
* wife’s responsibilities were home care, entertaining, help with the family and companionship – these services amounted to indirect contribution and business was family asset (15% interest)

Indirect contributions will get you an interest – but not particularly big one

Direct contributions – courts take these much more seriously; likely higher interest given

\*Liquidating business is last resort – will attempt to buy out spouse, use other assets first\*

### (iii) Academic Qualifications as Business Asset

* Distinction made between professional practice and professional qualifications that enable the holder to practice
  + **Professional practice** – the practice and the shares in the partnership or professional/management company where these exist may be valued as with any other business. That value is then divisible
  + **Professional qualifications** – ex. Academic degrees and licenses to practice a profession are intangible assets personal to the holder
    - Without market value
    - **Have been held NOT to be property with meaning of s.58 and 59 – regardless of contribution by non-owing spouse**
    - Nor is the income stream from that asset considered to be property subject to division (***Samson v. Samson* (1996) BCCA**)

### De Beeld v. De Beeld (1999) BCCA

* **Contributions made by a spouse towards the other spouse’s university degree or professional designation may be considered in the context of a spousal support claim**
* No error found in TJ’s conclusion that the equitable distribution of the resources of this marriage required a lump sum to be paid over a period of years when the primary investment by the parties during their marriage was in the earning capacity of one of them

### Caratun v. Caratun (1992) Ont CA

* A professional licence does not constitute property within the Ontario *Family Law Act*
* The right to work in a particular profession which is conferred by the licence is not transferable and requires the personal efforts of the holder in order to give any value in the future
* Court declined to treat the dentistry licence as a family asset, but awarded the wife a lump sum compensatory spousal maintenance

### Seymour (1992) BCSC

* A commercial fishing licence held to be a family asset that is divisible as property
* It had generated income for the family and was different from other intangibles such as a university degree or professional qualifications
* **The fishing licence had no specific personal quality – unlike professional qualifications which have value only in the hands of the holder**

### Dividing a Business

### Balic v. Balic (2006) BCCA [apportionment of shares of a business deemed a family asset]

* Only liquidate company in exceptional circumstances – liquidation is last resort
  + It is the valuation of the shares of a company held by a spouse, not the valuation of the company’s business which can be deemed a family asset and apportioned for fairness (FRA s.51)
  + Liquidating a family business is contrary to the intention of the FRA

### s.65 Reapportionment and Dissipation of Assets

### Narayan v. Narayan (2006) BCCA

* RRSPs are defined as family assets in the FRA – they are treated as property of both spouses upon a triggering event, as security for their future [s 58(3)(d)]
* Dissipation of assets and material non-disclosure are relevant circumstances which the court is entitled to take into account in making compensation orders and in determining whether, and to what extent, the evidence of the non-disclosing party is trustworthy
* The TJ should fully resolve the division of property – including s.65(1) reapportionment before turning to the issue of spousal support

### Date of Valuation of Assets

### Gilpin v. Gilpin (1990) BCCA

* FRA doesn’t specify a date of valuation
* Unless there is a reason to the contrary, the valuation date for family assets, including the matrimonial home should be the date of the trial

### Compensation Orders – First Nations and Provincial Property Law

* **s.124 FRA** – can be used to grant one party exclusive temporary use of the family residence and personal property in it pending determination of final division
  + generally where there is a great deal of dispute regarding valuation of property
  + **can’t apply to property on reserve**
* **s.66 FRA** – gives the Court authority to make any order necessary to give effect to a judicial reapportionment of property under s.65 or Part 6 of the FRA
  + can include: declaring ownership, dividing property, ordering compensation, ordering sale of property, ordering property transferred to child, or in trust for a child, and severing joint tenancy

### Derrickson v. Derrickson and Paul v. Paul

* **FRA provisions on compensation could be extended to Indians as these were not inconsistent with the property aspect of the *Indian Act*** – particularly when awarded for the purposes of “adjusting the division of family assets between the spouses”

### George v. George (1996) BCCA

* Mr. George was in “lawful possession” of property on reserve after residing there for 19 years without a Certificate of Possession under s.20(1) and (2) of the *Indian Act*
  + Because the home had been used by the couple as their matrimonial home = family asset
  + Mrs. George was entitled to a compensation order for her interest in the asset

# Spousal Support

Everyone does worse for a short period after divorce

Then direction of spouses seems to vary dramatically

After 2-5 years men are generally better off; women generally worse off

About 2/3 divorced women in Canada live below poverty line

When you add spousal support this number decreases only about 10% - has very little effect in reality

Pre-***Moge***: about 5% of women get spousal support orders

Post-***Moge***: this number has gone up to 10-15%

Only applied for in about 20% of cases

Spousal support is not automatic or particularly common

When payments are made they tend to be in high income families - therefore payments tend to be high

Divorce Act gives preference to child support

s.15.3 - courts must give priority to child support

Only if money left over after child support should there be consideration of spousal support

## Marriage-Like relationship

FRA s 1 “spouse” – common law couples have to show they lived together for 2 years in a “marriage like relationship”

### Molodowich v Penttinen (1980) Ont Dist Ct

* Most jurisdictions follow this test
* 7 factors:
  + Shelter
  + Sexual relationship, general characteristics of intimacy
  + Arrangement for domestic services
  + Social activities
  + Societal – do they hold themselves out as a couple
  + Financial arrangements – to what are extent are they interdependent (not determinative)
  + Attitude and conduct towards any kids in the relationship

### Gostlin v. Kergin (1986) BCCA

* Slightly different test; far less objective; used in BC
* Objective indicators include:
  + Did the couple refer to themselves as husband and wife, or as spouses or in some equivalent way that recognized a long-term commitment?
  + Did they share the legal rights to their living accommodation?
  + Did they share their property?
  + Did they share their finances and their bank accounts?
  + Did they share their vacations?
  + And perhaps most importantly – did one of them surrender financial independence and become economically dependent on the other in accordance with a mutual agreement
* **This test includes some analysis of intention of parties – some evidence of parties agreeing to indicate to world that they are in marriage like relationship**
* **Emphasizes economic dependence – considers marriage like relationship to require one spouse surrendering economic independence**

## Model 1: contractual – causal connection and “clean Break” (*Pelech* trilogy)

\*\*Largely gone now\*\*

### Messier v. Delage (1983) SCC

* 5 years after divorce husband applies to terminate support on basis that wife should have become self sufficient
* She had sought retraining but hadn't been able to find a full time job
* **SCC - this is a premature cancelling of support, we have to look at actual circumstances of parties, she is retrained but not actually self sufficient, support order continues**
* DISSENT - women's status has evolved, if they want equality they have to accept responsibility for their own upkeep. She had 5 years, any economic problems after this were the state's issue not the husband's

### Pelech

**Causal Connection Test:** Two part test(per Wilson J. in *Pelech*):

a) There must be a **radical change in the circumstances of the SS recipient** between the time the agreement was signed and the variation application.

b) That **change must flow from an economic pattern of dependency** engendered by the marriage.

Thus, there must be a causal connection between the change in circumstances and the fact of marriage.

If these circumstances are met, then the order can be varied

Here there was sufficient change, but must have causal connection to marriage

Psychological factors had preceded marriage - no causal connection between situation she is in now and circumstances of marriage

**Principles of self reliance and self sufficiency run through the trilogy decisions**

Self sufficiency – Focused largely on achieving income above the poverty line

If in full time employment – automatically considered self sufficient; or if earning $20,000

### Caron

* Wife seeks to have SS reinstated
* Court: no, there is no change in circumstances
  + In this case, the award simply expired because of period of cohabitation
* **Prospect of varying only applies when order has remained in force**
* Wilson J - the wife should have simply negotiated a better agreement

### Richardson

* No causal connection between marriage and circumstances -she was unemployed when agreement was signed and she's unemployed now
* Message of - you should have negotiated a better agreement

Cases are like Hartshorne when you sign an agreement it is up to you to make an agreement that will support you

Court wasn’t worried about these women in general because they have welfare available to them - not the responsibility of the husband, but of the state

\*No way this is what they are thinking now\*

## The Compensatory Model

### Moge v. Moge (1992) SCC [rely on for SS question]

Not a contract case – trying to vary a court order; because no agreement – no need to show change in circumstances

* **Self-sufficiency** is only one of several objectives in the section – none are to be given priority over the others
* **The Act promotes the doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution**
  + This doctrine seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes sacrifices and the economic advantages conferred upon the other spouse
  + It recognizes that work within the home has value
* Courts should take a broad approach with a view to recognizing and incorporating any significant features of the marriage or its termination which adversely affect the economic prospects of the disadvantaged spouse. These factors include:
  + Loss of future earning power
  + Losses directly related to the care of children
  + Loss of seniority
  + Missed promotions and lack of access to fringe benefits
  + Value of education and job training may decrease and even become useless where upgrading of skills and job-retraining isn’t undergone
* If childcare responsibilities continue past the dissolution of marriage the existing disadvantages continue
* Even cases where both spouses work full time, SS isn’t necessarily precluded if, in the interest of the family, one spouse declines a promotion, refuses a transfer, leaves a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities and incurs economic loss
* **Equitable sharing doesn’t guarantee either party the standard of living enjoyed during the marriage**
  + **This standard is a factor to consider in support entitlement**
  + **The longer the relationship endures, the closer the economic union, the greater the presumptive claim to equal standards of living upon its dissolution**
* **Judicial notice of economic impact of divorce on women**
* Causal connection test rejected in cases where there is no private agreement.
* Self sufficiency is only one of four objectives of spousal support (s 15.2(6)) and should not be prioritized over others. The correct approach is to consider the s 15.2(6) objectives and then apply to those objectives the s 15.2(4) factors.
* Marriage is an economic partnership that creates financial benefits for both parties and disadvantages on marriage breakdown.
  + The Court must look at what the effect of the marriage has been in either “impairing or improving each party’s economic prospects, regardless of gender”.
* While the analysis of the impact of the marriage and its breakdown applies equally to both parties, in most marriages it is the wife who remains the partner who is more likely to be economically disadvantaged. ***Moge* recognized the future economic harm that a traditional division of labour within a marriage can cause, and seeks to compensate women who undertake this work at the expense of their own careers and future earning capacity.**

## Non-Compensatory Model (Basic Social Obligation)

### Bracklow v. Bracklow (1999) SCC

**\*\*This model only available where there is no compensatory basis\*\* only where need would be unmet following agreement or compensation**

* The law recognizes three conceptual grounds for entitlement to spousal support [first recognition of these three categories]:
  + 1. Compensatory
  + 2. Contractual
  + 3. Non-compensatory
* ***Moge*** method for determining a support dispute:
  + Start with objectives which the DA stipulates – all must be considered [s 15.2(6)]
  + In relation to these objectives, consider the factors set out in s.15.2(4)
    - Generally must look at the “condition, means, needs and other circumstances of each spouse”
    - Balancing includes the length of cohabitation, the functions each spouse performed, and any order, agreement or arrangement relating to support
* Law considers compensation an important basis of support and encourages self-sufficiency of each spouse, but **where compensation is not indicated and self-sufficiency is not possible, a support obligation may nonetheless arise from the marriage relationship itself**
  + Entitlement to support is based on marriage as a joint endeavour and joint economic partnership – ie support arises out of basic social obligation of marriage
* Statutes do not limit the SS obligation to either contract or compensation grounds
* **Quantum** – amount and duration will vary with the circumstances and practical and policy considerations affecting particular cases
  + Factors can include:
    - Need of supported spouse
    - Duration of marital relationship
    - Limited means of supporting spouse
    - Obligations arising from new relationships that impact on means
    - Parties may by contract or conduct, enhance, diminish or negate the obligation of mutual support (within marital relationship) – subject to judicial discretion

Very few cases have followed *Bracklow*

Compensatory model works in most circumstances and the only way you get to *Bracklow* is after you have decided the means and needs can't be dealt with by compensatory model

You can use *Bracklow* and compensatory together - if compensatory fails to meet complete need of spouse then *Bracklow* applies

Where need exceeds what she would have been compensated for (result of illness disability, etc.)

Might result in increased amount

Also *Moge* order is typically time limited; no sense in *Bracklow* when this award is supposed to end (may increase length due to *Bracklow*)

## Separation Agreements and Variation of Support Orders

### Miglin v. Miglin (2003) SCC

**Facts:** parties entered into separation agreement; also entered “consulting agreement” which could be renewed by mutual consent and provided the H would pay the W $15,000/yr through the business

* A court should be loathe to interfere with a pre-existing agreement unless that agreement doesn’t comply substantially with the overall objectives of the DA
* ***Pelech* trilogy test is not applicable under new DA – no need to show radical change or causal connection**
  + A material change in circumstances is threshold requirement for varying an existing SS order (pursuant to s 17)
* TJ must consider the agreement in light of all objectives of the DA – including, certainty, autonomy and finality
* As in ***Moge*** – SS objectives of the DA are designed to achieve an equitable sharing of the economic consequences of marriage and marriage breakdown
* **Parliament’s preference in DA is that parties settle their dispute themselves**
  + Court recognizes that negotiations in a family law context of separation or divorce are conducted in a unique environment
* **The court should only set aside a pre-existing agreement where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act – those in s.15.2 and certainty, finality and autonomy**

Two stage approach to exercise of court’s discretion:

**1. STAGE ONE (at time agreement made):**

(i) Circumstances of Execution

* **First look to the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it**
  + Consider the conditions of the parties, including any circumstances of oppression, pressure or other vulnerabilities, taking into account all of the circumstances including those in s.15.2(4)(a) and (b), and the conditions under which negotiations were held, such as duration and presence of professional assistance
  + There must be evidence to warrant the court’s finding that the agreement can’t stand on the basis of a fundamental flaw in the negotiation process – **no presumptions of power imbalance or vulnerabilities**

(ii) Substance of the Agreement

* If conditions of negotiation are satisfactory, court must look at the substance of the agreement
* **Examining substance, court should ask whether the agreement is in substantial compliance with the DA – determined by:**
  + Only a significant departure from the objectives of the Act will warrant intervention
  + Objectives include SS considerations in s.15.2, finality, certainty and the invitation in the Act for parties to determine their own affairs
  + The greater the vulnerabilities present at time of formation, the more review at this stage
  + [as long as vulnerability and exploitation don’t vitiate negotiation, an agreement that doesn’t comply substantially with the DA must still be considered under s.15.2(4)]

If agreement addresses matrimonial property and party seeking to vary property division (apply ***Hartshorne***)

If party seeking to vary SS agreement then apply ***Miglin***

**2. STAGE TWO (at time of trial):**

* **On an application under s.15.2 the court should assess:**

**(1) the extent to which enforcement of the agreement still reflects the original intention of the parties and**

**(2) the extent to which it is still in substantial compliance with the DA**

* The applicant must show that in light of the new circumstances, the terms of the agreement no longer reflect the parties’ intentions at the time of execution and the objectives of the Act
  + It will be necessary to show that these new circumstances were not reasonably anticipated by the parties and have led to a situation that can’t be condoned
  + Parties should expect a certain degree of uncertainty in the future; things parties should consider:
    - Job market changes
    - Parenting responsibilities more onerous than expected
    - Transition into the workforce might be challenging
    - Each person’s health can’t be guaranteed as a constant
    - Relative values of assets in a property division will not necessarily remain the same
  + Where parties have demonstrated intention to release each other from all claims for SS, changes of this nature are unlikely to be sufficient to justify dispensing with that intention
* **Only where current circumstances represent a significant departure from range of reasonable outcomes anticipated by parties, in a manner that puts them at odds with the objectives of the Act should court be persuaded to give the contract little weight**

DISSENT: concluded that the appropriate threshold for judicial intervention should turn on whether the agreement as a whole is objectively fair at the time of the application, when tested against the objectives of spousal support orders as defined by s. 15.2(6) of the Divorce Act, and bearing in mind that an equitable sharing of the economic consequences of the marriage may be achieved by property sharing, spousal support and child support or any combination thereof.

### Rick v. Brandsema (2009) SCC

**Facts:** family dairy business, separation agreement where W got less than 50% of business, consent order dismissing all claims was entered into. W brought an action for variation – claiming misrepresentation of value of assets, and agreement was unconscionable because of her history of mental health, and alleging abuse by H during marriage.

* **TJ:** agreement was unconscionable because H exploited W’s mental instability during negotiations and deliberately concealed or under-valued assets
* **BCCA:** overturned TJ. Found the mere fact a party enters bad bargain doesn’t = unconscionable agreement; mere presence of vulnerabilities didn’t justify TJ’s intervention
* **SCC:** found for W
  + Special care must be taken to ensure assets of the relationship are distributed through a process that is as free as possible from informational and psychological exploitation
  + Where exploitation results in an agreement that deviates substantially from objectives of governing legislation resulting agreement may be found unconscionable and therefore unenforceable **– need exploitation and substantial deviation from objectives of legislation**
  + Duty on separating spouses to provide full and honest disclosure of all relevant financial information in order to help protect the integrity of the negotiating process
  + **Whether defective disclosure justifies judicial intervention depends on circumstances of each case – including extent of misinformation and degree it was deliberately generated, extent of differentiation**
* Court recognizes that negotiations in relation to disintegration of spousal relationship are uniquely vulnerable; there are vulnerabilities that exist simply because of the nature of these negotiations
  + Because of this the process needs to be free of exploitation
* **Only case where courts have been willing to intervene in an agreement – due to economic misinformation coupled with psychological exploitation**

## Spousal Misconduct and Economic Self-Sufficiency

### Leskun v. Leskun (2006) SCC

**Facts:** husband cheating on wife, leaves her to marry someone else and wants divorce.

**BCCA**: **Southin** – DA doesn’t prevent consideration of failure to achieve self-sufficiency as being a result of emotional devastation caused by the other spouse’s misconduct; **Newbury** – “bitterness” isn’t adequate reason for not achieving self-sufficiency in considering SS orders

**SCC:**

* DA s.15.2(5) – In making an interim or final order for SS the court shall not take into consideration any misconduct of a spouse in relation to the marriage
  + s.17(6) – court cannot consider any conduct in a variation application that couldn’t be considered in making the initial order
* **There is a distinction between emotional consequences of misconduct and the misconduct itself**
  + **Policy of DA is to focus on the consequences of the spousal misconduct not the attribution of fault**
  + Consequences of misconduct plus health and other family issues justify continuing the order
* Condition, needs and other circumstances (s.15.2(4)) includes the capacity of the spouse to be self-sufficient for whatever reason
* Court can consider after-acquired capital assets in making a SS order – otherwise would not reflect the true “means, needs and other circumstances” of the parties (s.15.2(4))

## Spousal Support Advisory Guidelines

* Not legally binding - operate on an advisory basis only
* Focus on amount and duration of SS once entitlement has been established
* Both formulas use an income sharing method to produce a range of amounts and durations for support
* **Without Child Formula**
  + Based on: gross income difference between parties, and length of marriage
  + **Amount of support:** 1.5 to 2% of difference in parties’ gross incomes for each year of marriage up to a maximum of 50%
    - Range for marriages of 25 yrs + = 37.5% to 50% of the differential in gross incomes
  + Factors provided to aid in determination of amount within range include:
    - Strong compensatory claim (strong ***Moge*** argument or not)
    - Recipient’s needs
    - Property division
    - Needs and limited ability to pay of payor spouse
    - Self-sufficiency incentives
    - If payor’s income less than $20,000 SS is not payable
    - If payor’s income is more than $350,000 guidelines give way to judicial discretion
  + **Duration:** ranges from 0.5 to 1 year of SS for each year of marriage
    - Marriage over 20 years – SS will be indefinite
    - “Rule of 65” – if marriage was 5+ years, and years of marriage + age of support recipient = 65+ support will be indefinite
* **With Child Formula**
  + **Amount:** Primary consideration – priority of child support over SS
  + Parental responsibility/partnership is driving rationale
  + Main differences with “without child formula”:
    - 1. “with child” formula uses net income of spouses (instead of gross)
    - 2. “with child” divides pool of combined net incomes (not difference of gross)
    - 3. Upper and lower limits in “with child” do not change with length of marriage
  + “Individual Net Disposable Income” – amount of income set out in Child Support Guidelines, minus child support payable, minus taxes and deductions, plus government benefits and credits
  + INDIs are then added together and range of SS = that which leaves recipient with 40-46% of combined INDI
  + Also special considerations for shared and split custody arrangements and where SS paid by custodial parent
  + **Duration:** initially indefinite, subject to outer limits
    - Longer marriages (10+ years) limits length of SS to length of marriage
    - Shorter marriages (under 10 years) limit is period of time for youngest child to finish high school

### W. v. W. (2005) BCSC [SS Guidelines – but decision might be outdated]

* SS Advisory Guidelines are consistent with the law in BC
* Advisory Guidelines are only advisory – there is no intention to legislate them
* **Guidelines can provide a cross-check against the assessment made under existing law**

\*\* SS Guidelines are being used more and more often \*\*

### Redpath v. Redpath (2006) BCCA

* If an award deviated substantially from the Guideline ranges, with no exceptional circumstances to explain that deviation, the standard of review should be reformulated to permit appellate intervention

# CHILD SUPPORT

* Determined primarily by focus on payor parent’s income
* Changes to CS regime often used as bargaining tool by government (ex. switch from focus on recipient parent income to payor parent income as trade for refusing to institute presumption in favour of JC)
* Seen as an economic obligation parents have to their children
* No legal nexus between CS and access (except with regards to how much is paid) – but in reality fathers who have access and exercise it have higher payment rates than fathers who don’t
  + Payment rate is currently about 40%
* CS Guidelines are legally binding (created federally; each province adopted them – provincial guidelines supposed to recognize cost of living in that province) – main considerations: income of payor spouse and number of children [s 3(1)]
  + **Presumption in favour of the Table Amount [s 3(1)] – so it will always be the starting point**

## (a) Defining the Parent-Child Relationship

* **S 15.1 (DA):** spouses are responsible for the support of any “child of the marriage”.
* **S 88 (FRA):** each parent of a child is responsible and liable for the reasonable and necessary support and maintenance of the child.
* **S 1 (DA):** “child of the marriage” means a child of two spouses or former spouses who, at the material time,

(*a*) is under the age of majority and who has not withdrawn from their charge, or

(*b*) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

* **S 2(2) DA**: For the purposes of the definition “child of the marriage” in subsection (1), a child of two spouses or former spouses includes:

(*a*) any child for whom they both stand in the place of parents; and

(*b*) any child of whom one is the parent and for whom the other stands in the place of a parent.

### Chartier v. Chartier (1998) SCC [a person who stands in place of a parent can’t unilaterally give up that status]

**Issue:** Under what circumstances, if any, can an adult who is or has been in the place of a parent pursuant to s.2 of the DA withdraw from that position?

* **Should be determined on case by case basis**
* **Focus is on best interest of child** – not biology alone
* Once a person is found to stand in the place of a parent that relationship can’t be unilaterally withdrawn by the adult
  + Term “children of the marriage” (in DA) should be interpreted broadly
* **TEST: court must determine the nature of the relationship by looking at a number of factors, including:**
  + Intention - including intentions inferred from actions, and consider that intentions may change
  + Whether the child participates in the extended family in the same way as a biological child would
  + Whether the person provides financially for the child (depending on ability of pay)
  + Whether person disciplines the child as a parent
  + Whether the person represents to the child, the family, the world, explicitly or implicitly that he is responsible as a parent of the child
  + Nature or existence of the child’s relationship with the absent biological parent
* Child Support Guidelines s 5 – if person stands in place of parent and is liable for CS the court doesn’t have to order the Table amounts
  + One of few discretionary situations
  + In a small number of situations courts will create CS obligation on both biological and stepparent - usually where biological is liable for an order and not paying it, or CS is very low because of their income; subsequent spouse would be liable to pay an amount less than the table to support the child

For CS applications under the provincial Child Support Guidelines (pursuant to the FRA), the term “stands in place of a parent” must be read to meet the criteria of the definition of “parent”- consider:

* History of support (financial contribution to raising child)
* Length of relationship
* CS application needs to be brought within 1 year of separation

### Doe v. Alberta (2007) ABCA

* Section of Alberta *Family Law Act* permitting a person to be adjudged a “parent” if he or she is “standing in the place of a parent” couldn’t be overridden – even by an express contract
* While actual intention is relevant, it is not determinative (following ***Chartier***)

## Child Support and Child Protection

### JMS v. FJM (2005) On SCJ Div Ct [for children under 19 but not living with parent]

* **Majority:** Father not liable for child support because disabled son was Crown ward and therefore no longer in his parents “charge”. A “child of the marriage” must be in his/her parents’ “charge”.
  + Order that enables Crown to have custody is for "care, custody and control" - you can't argue that child is in your charge if all of care, custody and control is in the hands of the state
* **Dissent:** the mother continued to bear costs associated with the child, had him in her care on at least a bi-weekly basis, and sought to treat him identically to his sibling. The court should address the wider context and not financially penalize a child on the basis of his disability. “Charge” should be understood to include financial context.
  + Parents driven to this situation due to lack of state funding - this shouldn't be seen as putting up a child for adoption
  + Compares scenario of adoption versus this scenario where child continues to spend a significant amount of time in mother's care

Establish what is the nature of the order that enables the person who is exercising care and control of the child

## Extraordinary Expenses (s 7)

### McCrea v McCrea (1999) BCSC

**Facts**: parties created separation agreement, including $1000/mo in CS. Separation agreement not incorporated in court order. Seeking variation of the CS amount based on the *Guidelines* and increase for extraordinary expenses.

**Payor’s income**

* New spouse’s income can’t be included when determining payor parent’s income
  + Here court includes new wife’s income because sees it as income splitting
* Where payor’s earnings are disbursed into a corporation and into a trust – appropriate basis for the calculation of the Guideline support was the pre-tax income of the company

**Extraordinary Expenses**

* *Guidelines* s 7 – sets out various “add-ons” that may be considered
* **1. Determine whether the expenses are extraordinary** - In deciding whether an expense claimed on behalf of children under s 7(1)(f) are extraordinary, the court should take into consideration:
  + the combined income of the parties
  + the nature and amount of the individual expense
  + the nature and number of the activities
  + any special needs or talents of the children
  + and the overall cost of activities

Relativity matters – fairly low income family, more than a few extracurricular activities seen as extraordinary; high income family may consider those things trivial (would therefore be included in Table amount)

* **2. Assess whether the expenses are necessary and reasonable, having regard to the income of the parents and the child, and to the family’s spending habits prior to separation**

**Hardship Claim:**

* Court rejects this – any additional expenses taken on cannot be at expense of previous children

## Shared Custody (s 9)

Once access hits 40% consider:

1. Table amounts

2. Increased cost of shared custody arrangements

3. Conditions, means, needs, other circumstances of each spouse and child for whom support is sought

### Green v Green (2000) BCCA [CS Guidelines s 9 – 40% access rule]

* **s 9** – where a spouse exercises a right to access, or has physical custody for not less than 40% of the time/year, the amount of the CS order must be determined by taking into account:
  + (a) The amounts set out in the applicable tables for each of the spouses
  + (b) The increased costs of shared custody arrangements, and
  + (c) The conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought
* s 9 requires some degree of judicial discretion (particularly s 9(b) and (c))
* In order to apply s 9 – it is important for parties to provide evidence relating to ss 9(b) and (c)
* “Cliff Effect” – time difference in access has very little effect in reducing costs for recipient parents
  + Because there are certain things that one parent always buys (mothers always buy clothes, personal items, shoes, school supplies) – so equal caring doesn’t necessarily reduce cost for one parent

### Contino v Leonelli-Contino (2005) SCC [CSG s 9 – shared custody agreement]

* s 9 provides a particular regime in cases of shared custody – requires a departure from the s 3 formula
* shared custody often leads to overall increased cost rather than reduced cost for one parent
* Language of s 9 warrants emphasis on flexibility and fairness to ensure the economic reality and particular circumstances of each family are properly accounted for
* The three factors structure the exercise of discretion – none of them should prevail
  + Weight given to each factor will vary according to the facts of each case
* Under s 9 there is no presumption in favour of awarding at least the *CSG* amount under s 3
  + There is no presumption in favour of reducing the CS obligation downward from the *CSG* amount

Three stage analysis for s 9 claims:

**s 9(a) – court is required to consider the Table amounts**

* Court should consider set-off amount - apply Table amount to each spouse and find difference
* Set off amount is starting point – court still needs to consider how much is actually being spent by each parent

**s 9(b) – acknowledges shared custody situations increase cost of raising kids overall**

* Examine costs and budgets of each parent and determine what they are actually paying for the kid
* From this determine whether shared custody has resulted in increased costs globally
* Increase should be distributed between the parents in accordance with their respective incomes

**s 9(c) –broad discretion to analyze the resources and needs of both the parents and children**

* Should look at standard of living of child in each household and ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances
* Financial statements and/or child expense budgets are necessary for proper evaluation of s 9(c)
  + It is important that parties lead evidence in relation to s 9(b)(c) and the courts should demand information from parties when the evidence is deficient
* When looking at set off and increased costs determine if this is fair
  + Discretion is paramount and determinations are on case by case basis

KELLY: has largely worked well because of discretion; but very little predictability

In terms of addressing costs of raising child it is probably more accurate approach

Thinks 40% is high for assuming costs of access being minimal below that

## Income over $150,000 (s 4)

* Up to $150,000 the Table amounts apply; for portion of income that exceeds this, s 4 allows a court to deviate from the Table amounts if it is considered inappropriate
* If a parent has an income over $150,000, s. 4 of the *Guidelines* authorizes a court to determine the appropriate amount payable if the table amount is considered “inappropriate”. This rule only applies to that part of the payor’s income that exceeds $150,000. The table amount applicable to $150,000 is presumed to be appropriate.

### Francis v Baker (1999) SCC [CSG s 4 – income exceeds $150,000]

* “inappropriate” = “unsuitable” – Courts have discretion to vary CS amount up or down
* It was Parliament’s intention that there be a presumption in favour of the Table amounts in all cases
  + Onus is on party seeking deviation to rebut presumption that the Table amount is appropriate
  + There must be clear and compelling evidence for departing from *CSG* figures
  + **High burden to rebut presumption of appropriateness**
* Issue of wealth transfer from one spouse to another (because of ridiculously high amount of CS)
  + Children shouldn’t be harmed because their rich parents separate
  + Just because an average person looking at amount would think it seems very high – rich people spend a lot on their children (this shouldn’t stop because they separate)
* Where court may deviate down – significant expenses being incurred by payor parent (ex. extremely high debt called in; costs of new family are not determinative, but a consideration; costs associated with looking after older parents; **looking for something that means payout is going to affect ability to meet other financial obligations**)

## Post-Secondary Education [DA s 15.1(1); CSG s 3(2)]

### Child of the Marriage

### Farden v Farden [post-secondary education factors for “child of marriage]

* If child is still “child of the marriage” (ie. under charge of parents)
* **With regard to a child who is enrolled in post-secondary education consider 8 factors to determine whether child is still a “child of the marriage”**:
  + **Whether child is enrolled in full or part-time studies**
    - seen as commitment to program
  + **Whether the child has applied for student loans or other financial assistance**
    - now presumption that you exhaust all other sources of funding; at least apply, if you don’t get it that’s not your problem
  + **The career plans of the child**
    - has to have some kind of plan; needs to be progressing to a career
  + **The ability of the child to contribute to their own support through part-time employment**
    - Expectation that kids try to fund themselves
  + **The age of the child**
    - Early 20s is probably ok; after that getting questionable
  + **The child’s past academic performance**
    - Interested in likelihood of success
  + **What plans the parents made for the education of their children**
    - particularly where those plans were made during cohabitation
    - looking for conversations or expectations within family
    - high achieving family more likely to get CS money; low achieving less likely
  + **Whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought**
    - Making distinction between minor and child over age of majority

### Neufeld v Neufeld (2005) BCCA [student loans/second degree]

* Factors in ***Farden*** are not a set of minimum criteria – but factors to be considered along with all relevant circumstances to make fact-specific determinations
* **Student Loans:** it is not necessary to exhaust every source of funding before looking to the parents for support
* **Pre-separation plans for daughter:** father had sufficient income to support his daughter’s “achievable, realistic and legitimate education goals”
  + There is no general principle that a child seeking a second degree did not qualify for support
* Court determines this is s 7 expense - Table amount awarded to cover living expenses; s 7 for tuition

### Haley v Haley (2008) Ont SCJ [hiatus in studies]

* Entitlement to child support could be revived despite a hiatus in studies
  + Can have a break, need to show good reason and program enrolling in is appropriate; court can also make kid pay some of his own way
* Determination must be made based on comprehensive consideration of the facts of each case
* This particular educational program was an appropriate endeavour, with reasonable costs and the reasonable prospect of advancing career prospects and maximizing the child’s potential

### Determining the Amount of Child Support for an Adult Child

* s 3(2)(a) – the same determination using the *CSG* tables can be used as if the child were under the age of majority
* s 3(2)(b) – if the court considers the 3(2)(a) approach inappropriate, it may determine an appropriate amount considering “the condition, means, needs and other circumstances of the child”
* s 7 – provides that CS may include “special or extraordinary expenses” including post-secondary education [s 7(1)(e)]

**\*\***Any child over age of majority is discretionary – court can do whatever they want\*\*

### Retroactive Child Support [DBS v SRG; LJW v TAR; Henry v Henry; Hiemstra v Hiemstra (2006) SCC]

* **“Retroactive support”** – an amount of CS sought, usually by the recipient spouse, where the income of the payor spouse has increased since a CS order has been made, a settlement contract was signed, or since separation (if no order or agreement)
* Support on this basis is not creating a new liability – it is seeking compensation for something that is legally owed
  + Parents have an obligation to support their children commensurate with their income – this obligation exists independent of any court order
  + When a payor does not increase payments in accordance with his income, he has not fulfilled his obligation to the child of the marriage
* The court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time
* **1. Determining whether to give a retroactive award:** the court will need to look at all the relevant circumstances of each case
  + Payor parent’s interest in certainty is balanced with the need for fairness and flexibility
  + Should consider whether the recipient parent has supplied a reasonable excuse for her delay
    - Holds that the recipient must act promptly and responsibly in monitoring the amount of CS paid
  + Conduct of payor parent
    - **“Blameworthy conduct”** – conduct that privileges the payor’s own interests over his child’s right to appropriate amount of support
  + Circumstances of the child
  + Hardship the retroactive award may entail
* **2. Once a court decides to make a retroactive award, effective date:**
  + Generally make the award retroactive to the date when effective notice was given to the payor parent
    - Onus on recipient to give “effective notice” to trigger date from which support is owed
    - Court will only look back 3 years
  + Where the payor parent engaged in blameworthy conduct – presumptive start date of award = the date when circumstances changed materially
    - Only time award may reach back to moment when obligation arose is if there is blameworthy conduct by payor
* **3. Court determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating**
  + Quantum determined with attention to *CSG* – but with discretion

### Arrears and Variation of Child Support

### Ghislieri v Ghislieri (2007) BCCA

* Parental responsibility for CS is based on parental capacity to earn – not actual earnings
* Judges may impute income to individuals who do not work, do not work full-time or at the level of remuneration they are able to earn
* Parents who don’t earn enough to satisfy CS obligations must clearly show why they have failed to do so
  + “Parents have a positive duty to earn as much as reasonably they can to provide CS and must provide satisfactory explanation for failing to do so”

### Earle v Earle (1999) BCSC

* Maintenance:
  + Parents have a joint and ongoing legal obligation to support their children
  + It is the child, not the other parent, who has the right to maintenance
  + The payment of maintenance is based on not just what a parent does earn, but what a parent can earn
* Variation:
  + There has to be a material change of circumstances, a change that is significant and long lasting
  + A change to the Guideline amount is not automatic
* Arrears:
  + Arrears will not be reduced or cancelled unless it is grossly unfair not to do so
  + Arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future
  + A reduction or cancellation requires detailed and full financial disclosure, under oath (usually in affidavit) that at the time the payments were to be made:
    - The change was significant and long lasting and
    - The change was real and not one of choice and
    - Every effort was made to earn money (or more money) during the time in question, and those efforts were unsuccessful
  + Responsibility for a second family can’t relieve the parent of his legal obligation to support the first family
  + Judges won’t cancel arrears because the child no longer needs the money – they should be compensated for what they missed
  + If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away

### Enforcement of Child Support

* Support orders may be enforced under the *DA, FRA, Family Maintenance Enforcement Act, Family Orders and Agreements Enforcement Assistance Act, Rules of Court* and Supreme Court’s equitable or inherent jurisdiction
* *Interjurisdictional Support Orders Act* (BC) – provides process for enforcing support orders internationally

### Dickie v Dickie (2007) SCC

* A court can exercise its discretion to refuse to hear the appeal of someone who has not complied with family law court orders, or stay the appeal until the person has purged their contempt
* Affirms the use of remedies such as payment of security ordered by trier of fact in circumstances where a non-payor is outside the reaches of provincial enforcement mechanisms
* Message: where there is wilful non-compliance with family court orders by a person who has the ability to pay, the consequences of non payment should be severe

### McIvor v The Director of Maintenance Enforcement for the benefit of Marjorie McIvor and Marjorie McIvor (1998) BCCA

* Access is not a prerequisite to the obligation of the access parent to CS
* This would erode the basic principle that a child is entitled to adequate maintenance from his parents, regardless of problems associated with access