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FAMILY BREAKDOWN: DIVORCE, SEPARATION & COROLLARY ISSUES

# Divorce Law & Process

STATISTICS

* Just over 113,000 divorce cases reported in 2010/2011, representing 35% of all family law cases
* Approximately 54,000 new divorce cases were initiated in 2010/2011, decreasing 2% from the previous year
* Between 2006 and 2011, new divorce cases declined 8 % in six provinces and territories
* 80% of divorce cases that courts handed in 2010/2011 were uncontested where both parties agreed to the divorce and on any related issues
* Fluctuating between 35% and 42%, the proportion of marriages projected to end in divorce had remained relatively stable during the last 20 years. In 2008, 40.7 of marriages were projected to end in divorce before the thirtieth wedding anniversary.
* In 2008, the average age at divorce was 44.5 for men and 41.9 for women
* Women without children earned more than women with children. For example, at age 30, average hourly earnings of women with children were $15.20 compared with $18.10 for women without children.
* On average, the earnings of women with children were 12% lower than those of women without children
* Earnings disadvantage of mothers differed based on several characteristics. For example, lone mothers, mothers with long career interruptions, and mothers with more than a high school education incurred grater losses than married or common law mothers, mother with no or short career interruptions and mothers with no more than a high school education

PRELIMINARY QUESTIONS

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

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

* 1. to **draw the attention** of the spouse the provisions of this Act that have as their object the reconciliation of spouses, and
  2. to discuss with the spouse the **possibility of the reconciliation** of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to him or her that might be able to assist the spouses to achieve a reconciliation.

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

**Alternative dispute resolution**

**The majority of FL cases settle out of court via**:

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

### 2. Are they a legitimate ‘spouse’?

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

Definition now includes same-sex couples (Bill C-38) --> when same-sex marriage first allowed, could divorce b/c DA not changed at same time

### 3. Either spouse ordinary resident? (lived in province for @ least 1 year prior to proceedings)?

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

* If only one spouse is a resident for 1 year, then you can commence divorce proceedings;
* “**ordinary resident**” = Q of fact “normally lives in settled routine” ***Thomson v MNR (SCC)?????***

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

### 4. Jurisdictional conflict with application? Look @ days applications were filed

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

* If two actions started on different days first action has priority (other action will get withdrawn, party who filed it will have to file a response to the first action and can file a counter-claim)

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

* If two actions started on the same day, gets transferred to Federal Court

GROUNDS FOR DIVORCE

* No-fault regime introduced through amendments to the federal DA in 1987 – Caused divorce to skyrocket!
  + No-fault divorce created a one-year separation as the primary basis for divorce
  + Fault still included: Two fault-based criteria are still maintained within the DA: (1) Cruelty and (2) Adultery
* The section gives **no preference to one factor over another, although in practice the court may grant a divorce on the basis of the spouses having lived separate and apart for one year, even though other indicia of marriage breakdown are present** (see for example McPhail v. McPhail, 2001 BCCA 250 for a divorce granted on one year separate and apart even though a party alleged cruelty. The Court held that where the one-year-separate-and-apart ground exists but a party insists on pursuing another ground, costs may be awarded.
* The Court does maintain inherent jurisdiction to postpone the granting of a divorce, even if grounds for divorce exist, if it would prejudice the rights of one of the parties (see for example Bhullar v. Bhullar (1997), 33 R.F.L. (4th) 163 (B.C.S.C.) and Darbyshire- Joseph v. Darbyshire-Joseph, [1998] B.C.J. No. 2765 (QL) (S.C.)

## was there a breakdown of the marriage?

* Sole ground for divorce is “breakdown of the marriage” (s. 8(1)).

### Breakdown of marriage established if

1. **Living Separate and Apart for 1 year** -- s.8(2)(a): spouses must have lived separate & apart for at least 1 year immediately preceding the determination of the divorce proceeding and must be living separate and apart at the commencement of the proceeding. If the parties meet this requirement, then the divorce is granted "on consent”
   * Calculation of period of separation
     + s.8(3)(a): spouses shall be deemed to have lived separate & apart for any period during which they lived apart & **either** of them had the **intention to live separate & apart from the other** (NOT necessarily consensual)
   * Separation Interrupted? - Mental Capacity & Cohabitation
     + s.8(3)(b)(ii): spouses **can resume cohabitation** for period of not more than 90 days, w/ reconciliation as primary purpose
       - If the spouses exceed 90 days in cohabitation, the clock starts again.
       - You can keep trying to reconcile over the 1 year period, so long as each reconciliation period is no more than 90 days
     + **Statute is silent on issues on whether you can live separate & apart while still living under same roof** (Oswell 5 factors)
       1. There must be **physical separation between the spouses** - usually done through separate bedrooms. Remaining in the same home for economic reasons does not mean that the parties are not living separate and apart (Dupere v. Dupere).
       2. There must be **withdrawal by one or both of the spouses from the matrimonial obligations** with the intent of destroying the matrimonial consortium
       3. The **absence of sexual relations is not conclusive** but is a factor to be considered
          - Ceasing sexual relations and living in separate bedrooms is a factor but not conclusive (Riha v Riha)
       4. **Other matters include** (1) the discussion of family problems and communication between the spouses, (2) presence or absence of joint social activities, (3) meal patterns, etc
       5. **Division of household tasks between the spouses**.
     + s.8(3)(b)(i): by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse’s own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable
       - The minimum capacity required to form the intent to separate is the capacity to instruct counsel (Wolfman-Stotland v Stotland, 2011 BCCA)
       - Divorce requires (understanding) the desire to remain separate and to be no longer married to one’s spouse (Calvert)
2. **Adultery** -- s.8(2)(b)(i): only the “innocent” spouse can apply. – DON’T HAVE TO WAIT 1 YEAR
   * “Voluntary sexual intercourse between a married person and another person of the opposite sex other than his or her spouse”(Orford v Orford (1921)
     + Artificial insemination without H’s knowledge = adultery (Orford)
   * CL definition of adultery expanded to include same sex adultery (intimate sexual activity outside marriage) -- wife granted divorce on grounds of adultery after discovered her H having affair with another man. (P(SE) v P(DD) (2005) BCSC
   * Not a high standard --> proof on BoP
     + Prove opportunity & intimacy on BoP burden on adulterer to call evidence to rebut
3. **Cruelty** -- s.8(2)(b)(ii): “**physical or mental cruelty** of such a kind as to render intolerable the continued cohabitation of the spouses.” – DON’T HAVE TO WAIT 1 YEAR
   * Conduct at issue must be “grave and weighty” going beyond incompatibility. (Balasch v Balasch (1987) Sask)
   * Does not go to intent to be cruel, but subjective effect of the treatment on the other spouse (Balasch)

Oswell v Oswell, 1990 Ont H.C. – \*Living Separate and Apart\* - Subjective and Objective Test.

**Facts**: H said they began separation in 1984, W said 1988.

**Issue**: In what year did the couple separate?

* + Subjective and objective test.
    - Subjectively it’s whether the parties had the intention to live separate and apart.
    - Objective considerations can include whether you physically live separate (separate bedrooms, separate parts of the house, etc.), whether they had withdrawn from obligations (meals, laundry, social functions, driving him/her to work, absence of sex). Case also considered fact they went on trips together, had drafted separation agreement but didn’t file it, he gave her gifts, they went to her parent’s funeral together.
  + In the end, judge decided he may have thought about separating in 1984, but it wasn’t his true intention moving forward. He tried to reconcile their relationship – counselling, sharing the bed, taking trips together, lots of communication b/w them regarding social schedules.
  + In the end, judge found they separated in January of 1988.

## are there any bars to the divorce?

* Three bars to divorce:
  1. **Collusion** - partying lying together about factors & falsifying evidence = application dismissed
  2. **Maintenance** - ensures reasonable arrangements for child = divorce stayed
  3. **Condonation or connivance** - in context of cruelty and adultery only - condoning acts that form basis of 8(2)(b) = application dismissed

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

* s.11(1)(a): to satisfy itself that there has been no collusion in relation to the application for a divorce and to dismiss the application if it finds that there was collusion in presenting it;
  + Definition - s.11(4): “**collusion**” means an agreement or conspiracy to which an applicant for divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or deceive the court, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property or the custody of any child of the marriage.
* s.11(1)(b): to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made to stay the granting of the divorce until such arrangements are made
* s.11(1)(c): where a divorce is sought in circumstances described in para. 8(2)(b), to satisfy itself that there has been **no condonation (acting as if it didn’t happen) or connivance (trick someone into cheating; may be non-monogamy agreement) on the part of spouse bringing proceeding**, & to dismiss application for a divorce if that spouse has condoned or connived at the act/conduct complained of unless, in the opinion of the court, public interest would be better served by granting divorce
  + s.11(3): trying to reconcile for less than 90 days ≠ not condonation

## when will the divorce take effect?

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

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

s.13: on taking effect, legal effect throughout Canada

s.14: on taking effect, dissolves marriage

## foreign divorce?

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

PROCEDURAL ISSUES

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

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.)

De Kova v. De Kova - 2013 BCSC 1271

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

Vilardell v. Dunham - 2014 SCC 59

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

MOVING TOWARDS NON-ADVERSARIALITY

* Major initiative in BC to move away from adversarial procedures:
  + Potentially less expensive
  + Less adversarial
  + Encourage parents to put their child’s needs ahead of their own
* FLA s. 8 - recognition that family violence may negatively affect the process

1. **Direct Negotiation**
2. **Lawyer-assisted Negotiation**
3. **Mediation**
   * s.9: duty of lawyer to (1) draw to attention of the spouse provisions of DA that have as their object the reconciliation of spouses, and (2) to discuss the possibility of reconciliation, and to inform the spouse of marriage counselling or guidance facilities, unless circumstances of case are of such a nature that it would clearly not be appropriate to do so.
   * Mediators are not decision-makers – attempt to help parties reach consensual agreement
   * Mediation does not preclude later litigation
   * Full disclosure and confidentiality are required – nothing said in mediation can be used later in trial (FLA s.5)
   * ADVANTAGES: lower cost; less adversarial; ownership of agreement; avoid stress of court
   * Argument that it should never be used where there is abuse or serious power imbalance. Victimized spouse is more vulnerable to manipulation and will easily compromise more than they should.
4. **Collaborative Family Law**
   * 4 way process of negotiation: 2 clients and 2 lawyers -- work together with sole goal of settlement
   * Key Features:
     + Not go to court, or even threaten to go to court;
     + Communicate with honesty and respect;
     + Make a sincere effort to understand each other’s needs and concerns;
     + Promptly disclose all relevant information;
     + Work together towards an agreement that is in everyone’s best interests
     + Each party has their own lawyer; instead of working against each other, your lawyers meet together and the two of you to create a settlement that’s right for both of you
     + Usually also involve divorce coaches, Child specialists, financial specialists and lawyers all on the same team
   * Participation agreement that must be signed --> if decide to go to court MUST hire different lawyers
   * ADVANTAGES: Much cheaper than regular family law; Interest-based method of advocacy
   * PROBLEMS: Power disparities; not enough focus on substantive so allowing women to suffer afterwards; many women lack financial resources to hire a lawyer; and criticisms of mediation.
5. **Judicial Case Conferences**
   * JCC = informal session with a Master or Judge, disputing parties and legal representatives
   * Normally a JCC must be held before a BC court will hear a contested application (BCSC Family Rules 7-1(2) --> cannot serve application or affidavit unless have had JCC
     + Exceptions: The following applications ay be brought before a JCC: Rule 7-1(3)
       - Application under s. 91 of FLA restraining the disposition of any property at issue
       - Consent order
       - Application without notice
       - Application to change a final order
       - Application to change or set aside the determination of a parenting coordinator
     + Court may relieve party from requirement of JCC if: Rule 7-1(4)
       - Premature to require parties to attend JCC
       - Impracticable or unfair to require party to comply
       - Application is urgent
       - Delaying application or requiring JCC is or might be dangerous to the health or safety of any person
       - Court considers it appropriate that the party be relieved from JCC requirement
   * **GOALS**: Streamlining costs and time by identifying & narrowing issues + encouraging settlement

# Custody, Access & Post-Separation Parenting

*DA* and *FLA* 25-26

Custody under the *Divorce Act* is in terms of custody and access and is governed by s. 16. Custody includes most rights incidental to guardianship (deciding on health care, education, religion, etc) and physical care and control of the child. As joint custody is increasingly awarded, these rights are split by the judge. The *FLA*, ss. 39-49, do away with custody and access. There are instead guardians, who may have parental responsibilities and parenting time. Non-guardians may have contact (s. 58). Focus is on parental responsibilities, rather than parental rights.

Guardianship Under the *FLA* 26-31

While parents are living together, and after they separate, both parents are guardians. A parent who never resides with the child is not a guardian unless there is an agreement to the contrary or the non-resident parent regularly cares for the child. During parenting time, day-to-day decisions can be made. Significant decisions are also a parenting responsibility that may be awarded to one or both parties. Responsibilities must be exercised in the BIC. No particular arrangement of parenting time or responsibilities is.

### Definitions

* *DA*
  + **Joint custody** = means both have the bundle of custody rights, but one parent could only have child in their care every other weekend
  + **Shared custody** = means having child in your care more than 40% of the time
    - Could have joint and shared custody
  + **Split custody** = if there’s 2 kids, one kid goes with each parent
    - Could have joint and split custody
  + **Access** = time spend with kid
* *FLA*
  + **Guardianship** = parental responsibilities
  + **Parenting time** = time that a guardian spends with child
  + **Contact** = time that a non-guardian spends with a child

*DA* - CUSTODY & ACCESS

* Traditionally under the *DA* one parent is awarded custody and the other access - s.16(4) - allows for custody to be awarded to “one or more persons” (joint custody)
  + **Custody**: s.2(1) - includes care, upbringing and any other incident of custody (e.g., right to determine a child’s education, health care, religion) and physical care/control over a child
  + **Child of the marriage**: s. 2 - means a child of two spouses (not necessarily biological parent) or former spouses who, at the material time,
    - Is under the age of majority (19) and has not withdrawn from their charge, or
    - 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

\*\*CAN ONLY BRING AN APPLICATION FOR CUSTODY AS COROLLARY TO A DIVORCE BEING FILED\*\*

S. 16 Custody and Access Orders

When making an order the court shall:

(8) Consider only the **best interests of the child** by reference to the condition, means, needs and other circumstances of the child

(9) Not consider past conduct unless it is relevant to ability of person to act as a parent of the child

(10) Maximum contact principle

s. 17 Divorce Act Variation Orders

(1) Court can make an order varying a custody order or any provisions thereof

(5) Court must be satisfied there has been a change in condition, means, needs or other circumstances since making the order

* + *Change in circumstance can just be child having gotten older*

(9) court will take into account Maximum Contact principle

### Who is applying for custody/access?

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

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

Non-spouse applying for custody/access?

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

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

Interim order for custody/access?

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

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

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

### What are you applying for?

**(Joint) Custody/Access**

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

**Access**

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

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

### Joint Custody and Guardianship Master Joyce Model (FRA)

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

*FLA* - GUARDIANSHIP/PARENTING TIME

### No more *de facto* custody & Guardianship

* Under the *Family Relations Act*, if the parties are living separate and apart:
  + Section 27 provides that the parent who has care and control of the child is the sole guardian, unless a Court orders otherwise
  + Section 34 provides that the parent with whom the child usually resides may exercise custody over the child
  + Implications for single mothers where ex has been out of the picture for many years.

Definitions:

“**Child**” except in Parts 3 (Parentage) and 7 (Child and Spousal Support) and s. 247 (Regulations respecting child support), means a person who is under 19 years of age;

“**Guardian**” means a guardian under section 39 [parents are generally guardians] and Division 3 [Guardianship] of Part 4

* If you’re a guardian, you’ll have parental responsibilities (set out in s. 41)

“**Parent**” means a parent under Part 3 (Parentage)

**Part 4 Care of and Time with Children**

Division 1: Best Interests of Child

s. 37 Best Interests of Child

(1) …must consider the best interest of the child only

(2) ..all of the child’s needs and circs must be considered, including the following: a) health and emotional well being, b) child’s view, unless it would be inappropriate to consider them….(g) impact of any family violence on child..., (h) whether violent parent is impaired in his/her ability to care for child, (i) whether cooperation b/w parents would increase any risks to safety, security or well-being of child or other family members

Division 2: Parenting Arrangements

S. 39 who is guardian

(1) **While child’s parents are living together and after they separate each parent of the child is the child’s guardian**.

(2) Except if there is an order or agreement made after or in contemplation of separation

(3) If you haven’t resided with your child you are not a guardian unless situation (a) person is parent under s. 30, (b) there’s an agreement in place, or (c) the parent regularly cares for the child)

(4) If you marry a guardian or enter a relationship do not automatically become a guardian

S. 40: only a guardian may have parental responsibility and parenting time

* s. 40(2) -- UNLESS agreement or order varies, assumption that each guardian may exercise ALL parental responsibilities in consultation with the other, UNLESS reasonable or inappropriate
* s. 40(4) -- NO PRESUMPTIONS
  + No particular arrangement is to be presumed to be in child’s best interests.
  + In particular, there is no presumption that:
    - Responsibilities should be allocated equally
    - Parenting Time should be shared equally
    - Decisions should be made separately or together
  + But... the FLA essentially sets up a “joint” guardianship regime as each guardian is entitled to exercise parenting responsibilities unless an agreement or Order provides otherwise.

S. 41: **Parental Responsibilities** (for guardian) --> long list of responsibilities; courts have begun to delineate these responsibilities between the parents

A guardian must exercise parental responsibilities in the best interests of the child (ss. 40 and 43)

S. 42: Parenting Time – time child has with guardian (no longer “access”) -- during parenting time may exercise day-to-day decisions affecting the child

S. 44: allows guardians to make agreements on parenting arrangements

S. 45: only guardians can make an application to the court re:

* The allocation of parental responsibilities;
* Parenting time;
* The implementation of an order made under this Division
* The means for resolving disputes respecting an order made under this Division

S. 48 - informal parenting arrangements

* Guardians have had an informal parenting arrangement in place for a period of time, establishing a normal routine for the child ∴ cannot change informal relationship without consultation with other guardians unless it would be unreasonable or inappropriate in the circustmances

Division 3: Guardianship (ss. 50-57)

S. 51 applies to non-parents, and to parents who have not lived with a child and have not had regular care of the child.

* The Court may appoint a person as the child’s guardian, or terminate a person’s guardianship of a child (s. 51(1)(a))
* The Court may also terminate a person’s guardianship of the child, except when director is guardian under the Adoption Act of the CFCSA (s. 51(1)(b))
* The test is the best interests of the child (s. 51(2))
  + If a child is 12 years of age of older, the Court must not appoint a person as guardian without the child’s written approval (s. 51(4))
* Notice must be given to all parents, guardians and other who provide care for the child or with whom the child lives (s. 52(1))

S. 52 = notice of application requirements

Division 4: Contact with a child (ss. 58-60) (access for non-guardians)

* If you’re not a guardian, you don’t get parenting time, but you can get contact through agreement or order of the court
* S. 58 - Agreements for contact are only binding if made with all guardians having parental responsibility for contact
* S. 59 - Orders for contact may include terms and conditions, such as supervision requirements

Division 5: Compliance with Parenting Time or Contact with a Child

* Under FRA, you could only get ‘contempt of court order’ if spouse didn’t exercise access. Now, FLA has new provisions
* S. 61 where there’s a denial of parenting time or contact, court can order parties to attend family dispute resolution, counselling, compensatory parenting time, reimbursement, supervised transfers of child, order guardian to provide security or report to card, pay a fine.
* S. 62 when denial is not wrongful (ie. other person is violent, addicted to drugs, etc.)
* S. 63 failure to exercise parenting time of conduct
* S. 64 Orders to prevent removal of child (from geographic area)

Transition from *FRA* to *FLA*

S. 251 -- If a party has custody or guardianship of a child, then that party is a “guardian” under the FLA and has parental responsibilities and parental time. If a party has access to a child, then that party has “contact” under the FLA.The party’s parenting responsibilities, parenting time or contact are as described under the existing agreement or Order.

## STEPS

1. Are they a guardian?
   1. Are guardians separated? -- no order unless separated
2. What are you trying to do?
   1. Agreement --> s. 44, s. 48
   2. Order --> s. 45(1) only guardians can apply
3. Do you need to serve notice?
   1. Who needs to be served --> s. 52(1)
4. Best interests of the child? --> s. 37
5. Truly in the best interests of the child? --> s. 37(3) - when not in best interests

## Guardianship under *Fla* - Cases

DLD v RCC - 2013 BCSC

L: *FLA* directs courts to consider only BIC --> issues like status quo are a factor, but not determinative of BIC.  
C: Both parents guardians, parenting time shared equally and decision-making to be by consultation, with father having final say.

STH v RMG - 2013 BCPC

L: s. 39 of FLA establishes **presumption of joint guardianship if parents were living together prior to the birth of the child**. Termination only allowed under s. 51, which has a high bar.  
C: But, what about s. 39(2)(order that parent is not a guardian)? Maybe this case shouldn't be followed?

GP v MJRP - 2013 BCSC

F: Prior interim order gave father primary residence and custody. Children had spent most time with mom due to work schedules.  
C: Both parents guardians due to s. 39, since children born prior to separation and interim order was not based on parenting ability. Primary residence remains with the father.

JLM v GAT - 2013 BCPC

L: s. 39 allows court to make declarations of guardianship or non-guardianship. -- in contrast to *STH v RMG*  
C: Father's violence, lack of contact, and failure to reply justifies terminating guardianship.

D v D - 2013 BCPC

L: Sole guardianship to be awarded only in the rarest of cases. Parents should have maximum opportunity to remain a significant part of the child's life -- emphasized sole consideration of BIC s. 39 -- **to terminate guardianship, must find that it is *not* in the children’s best interests to have both parents retain guardianship** -- here just reallocated responsibilities

K(JW) v K(E) - 2014 BCSC -- **termination of guardianship is a final recourse only -- can often accomplish BIC with restricting parenting responsibilities and parenting time**

Facts: Appeal pursuant to s. 233 of *FLA* from an order that resulted in terminating his status as a guardian of the parties’ two children // mother applied pursuant to s. 51(1)(b) to terminate father’s guardian status because of ongoing his ongoing struggle with drug and alcohol addiction // despite addiction issue father still has close relationship with children // TJ said it was one of those ‘exceptional cases’ where guardian can lose their status

Law: Termination of guardianship should be a final recourse only and only then where no other means of protecting BIC is available

* Here significantly restricted father’s parenting responsibilities and parenting time -- that way he still had legal rights to challenge things in court, etc. -- would not have had this if only had contact

## Reconciling the *DA* and *FLA*; and transitioning from *Fra* to *Fla*

CKBM v GM - 2013 BCSC

L: If unclear whether prior order was made under DA or FRA, assume DA.

s. 251: guardianship or custody == a guardian; access == contact.

JCP v JB - 2013 BCPC

L: purpose of s. 251 of FLA is to translate terms from FRA to FLA and not to be used to determine issues previously not adjudicated upon that are in issue

AJH v LCH - 2013 BCSC

L: Sole custody awarded under FRA = sole guardianship under FLA. Other parent has contact only -- can apply to vary terms of agreement in order to obtain guardianship.

CKBM v GM - 2013 BCSC

L: Can take away certain parental responsibilities without removing guardianship -- like certain decision-making authority.

Rashtian v Baraghoush - 2013 BCSC

L: DA used to address custody, using FLA concept of guardianship to "supplement" the decision.

# Best Interests of the Child

### Best Interests of the Child - Overview

* An agreement or Order is **not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being** (s. 37(3))
* Agreements must be set aside by the Court if satisfied that they are not in the best interests of the child re parenting arrangements (s. 44(4)) and re contact (s. 58(4)).

What Is It?

**UN Convention on the Rights of the Child**: In all actions concerning children, the best interests of the child shall be a primary consideration.  
DA: 16(8): Determined by reference to the condition, means, needs and other circumstances of the child. 16(9): Past conduct not to be considered unless relevant to the ability to parent. 16(10): Maximum contact principle.  
FLA: Provides much more guidance, see ss. 37 and 38. Most notably, history of care, child's views, family violence and no maximum contact principle.

LEGISLATION

Best Interests of Children - Factors That Must Be Considered

s. 37(2): All of the child's needs and circumstances must be considered, including:

* 1. The child's health and emotional well-being;
  2. Child’s views, unless inappropriate to consider them;
  3. Nature and strength of relationships between child and significant persons;
  4. The history of the child's care;
  5. Child’s need for stability;
  6. The ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

**Family Violence factors:**

* 1. The impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
  2. Whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
  3. The appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members; and
  4. Any civil or criminal proceeding relevant to the child's safety, security or well-being.

Stretch factors out as much as possible --> what is the best arrangement for the child, who should have more authority, what should parenting time arrangement be?

s. 1 - Definitions:

* “Family Violence” is defined broadly to include:
  1. Physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
  2. Sexual abuse of a family member,
  3. Attempts to physically or sexually abuse a family member,
  4. Psychological or emotional abuse of a family member, including
     + Intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
     + Unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
     + Stalking or following of the family member, and
     + Intentional damage to property, and
  5. In the case of a child, direct or indirect exposure to family violence;
* “Family member”, in relation to a person, is defined broadly as:
  1. The person’s spouse or former spouse;
  2. A person with whom the person is living or has lived in a marriage-like relationship;
  3. A parent or guardian of the person’s child;
  4. A person who lives with, or is related to, the person or a person referred to in paragraphs (a) to (c); or
  5. The person’s child and includes a child who is living with, or whose parent or guardian is, a person referred to in paragraphs (a) to (e)

s. 38 - Assessing Violence

For the purposes of section 37(2)(g) and (h) – family violence – a Court must consider all of:

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

CASES

Young v Young

L'Heureux-Dubé, in dissent, warned about principles of maximum contact and equality being claimed by parents with the effect of obscuring child's true needs and concerns. BIC is not a great test because it could come down to competing experts and judges' (potentially biased) discretion.

* Issues that affect decisions:
  + Race -- *Van de Perre v. Edwards*
  + Violence -- *Carlson v. Carlson*, *TS v. AVT*
  + Sexual orientation -- various cases
  + Trends in joint C/joint G --> NOT APPROPRIATE IN HIGH CONFLICT SEPARATION RELATIONSHIP

## Race

Van de Perre v. Edwards, 2001 SCC (Vol II p 54) - \*\***Race is an issue that courts will take into account in granting custody/access, but it’s not determinative. It’s importance depends on the circumstances**.\*\*

Facts: White Canadian woman and black basketball player had a child together. He was married – his wife and kids lived in the US. VdP brought case for custody and support – at trial she was granted sole custody and he was granted access. It was appealed and CA granted him custody. Then she appealed.

* CA did odd things: encouraged Mr. Edward’s wife to become a party to the proceeding (this was an error)
* One ground of appeal was ability to overturn BCSC decision – SCC said CA erred in overturning BCSC’s decision and adding wife as party. Neither parent was an ideal parent in this case. She was portrayed as party girl from bad home who was a gold digger. He had had multiple affairs and wasn’t around to parent much.
* There were questions about who was the better parent
* **Key issue: RACE.** What was the right place for him to be raised
  + Courts should consider whether parent is a good parent, and not whether their wife is a good mother to their other children.
  + 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 – relevancy of this factor depends on context
  + 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**

Law: Must consider ability to exercise rights and duties of custody. Past conduct is irrelevant unless they provide evidence for attitudes that could effect the well-being of the child. Can't give custody to a person just because their partner is a good parent. Racial identity, and the ability of each parent to develop that identity, is one factor that must be considered, but is not determinative. Not as much of a factor as in adoption, since both parents will still be involved.

**NOTE - MORE BACKGROUND IN TRIAL DECISION**

## Violence

Carlson v Carlson, 1991 BCCA (Vol II p 66) - **\*\*Violence\*\* relevant to best interests**. Court relied on s. 15 report

Facts: Mom and dad had separated, had 4 kids. He had tried to take them away, brought them back. He became abusive towards her. She sought social assistance. Things deteriorated again. There were allegations of sexual assault by the father. They had a s. 15 report done by a family justice counsellor. Mom’s position was that father was aggressive to wife and children. Counsellor disregarded aggressive behaviour. She thought that both the parents were adequate. At trial, judge found father was more capable parent. Counsellor suggested kids go to father and TJ agreed. They said mom couldn’t provide stability of home life. She appealed to C.A. Appeal was brought on grounds that TJ erred in violating principle of status quo, made errors of fact, and gave insignificant weight and disregarded witnesses of the mom.

* **BCCA**: decided mom should have custody – TJ erred in violating principle of status quo.
* 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)

Law: Violence is a relevant factor where past history may indicate likelihood of future conduct. Expert evidence clearly flawed since it did not consider all relevant factors. --> NOTE under *FLA* would have to consider under BIC how father’s behaviour affected child

TS v AVT, 2008 ABQB (Vol II p 71) – **BIC to have one primary parent, and for that parent not to alienate daughter from the other parent**

* Mother made “spurious” allegations of sexual assault against the father; Court found he was dedicated in attempting to foster a relationship w/ his daughter
* Court awarded primary residence and decision making to the father on basis that he would not alienate daughter from other parent, despite fact that mother ran a very stable home, of her other children
* Best interest of child was to have one primary parent, and for that parent not to alienate her from the other parent

Law: Unsupported allegations of violence may be seen as “spurious” and “obstructionist”

## Sexual orientation

N v N (1992) BCSC: **"Discrete" homosexuality does not interfere with BIC** --> strong suggestion only because it was discrete  
JT v SCT (2008) Ont. Sup. Ct.: Morality not a consideration. In awarding joint custody, lesbian parents assigned traditional gender roles. --> BIC focused on maximum contact  
MMG v GWS (2006) SKQB: New homosexual relationship not an issue, but decision to not disclose it to children is seen as an inability to communicate. **Discrete is a bad thing now**.  
JSB v DLS (2004) ON Sup. Ct.: **Race and sexuality are only factors in analyzing BIC**. Homosexuality not presumed to be bad. This is the most hands off approach. A lesbian relationship conducted with discretion and sensitivity is no more harmful to children than a heterosexual relationship conducted with discretion and sensitivity.

## Joint Custody / joint guardianship

* Joint legal custody often presumed to be in BIC, even though physical custody may not be joint. Joint custody a rising trend, but recently concerns have been raised as to its appropriateness, especially in unequal power dynamics.

Stewart v Stewart (1994) BCCA: **Joint custody should be rare and only awarded when parents are totally in agreement.**

* TJ had ordered JC to encourage communication b/w hostile and antagonistic parties
* BCCA found no evidence this could work ∴ sole custody to mother and specified access to father
* Reluctance of court to make JC orders for high conflict families who appear unable to cooperate

Robinson v Filyk (1996) BCCA: **No presumptions, either for or against joint custody**. Dilutes Stewart.

* Legal and factual presumptions have no place in an enquiry into the best interests of a child

Javid v Kurytnik (2006) BCCA: Parents' inability to communicate and cooperate = no joint custody.

Narayan v Narayan (2006) BCCA: Obvious animosity and history of violence = no joint custody.

Kaplanis v Kaplanis (2005) ONT CA: I**nability to communicate is not a complete bar to JC but hoping that communication will improve because JC is ordered isn’t a basis for making an order** (aspirational orders not appropriate)

* Must be evidence that the parents will be able to communicate with one another despite their differences in order to award joint custody. Not sufficient to hope communication or parenting skills will improve due to joint custody being awarded.

Windle v Windle (2010) BCSC

Facts: High conflict relationship. Mom moved a short distance with children, with courts permission. Dad later moved very far away, making access difficult. Eldest child does not want to go visit dad anymore (found as fact despite expert evidence to the contrary).   
Law: Court not bound to abide by expressed preference of the child. But, compulsion generates stress and disfunction. Continuing contact with both parents is important.

* **Because of conflict and distance between H and W, JG wasn't appropriate**
* **Court will not grant JC/JG where it will only cause further conflict, which affects BIC**
* **Court will not make an order (that kids have to visit with father) if it will be ignored or cause significant stress**
  + Up to teenage child to decide if/when to visit father

A: Ordering change in primary residence would be contrary to BIC because of need for stability and wishes of the children. Joint custody not appropriate because the parents cannot communicate without conflict. Mom gets sole custody, required to report to dad about educational and health matters. Access must be exercised near mom's house, dad must travel and give reasonable notice. Stepdad-to-be used as conduit to avoid conflict between mom & dad.

# Access, Parenting Time, Contact

Legal Definitions of Access, Parenting Time and Contact

### What Is Access?

* Defined in French version of *DA* as “the right to visit”
* s. 16(5) of *DA* states that unless a court otherwise orders, the access parent has the right to make inquiries and to be given information, as to the health, education, and welfare of the child
* See Young v. Young for the meaning of access

Young v Young, [1993] SCC (Vol II p 52 and 102) - **\*\*Access\*\* Best Interests of Child is the sole criterion. Custodial parent doesn’t have a right to limit H’s right to teach kids about religion. No restriction on access rights unless there is evidence of harm/risk of harm.**

Facts: Father wanted kids to have more exposure to his faith as a Jehovah’s Witness. Mother trying to restrict him from doing this and attach conditions to father’s access. At trial, TJ said father wasn’t allowed to talk about religion with the kids. TJ said conflict bw parents caused conflict for the kids. Father was more concerned about his rights than for welfare of the kids. CA said restriction should not be placed on freedom of access, and access parent should be allowed to discuss religious beliefs unless there is potential for real harm to the children. CA said it was in best interest of children to know non-custodial parent fully including his/her religious beliefs.

Issue: does an access parent have any restrictions with sharing belief system with his children?

* SCC – Majority said father’s access rights shouldn’t be restricted, unless it shows harm to the children. Absence of harm – unrestricted access? BIC is paramount consideration. Majority said TJ put too much emphasis on custodial rights of parents, and failed to consider of whether there was any evidence of risk of harm.
  + **Harm** = adverse affect on upbringing that is more than transitory (affects well-being)
* Court must give effect to statutory requirement that kid should have as much contact with each spouse as possible [DA s 16(10)]. Right to know parent fully with no restriction.

Law: Test for BIC under *DA* encompasses a broad range of factors, including maximal contact b/w child and each parent. Custodial parent’s wishes are not a reason to limit access. Risk of harm is also a factor, but not a necessary one. Custodial parent has no right to place restrictions on access parent.

Johnson-Steeves v. Lee, [1997] ABQB (Vol II p 112) - **\*\*Bio dad vs social dad\*\* Access is the right of the child – it’s not the right of the mom to bargain it away.**

Facts: In this case, woman decided she wanted to have another child. She knew Lee from before. Now that she was divorced she made arrangements with him to have a kid (oral contract, not written down, never discussed access). Mom was raising the kid, father lived away. Mom wanted to have an autonomous family unit. She said she made it clear to him that he would be a sperm donor. He was meant to provide financial support.

Issue: Should the father be granted access?

* 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. He should be granted access b/c it would benefit the child.
  + Biological father not automatically entitled to access – access determined by best interests test
* Access determined according to BIC – It is never the mother’s right to bargain access away – access is the right of the child
* Court said there is a difference between a biological father and social father. They found he was a legal parent and should have access to his child.

**NB** - Under *FLA* Mom could’ve made an agreement under Part 3: Parentage -- Would Dr. Lee be considered a guardian? No he wouldn’t because they never lived together. Under FLA, if the parents had lived together they would automatically be joint guardians. He never lived with them, so he only has a right to contact (no right to parenting time). He would have to argue to be a guardian to get parenting rights. He’s not seen as someone who parents, but need to decide if his relationship with child is significant enough to warrant contact.

### What Is Parenting Time?

* No exact parallel to “access” under the *FLA*
* *Guardians* have “parenting time” - *s. 42*
* *Non-guardians* have “contact” - s. 59
  + A person with “contact” ≠ a guardian ∴ has no parental responsibilities under s. 44 or parenting time under s. 42
  + s. 59 also authorizes the court to order supervised contact
  + Clarifies that an access order under the CFCSA is a contact order for the purposes of the *FLA*

### Supervised Access

* Access/contact may be restricted when there is a concern that the visits may result in harm to the child
* In general, supervised access is intended to be a short-term solution
* NOTE -- it is up to the spouse who says someone’s access should be supervised to prove why it should be supervised
* Who supervises?
  + Various private programs or MCFD (if MCFD is involved)
  + Grandparent, friend, another relative
* In what type of situations might access/contact be supervised?
  + There has been a history of child abduction or attempts to abduct
  + History of abuse
  + Attempted alienation
  + Concerns about the parent’s ability to properly care for the child, which may include mental and physical illness

### Conditional Access

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

ACCESS / PARENTING TIME / CONTACT AND ALLEGATIONS OF VIOLENCE

* Might change under *FLA*, but under *DA* only clear evidence of the probability of harm to a child results in denial of access
* Supervised access can be used as a tool to preserve contact with a child but under varying degrees of supervision to ensure safety of child and/or other parent

Fullterton v Fullerton - **only clear evidence of probability of harm to a child results in denial of access** -- witnessing abuse was not enough

EH v TG - 1995 NSCA - **terminated access**, TJ found it impossible to determine if there was sexual abuse of child, CA terminated access on grounds that TJ didn’t consider the psychological impact father’s actions on daughter

Baggs v. Jesso - 2007 NLUFC 4 - **being acquitted of criminal charges is not determinative -- supervised access may be ordered, but should be examined whether truly in BIC**

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

REMEDIES FOR DENIAL OR FRUSTRATION OF ACCESS

### Divorce Act

* *DA* offers no explicit remedy for access parents who are denied access to a child
* Possible remedies the court can use = contempt of court, termination of spousal support, change in custody

Frame v Smith - 1987 SCC - **no cause of action in tort or breach of fiduciary duty** against custodial mother and her new husband for interfering with non-custodial father’s access rights

BL v DR - 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 without a valid reason (judge --> unlikely to help, but must send a message that there are costs for disobeying a court order)

JKL v NCS - 2008 Ont Sup Ct - father turned son against mom -- mom **awarded custody** and son sent for deprogramming

Cooper v Cooper - 2004 Ont Sup Ct J - **mother found in civil contempt for leaving it up to children to answer phone call from dad**

“In shirking her responsibility obligation directly, and by indirectly conveying to the children her disapproval of telephone access, she wilfully and deliberately sabotages this telephone access”

Ungerer v Ungerer, 1998 BCCA – **Terminating spousal support as remedy to frustrating access**

Facts: Mom cuts off access, turns child against dad // found in contempt once, but no second order of contempt because by that time the child did not want to see dad

Issue: Whether misconduct by a former spouse after the marriage has ended by divorce can be considered as the basis for varying or cancelling an earlier order for spousal support?

* Conduct is not supposed to be considered in determining SS (by s. 15(6) DA)
  + 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
* Court found that they could and should have terminated spousal support

### Family Law Act

* *FLA* does provide a remedial framework for failure to comply with orders and agreements regarding parenting time or contact (*ss. 61-64*)
  + *S. 61*: Remedies court may order – for recent denials where denial was wrongful
  + *S. 62*: Circumstances were denial not wrongful
  + *S. 63*: Remedies for repeated fails to exercise parenting time or contact
  + *S. 64*: Court can order that child not be removed from a specified geographical area where there is concern that the person proposing to move the child is unlikely to return the child (can’t be used to stop a relocation order)

GRANDPARENT’S ACCESS

* ss. 16(1) and (4) of the *DA* permit an order of access in favour of a third party
* ss. 58-59 of the *FLA* permit agreements and orders granting contact to both guardians and non-guardians
* The onus is on the third party applicant to show that the access is in the best interests of the child
* Courts are reluctant to order access to third party if there’s conflict between the parties

Bridgewater v Lee, (1998) ABPC - **where access would disrupt nuclear family, court to exercise caution in evaluating BIC**

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, 1993 BC SC - **Courts should be reluctant to grant 3rd party access where there’s conflict**

Onus on applicants to demonstrate access is in the child’s best interests -- custodial parent doesn’t need to give reasons about why they cut off access

Courts should be reluctant to interfere with custodial parent’s decision on access, only do so if satisfied that it is in BIC

Beneficial for children to have contact with extended family, but not to be forced to do so when no positive relationship exists

Not in the child’s best interests to be exposed to real conflict between the custodial parent and a non-parent.

Parsons v Parsons, (2002) Ont Sup Ct – **access granted to grandparents**

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.”

## OTHER NON-PARENTAL ACCESS

GES v DLC, (2005) Sask CA – looking at BIC CA found that conflict between the adults can negatively affect the child

GES not biologically related, but helped financially and considered himself a father figure // TJ found that he had a significant role and that they were a ‘non-traditional family unit’ // CA found involvement to be minimal and did not warrant an access order

# Mobility & Relocation

* Mobility/relocation cases arise where one parent (usually the custodial parent) wants to move to a new location with the child and the other parent opposes the move

RELOCATION UNDER THE *DA*

* Not covered by the *DA* -- guideline was formed in Gordon v Goertz
  + This case is still relevant for people dealing with separation under *DA* and even though *FLA* provides a comprehensive framework, the case may continue to influence *FLA* decision making

Gordon v. Goertz, [1996] SCC – **Mobility Test** (applies before March 2013)

Facts: Dad had been abusive. Mom wanted to move to Australia to take dentistry program. After completing it she intended to move back to Canada. Dad argued that she shouldn’t be allowed to move. He brought action for custody to block move.

Issue: Should the custody order be varied to allow the mom to go to Australia?

**TWO PART TEST**

* 1. The applicant must meet the threshold requirement of demonstrating a **material change in the circumstances affecting the child**. (move counts as a material change)
     + Threshold requirement of demonstrating a material change of circumstances affecting the child (a change, which materially affects the child, and was unforeseen or not reasonably contemplated at time of previous Order)
  2. If the threshold is met, the **applicant must establish that the proposed move is in the best interests of the child**, given all the relevant circumstances, the child’s needs and the ability of the respective parents to satisfy those needs.
     + Factors court should consider for BIC includes:
       - Existing custody relationship and relationship between child and custodial parent
       - Existing access relationship and relationship between kid and access parent
       - \*\*Does kid actually have relationship with access parent that would be hindered\*\*
       - Desirability of maximum contact between kid and both parents (this is not absolute)
       - Views of kid
       - 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
       - Disruption to child of change in custody
       - Disruption to kid on removal from family, school, community (due to move)

**SUMMARY OF LAW**

1. Parent applying for move must meet the threshold requirement of material change
2. Fresh inquiry on BIC
3. Evidence of new circumstances + findings of judge who made previous order
4. Inquiry does not begin with a legal presumption in favour of the custodial parent, although custodial parent’s views are entitled to great respect
5. Each case turns on its own unique circumstances -- only issue is BIC

One v One (FRA; 2000 BCSC) - **Post** Gordon **12 factors to be considered in determining BIC in mobility cases**

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 (FRA; 2006 BCCA) - **every case depends on its facts & deference to trial judge**

Facts: Ms. Karpodinis wants to move with son to Texas in order to continue employment with current company. Probably unable to find alternate employment in Vancouver. She has identified community and school where she will move to. She will waive child support so Mr Kantas can visit and will visit Vancouver so child can meet other relatives.  
Analysis: Have to balance economic motive for move with how relationships may be affected. Move for financial reasons can be BIC. But, since child is very young and most of family is in Vancouver, there will be significant negative affect on the development of any relationships. Every case depends on its facts, deference to trial judge, etc, etc. Move NOT allowed.

**TRIAL DECISION**

Met the material change threshold // issue is what is in BIC // weigh interests of financial security of mother and ability to provide for her son and have a fulfilling career vs. value of child of having regular contact with his father and other members of his family // being only 3 son is in early stages of bonding ∴ threat to relationship if move // mother is still employable in Vancouver but just not in as good of a job // may be consequences to kid by mom having reduced income BUT there is no evidence that one of the consequences would be his needs not being met // balancing interests favours staying in Vancouver

## *Divorce act* vs. *FLA*

* **What law applies?**
  + Depends --> are parties married? Is the proceeding in the SC or PC
* **Can parties choose?**
  + MM v CJ - 2014 BCSC
    - NoFC seeking relocation under *FLA*; neither party relied on the *DA*
    - Court did not need to decide the paramountcy issue and undertook analysis solely under the *FLA*
* **Paramountcy?**
  + TK v RJHA - 2013 BCSC
    - “In my view the relocation provisions of the *FLA* are inconsistent with the *DA*, and it is ∴ appropriate to analyze the issue of relocation (mobility) under the *DA* and not the *FLA* ... In my view the *FLA* may well require the court to weigh relevant factors in a different manner than it would under the *DA*”

RELOCATION UNDER THE *FLA*

### The Goal

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

### Guardianship is Key

S. 40: only guardians may have parental responsibilities

S. 41: parental responsibilities includes decisions about where a child resides or with whom the child lives or associates

S. 69: only guardians have the right to challenge a relocation

## Section 46

* S. 46 applies in the following circumstances -- **NO agreement or order**:
  + There is no written agreement or Court order respecting parenting arrangements
  + An application is made under s. 45(1)(a) or (b), including an application for parenting time; and
  + One guardian plans to change the location of the children’s residence, which change can reasonably be expected to have a significant impact on the children’s relationship with the other guardian
* When s. 46 applies it is determined along with parental arrangements (parenting responsibilities and parenting time) and contact, the **Court is required to determine the parenting arrangements that are in the BIC by taking into account the factors set out in** s. 37(2) as well as the **reasons for the change in the location of the children’s residence**
  + NOTE -- s. 46 states the Court must not consider whether the guardian who is planning to move would do so without the child (the improper double-bind question)

**Informal Parenting Arrangements - s. 48**

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

**Notice of Application - s. 52**

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

## Part 4, Division 6 - Relocation

* **Applies if (s. 65(2))**:
  + Written agreement or Order respecting parenting arrangements or contact; and
  + Guardian plans to relocate him/herself or the child, or both
* “Relocation” = “a change in the location of the residence of a child or child’s guardian that can reasonably be expected to have a **significant impac**t on the child’s relationship with **a guardian** or one or more **other persons having a significant role** in the child’s life” (s. 65(1))
  + “**Significant impact**” ≠ change of residence within a metropolitan centre (ex/ the Lower Mainland) does not qualify as relocation - Berry v Berry - 2013 BCSC

Notice of Relocation - s. 66

* **Requirements**:
  + To all other guardians and persons having contact with the child;
  + At least 60 days in advance; and
  + In writing, with the date of the relocation and the name of the proposed location.
* **Court can grant exemption if**:
  + Notice cannot be given without incurring a risk of family violence; or
  + No ongoing relationship between the child and other guardian or contact person.
* Application for exemption can be brought *ex parte*.
* **Purpose of notice**:
  + Provides the parties the opportunity to discuss the move.
  + Allows for the ability to work out new parenting arrangements.
  + Provides time for a guardian to make an application if they oppose the move.

Resolving Relocation Issues - s. 67

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

Objecting to Relocation - s. 68

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

Orders Respecting Relocation - 69

* Court can make an Order permitting or prohibiting the relocation.
  + **Test**:
    - Best interest of the child: s. 37(2);
    - Good faith; and
    - Reasonable and workable arrangements to preserve the relationship between the child and the other guardians, persons entitled to contact, and other persons who have a significant role in the child’s life.
  + Onus depends on whether or not there is **substantially equal** parenting time.
* “**Good faith**” requirement is intended to restrict relocations to those likely to improve quality of life and to prevent moves designed to limit a child’s relationship with another guardian
* “**Reasonable and workable arrangements**” -- MN v CJ - 2014 BCSC
  + Father had not proposed reasonable and workable arrangements to preserve relationship between mother and son (8 year old)
  + This did not defeat relocation application; rather Court imposed such arrangements

Regarding Substantially Equal / Not Equal Parenting Time

* **Not substantially equal parenting time** - s. 69(4)
  + **Relocating guardian must satisfy the Court that**:
    - The proposed relocation is made in good faith; and
    - She/he has proposed reasonable and workable arrangements to preserve the relationships.
  + If Court is satisfied of the above, then relocation must be considered to be in the best interest of the child unless other guardian satisfies the Court otherwise.
    - **Onus is on the other guardian.**
* **Substantially equal parenting time** - s. 69(5)
  + **Relocating guardian must satisfy the Court that**:
    - The proposed relocation is made in good faith;
    - She/he has proposed reasonable and workable arrangements to preserve the relationships; and
    - The relocation is in the best interests of the child.
      * **Onus is on the relocating guardian.**
  + MM v CJ - 2014 BCSC
    - Each guardian exercised equal parenting time from separation to February 2013; then mother had five of 14 days. Jenkins J. found this was “a significant amount of parenting time” and held that each parent has substantially equal parenting time.

Factor to NOT be Considered - s. 96(7)

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

Four Possible Scenarios

1. Relocation allowed; other parent stays
2. Relocation allowed; other parent moves
3. Relocation denied; moving parent moves
4. Relocation denied; moving parent stays

Other Orders - s. 70

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

Good Faith - s. 69(6)

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

### Evidence for relocation

BIC

* S. 37(2) **of the *FLA* + look at**:
  + Gordon v Goertz
  + One v One
  + Stav v Stav

Other Evidence

* **Economic factors**
  + “[child] deserves the opportunity not to live in poverty” - JP v JB
  + Mother could work as teacher in Peace Region; parties’ combined income would be higher than if mother stayed in Kelowna - HNM v SCJK
* **Health and well-being of guardian**

### Uncharted Waters - Guardian Moving Without Child

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

### Must I Stay or Can I Go Now?

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

JURISDICTION AND CHILD ABDUCTIONS

* Under the ***Hague Convention on the Civil Aspects of International Child Abduction*** (and *FLA* s. 80) the removal of a child, or the retention of a child, is considered wrongful if it breaches the rights of custody under the law of the jurisdiction in which the child was habitually resident immediately before the removal/retention, and those custody rights were actually being exercised
  + Deciding what is in BIC is a matter for the courts of the “home state” ∴ courts must order return except for a few good reasons
* **CC provisions** - ss. 280-286
  + Abduction of a person under sixteen - s.280
  + Abduction of a person under fourteen - s. 281
  + Abduction in contravention of custody order - s. 282
  + Abduction - s. 283
  + Defences - ss. 284-286

EXTRAPROVINCIAL MATTERS

* Per FLA ss. 72-79, extraprovincial orders will be enforced in BC
  + s. 75 = extraprovincial order to be enforced as long as it was made by a tribunal with proper jurisdiction, etc.
  + s. 74 = test for whether a court may exercise jurisdiction in a child-related case

ECOMONIC CONSEQUENCES OF FAMILY BREAKDOWN

# Marriage Contracts and Property

ENFORCEABILITY OF MARRIAGE CONTRACTS

* s. 92 of FLA lets spouses make agreements respecting the division of property and debt
* Be aware when reading cases that refer to *FRA* that the considerations in the *FLA* are different.
  + s. 93 of FLA sets out circumstances where an agreement may be set aside because it was either procedurally or significantly unfair
  + According to SHJ v SKC (2013 BCSC) - s. 93 of FLA codifies Miglin and Rick v Brandsema

S. 93 - Setting Aside Agreements

* Two-step test similar to Miglin
* s. 93(3) outlines circumstances where an agreement may be set aside because it was **procedurally unfair** at time the parties entered into it:
  + 1. a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
    2. a spouse took improper advantage of the other spouse’s vulnerability, including the other spouse’s ignorance, need or distress;
    3. a spouse did not understand the nature or consequences of the agreement;
    4. other circumstances that would, under the CL, cause all or part of a contract to be voidable
* s. 93(5) provides that, even if procedurally fair, an agreement may be set aside if “the agreement is **significantly unfair** on consideration of the following”:
  + 1. the length of time that has passed since the agreement was made
    2. the intention of the spouses, in making the agreement, to achieve certainty
    3. the degree to which the spouses relied on the terms of the agreement

Hartshorne v Hartshorne (FRA; SCC 2004) - **test for enforceability of marriage contracts is whether the circumstances at the time of separation were in the reasonable contemplation of the parties at the time the agreement was made**

Facts: Parties sign agreement on day of wedding at request of the husband. Wife had gotten advice and was told it was likely unenforceable.   
Issue: Can a marriage agreement be found unfair in substance despite being entered into with legal advice in a procedurally fair manner?  
Law: Cannot determine fairness by simply comparing agreement to statutory regime. Fairness might depend on length of relationship (e.g./ would be fair if the relationship ended after one year, but not if it ended after 30). Some weight must be given to the agreement, but the amount of deference owed can vary. Test is whether the circumstances at the time of separation were in the reasonable contemplation of the parties at the time the agreement was made. Court should first apply the agreement and then consider the factors in the legislation to see if the contract operates unfairly. Must consider an agreement over property in light of spousal support.  
Analysis: Party cannot rely on advice that agreement was unfair in order to sign it and back out of it later. The events of the separation were exactly what was contemplated by the parties when making the agreement. Agreement does not operate unfairly, especially since wife still entitled to support.

Johnstone v Wright (FRA; 2005 BCCA) - **interference only allowed when things did not turn out the way the parties expected**

Facts: Applied Hartshorne to a cohab agreement to remain financially independent and keep all present and future property separate // independent legal advice indicated several deficiencies in agreement and recommended against signing it // Ms. applied to set aside agreement due to unfairness // W had SIGNIFICANTLY more assets than her

Law: Per Hartshorne, private arrangements can only be interfered with if things did not turn out the way the parties expected.

Analysis: Nothing unexpected occurred here -- when relationship was over J was left in position contemplated by the agreement

# Matrimonial Property

DIFFERENT TYPES OF PROPERTY REGIMES

1. **Separate Property**
   * In this regime, each party maintains separate property unless they decided otherwise through contract
   * Today in BC, people may accomplish this through contract, if they have
     + Lots of money (prenup)
     + Kids from previous marriage might, to protect assets for their kids
2. **Traditional Community of Property**
   * In this regime, all property owned and acquired by either spouse during the marriage is the common property of both; however, the husband has sole control and management of it
3. **“Full and Immediate” Community of Property**
   * Assets are shared immediately upon marriage; however, the administration of the assets is shared jointly by the spouses
4. **Deferred Community of Property (CANADA)**
   * General theory that all marital property is to be shared equally when the marriage partnership is dissolved
   * Separate property rights continue to exist during marriage although some restrictions are placed on those rights to protect the eventual deferred distribution between the spouses
     + Recognizes non-financial contributions
   * Assumes that while you’re married, you’re working in a partnership.
5. **Excluded property (*FLA*)**
   * **Excluded property**: assets acquired before the relationship, plus gifts, inheritances, certain court awards and insurance proceeds, certain trust interests
   * **Family property**: assets existing at the date of separation acquired during the relationship, plus the growth of excluded assets
   * **Presumptive division**: family property and family debt to be divided equally; excluded property remains property of owner

WHO IS A SPOUSE FOR PROPERTY DIVISION?

**Defined in s. 3 of the FLA**

s. 3(1): A person is a spouse for the purposes of this Act if the person:

* + 1. is married to another person, or
    2. has lived with another person in a marriage-like relationship, and
       1. has done so for a continuous period of at least 2 years, or
       2. except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.
  1. A spouse includes a former spouse.
  2. A relationship between spouses begins on the earlier of the following:
     1. the date on which they began to live together in a marriage-like relationship;
     2. the date of their marriage.
  3. For the purposes of this Act,
     1. spouses may be separated despite continuing to live in the same residence, and
     2. the court may consider, as evidence of separation,
        1. communication, by one spouse to the other spouse, of an intention to separate permanently, and
        2. an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

## Tests for proving a “marriage-like relationship” or conjugality

Gostlin v Kergin (1986 BCCA) - **focus first on subjective intention, if unclear, move to objective indicators**

Law: Determine whether the unmarried couple has embraced permanent support obligations. If you were to ask each of them "if your partner were suddenly disabled for life, would you feel committed to their life-long financial and moral support?" If subjective intent is elusive, then turn to objective factors, most importantly whether one partner surrendered financial independence.

\*\*SCC did not explicitly reject or criticize this in M v H ∴ modernized version still applies in BC\*\*

Takacs v Gallo (1998 BCCA) - **confirms** Gostlin **-** Molodowich **too expansive, subjective intent in** Gostlin **a good thing**

Law: Objective indicators in Gostlin were advanced as a means of divining subjective intentions when they proved elusive. Subjective or conscious intentions may be overtaken by conduct such that whilst a person living with another might not say they were in a marriage-like relationship, the reality is that the relationship has become such.

Molodowich v Penttinen (1980 Ont) - **series of objective indicators to assess conjugality**

Law: Sets out series of objective indicators, on p 172-173, such as shelter/sleeping arrangements, sexual and personal behaviour, performance of domestic services, social and societal relations, economic support and attitude and conduct concerning children. The extent to which a particular element must be taken into account varies with each case. Must be flexible.

Austin v Goerz (2007 BCCA) - **can be in a marriage-like relationship despite lacking capacity to marry (such as because already married).**

**Financial dependence no longer a key factor** --> marriage = partnership between equals so no reason why marriage-like relationship should be different

GJJ v AKM (FRA; 2009 BCSC) - **it is cessation of marriage-like relationship that is important, not the cessation of cohabitation**

Law: Arrangement of finances just one factor in determining whether there is a marriage-like relationship. Must determine whether there was intent to live in a marriage-like relationship from an objective overview of the facts. A marriage-like relationship is ended when either party has a settled state of mind that the relationship is at an end. Key factors include absence of sexual relations, physical separation and cessation of presentation to the outside world as a couple.

## When can a spouse bring a claim?

S. 198 of the *FLA* provides that a proceeding for division of property or allocation of debt between spouses must be brought:

* **For married spouses** – within **2 years** of the date of divorce or declaration the marriage is a nullity; and
* **For unmarried spouses** – within **2 years** of the date of separation.

S. 252 - unmarried spouses can elect to amend their pleadings to advance claims under the FLA, provided that:

* They are spouses under s. 3;
* They have met the time limit imposed by s. 198; and
* They are otherwise at liberty to amend their pleadings
* Married spouses must continue an action under the *FRA* unless they otherwise agree

Meservy v. Field, 2013 BCSC 2378 - ***FLA* has a restrospective effect WRT unmarried spouses**

Facts: The parties were unmarried spouses, whose marriage-like relationship had lasted longer than two years // parties separated before the FLA came into force // parties were separated for less than two years when the action was commenced // Mr. Field amended his Counterclaim to include a claim under the *FLA* for division of property owned by Ms. Meservy // Ms. Meservy argued that because the parties had separated before the *FLA* came into force, the *FLA* did not apply

Law: The Court held that the *FLA* has a retrospective effect, in that parties who meet the definition of spouse in s. 3 and bring their claim within 2 years of their separation (as required by s. 198) obtain the status of spouses (or former spouses) under the *FLA* on the date of the coming into force of the *FLA* and are entitled to bring claims for property division under the *FLA*

* This results even if the facts giving rise to parties’ status of spouses (or former spouses) under the FLA occurred prior to the coming into force of the FLA
* If the parties separated before the coming into force of the *FLA*, Part 5 of the *FLA* will apply provided that they separated within two years of the FLA coming into force (i.e. at some point after March 18, 2011)

WHAT IF YOU ARE NOT A “SPOUSE”?

* If you are not a “spouse” you cannot make a claim for the division of property or debt through the *FLA*
  + **Jointly Owned Asset**: Presumed to each be entitled to half of the value of that property
  + **One Person Owns the Asset**: The other person will have to prove an entitlement to that asset through the principles of the CL
* Nova Scotia v. Walsh (2002) SCC (aka Walsh v Bona) (Vol II p 157) - **\*Equality vs Autonomy\* SCC decided not to extend property regimes to common law spouses. Valued individual’s right to choose over right to equality.**

## JOINTLY OWNED ASSETS

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

## individually OWNED ASSets - TRUSTS (CL)

* Still important for CL couples together for less than 2 years
* **Three types of trust claims that can be made**:
  1. **Constructive trust** -- when you’re looking at domestic property and disputes, the main focus should be unjust enrichment and constructive trust
  2. **Express trust** -- comes into existence when settlor expresses intention that specific property be held for specific purpose/person
  3. **Resulting trust** -- cases did look for common intention resulting trust when dealing with domestic property disputes but Kerr v Baranow killed it

## Unjust Enrichment and Constructive Trusts

### Step 1: Test for Unjust enrichment

* Has there been:
  1. An (unjust) enrichment?
  2. A corresponding deprivation?
  3. No juristic reason for the enrichment?
     + Under no obligation, contractual, statutory or otherwise to enrich the other party
     + Reasonable expectations of the parties
     + Public policy

Pettkus v. Becker - 1980 SCC - **\*\*first case\*\* sets out requirements for unjust enrichment in this context**

Facts: Lived together, never married. She had always had better jobs. They then decided to become beekeepers and bought properties. They both worked really hard on farms/business. Relationship later broke down, all properties were in the man’s name. He gave her $3,000 and 40 beehives and said good luck. She brought a case up to SCC saying unfair. TJ said it was very fair. CA said no and gave her a half interest in all the properties.

Law: SCC agreed with CA. They said (1) he was unjustly enriched. Through sweat equity and fin’l support, he got 3 properties. (2) She suffered deprivation – she quit her job, bought these properties and worked her butt off. (3) There was no juristic reason for this enrichment – there was no contract, she wasn’t an employee, there was no reasonable expectation of the parties. There was a connection between her work and those properties. B/c of this, SCC found there was unjust enrichment and she was entitled to share in the property. They had both started with nothing, each worked continuously and it was a joint effort.

### Step 2: Casual Connection

* Is the contribution of the party **sufficiently substantial and direct** as to entitle him/her to a portion of the profits or property?
  + She worked just as hard as he did
* **Contribution must relate to the preservation, maintenance or improvement of the property**?
  + Her contribution did
* The contribution does not need to be connected to the acquisition of the property

Sorochan v Sorochan - 1986 SCC (Example of this applied) - **clear link between contribution and the assets = causal con.**

Facts: W moved onto H’s property. They were together for 42 years, they had 6 children. They worked on the farm. At end of relationship he sent her packing. In that case, you would say she had a reasonable expectation of interest in that property, as she contributed to the preservation, maintenance or improvement of property, even though her work did not contribute to the acquisition of the asset. SCC agreed.

Peter v. Beblow - 1991 SCC - **definition of absence of a juristic reason**

Facts: 12 year relationship. She moved into his home, was a homemaker, looked after children, no compensation.

In this case, court defined what absence of juristic reason means: They’re under no contractual obligation or otherwise to enrich the other party.

* Kerr: there is no reason in law or justice for D’s retention of benefit from P. First consider if there is an established category of juristic reason (ie. intention to make a gift, a contract, or a disposition of law). Then consider reasonable expectation of the parties and public policy reasons.

In this situation, reasoning holds that he was able to increase his estate and maintain his property b/c of work she did in the home. She was under no obligation to do it, except she would’ve had legitimate expectation in developing an interest in the property. //Contribution to care of household and childcare duties without compensation enhanced value of property, sufficient to make out a proprietary claim.

Kerr v Baranow - 2011, SCC - **most recent - deals with remedies, how to establish, etc.**

* Use of CIRT is incorrect -- should approach using unjust enrichment and constructive trusts
* Deals with remedies
  + More than two remedies (provision for unpaid services and unrecognized contribution to property)
  + Introduces **joint family venture** -- occurs where an unjust enrichment occurs when one party retains a disproportionate share of the assets produced by the joint efforts of the couple
    - **Factors for if there was a joint family venture**:
      * Mutual effort = joint contributions, or contributions to a common pool
      * Economic integration
      * Actual intent = parties’ actual intent, express or inferred, from the evidence
      * Priority of the family = some sense of detrimental reliance on the relationship for the sake of the family
* **Quantum meruit vs. constructive trust**
  + Monetary remedy for UE is not restricted to quantum meruit
  + Where monetary award is appropriate should be calculated on the basis of the share of those assets proportionate to claimant’s contribution
  + To be entitled to this type of reward must show -- JFV + link b/w contributions and accumulation of assets
  + JFV is a question of fact and may be assessed by having regard to all of the circumstances

### Step 3: Remedy

* **Monetary Judgement**: Imposed if there is sufficient money (court considers probability that award will be paid)
* **Constructive Trust**: Use if $ insufficient
  + Value is based on what is fair, having regard to the contribution to the property in question

*FLA* AND PROPERTY DIVISION

* Part 5 of the FLA
  + Spouses are entitled to an **undivided half interest in “family property”** as a tenant in common regardless of use or contribution (s.81)
    - “**Excluded Property**” is defined in s. 85
    - “**Family Property**” is defined in s. 84
    - “**Triggering Event**” = the date of separation (s. 81)
  + Equally responsible for family debt
* Valuing Family Property and Family Debt (s. 87)
* Unequal division by order and division of excluded property (s. 95 and 96)
* **Once an item qualifies as a family asset, it will be subject to *prima facie* equal division (subject to reapportionment)**

### *FRA* & old method vs. *FLA*

* Under *FRA* fact that asset was acquired prior to marriage was immaterial -- test was whether it was for ordinary use for a family purpose (OUFP Test)
* Rather than arguing that property was not for OUFP, under *FLA* must argue that property falls into one of the **s. 85** exclusions for it not to be considered family property

### What is “excluded Property”?

Asselin v. Roy, 2013 BCSC 1681 - **discusses “excluded property” under the *FLA***  
Facts: Parties were not married and separated after a 24-year relationship // Mr. Roy had a home and other property before the relationship began. // He sold the home during the relationship and used the proceeds to buy another family home, registered in his name. // He also bought rental properties, which were registered in his name. // The parties also bought two properties registered in joint names // Both parties received inheritances during the relationship. // Mr. Roy used his inheritance to pay the mortgage on the family home and as a down payment on one of his rental properties. // Ms. Asselin used her inheritance to renovate the family home and as a down payment on a jointly-owned property. // Some of her inheritance remained in her separate bank account and her RRSP at separation. // Ms. Asselin sought to exclude the accounts that arose from her inheritance and funds traceable into other properties. // Mr. Roy sought to exclude property owned before the relationship, the property bought with his inheritance, and the equity in the family home traceable to his inheritance.

Analysis: **The Court sheds some light on the types of evidence that will be required to prove an exclusion**:

* A proposed “broad brush” approach to the parties’ competing claims for exclusions was rejected as being inconsistent with the approach mandated by the FLA (para. 192)
* Instead, the Court’s reasons indicate that historical appraisals and other evidence as to the value of excluded property at the date of cohabitation or the date of acquisition are normally required to assess claims for exclusions (e.g. paras. 196, 201, and 213-214)
* **The Court commented at paras. 105-106 on the types of evidence future litigants advancing claims for exclusions under the FLA will be required to provide**:
  + Where an exclusion of property is sought, documents showing the value of the property as at the time cohabitation commenced and at the date of separation will be critical;
  + Were excluded property has changed character into another asset, documents should be provided to allow the Court to trace the transaction back to the property said to be excluded; and
  + Where inheritances are said to come into play, estate documents should be produced

TYPES OF FAMILY ASSETS

* **Capital Assets**
  + Under *FLA*, because OUFP doesn’t matter, question will be whether the capital asset is included under s. 84 or excluded under s. 85
* **Hobbies**
  + Under *FLA*, central issue will be whether or not hobby-related property falls under s. 85
  + Also hobby property that is inherited or that is gifted will be excluded
  + Hobby property acquired during relationship will be added to pool of assets
* **Tracing: Conversion of a Family Asset into a Different Asset**
  + s. 84(1)(b) allows tracing -- conversion may be a factor in reapportionment
* **Debts**
  + s. 86(a)+(b) make spouses equally responsible for family debt
  + “**Family debt**” = all financial obligations incurred by a spouse during the relationship AND after separation if incurred for the purpose of maintaining family property
* **Contingent Liabilities**
  + Liabilities that cannot be valued at the time of trial -- Stein v Stein arose under *FRA* which was silent on debt
* **Pensions**
  + s. 84 expressly includes pensions as family property
* **Ventures and Business Assets**
  + *FLA* doesn’t recognize the distinction between ventures and business assets
  + *Balic v Balic - 2006 BCCA* still good law under *FLA* for the apportionment of shares of a business deemed to be a family asset
    - Liquidation of such a business is usually not an appropriate solution after family breakdown
      * If the jurisdiction exists to order the liquidation of a company in order to facilitate the distribution of its assets to divorcing spouses, such an order should be made only in exceptional circumstances, where all the necessary procedural safeguards are in place, and where the court has complete information as to the consequences of the order sought
    - 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

VALUATION

S. 87(a) of the *FLA* provides that the value of family property is the **fair market value** unless an agreement or Court order provides otherwise and except in relation to a benefit under a pension plan.   
S. 87(b) provides that the valuation date is either the date of an agreement or the date of trial or the hearing before the Court respecting the division of family property and family debt.

Asselin v. Roy, 2013 BCSC 1681 - **valuation date considerations**

* The valuation of assets which are family property consisting of accounts and financial institutions subject to day to day use, such as checking accounts, should be taken as at the date of separation (para 171).
* However, “for those accounts representing long-term investments, specifically the RRSPs of each party found to be family property; those are to be divided in specie at the time of division unless it can be shown contributions were made post-separation. In such case, the amount of such contribution should be subtracted from the divisible portion of the asset” (para 172).

PROTECTING PROPERTY

## Financial Restraining Orders

S. 91 of the *FLA* provides authority for **orders restraining a spouse from disposing of property**:

* “The Respondent shall be and is hereby restrained from disposing or encumbering, or attempting to dispose of or encumber, the family property and other property at issue without the express written agreement of the Claimant or further order of this Honourable Court.”
* **NOTE**: The Provincial Court does not have the power to make orders affecting property, including restraining orders about property

A) S. 91 of the FLA

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

B) Rules of Court

* Rule 12-4 of the Supreme Court Family Rules gives the court the authority to make a general restraining order, also called an injunction, to make someone do something for not do something

C) The Law and Equity Act - s. 39

* Also deals with an injunction

### Failure to COmply with a Property Restraining Order

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

UNEQUAL DIVISION

* **Change from “unfair” under “significantly unfair” is presumably meant to create a higher threshold and make the test for reapportionment stricter --> BUT significantly unfair was not defined**
* Under s. 95 of the FLA, the Court may divide family property and family debts unequally if it would be **significantly unfair** to equally divide family property or family debt or both, having regard to specified criteria.
  + **The criteria include**:
    - 1. Length of the relationship;
      2. The terms of any agreement between the spouses, other than a written agreement described in s. 93(1);
      3. A spouse’s contribution to the career or career potential of the other spouse;
      4. Whether family debt was incurred in the normal course of the relationship;
      5. If the amount of family debt exceeds the value of family property, the ability of each spouse to pay family debt;
      6. Whether a spouse has, post-separation, caused a significant decrease or increase in the value of family property or debt beyond market trends;
      7. Where a spouse, other than in good faith:
         1. Substantially reduced the value of family property,
         2. Disposed of property, or changed property into another form, causing the other spouse’s interest in the property or family property to be defeated or adversely affected;
      8. A tax liability that may be incurred by a spouse as a result of a transfer or sale of property or any order of the court; and
      9. Any other factor that may lead to significant unfairness
* Under s. 95(3) of the *FLA*, the Court may consider the extent to which financial means and earning capacity of a spouse have been adversely affected by the responsibilities and other circumstances of the relationship, provided spousal support objectives (in s. 161) are not met.

## MEANING OF “SIGNIFICANTLY UNFAIR”

Asselin v. Roy, 2013 BCSC 1681 - **not found to be significantly unfair**

* Involved unmarried spouses whose claims were decided under the *FLA*. The Court found that there was no significant unfairness in an equal division of the family property (paras 253-254).
* The Court notes that the parties’ relationship was long, and the division of property under the *FLA* would leave each party in a position of economic well-being and self-sufficiency, despite the fact that Mr. Roy was not working (para 255).
  + “‘I know it when I see it’ and this ... is not ‘it’” (para 254).
* Kept separate bank accounts // tracing -- looking back to see what should be excluded // one home excluded because came from an inheritance

GL v GR (FLA; 2013 BCSC) - **significant unfairness > trifling unfairnes**s

* What is meant by "significantly unfair" in 95(1)?

Law: Court should not interfere unless there is more than trifling unfairness. Court should not be trying to achieve perfect fairness.

Karreman v. Karreman, 2014 BCSC 381 - **found that situation was significantly unfair**

* Involved unmarried spouses whose claims were decided under the FLA. Both parties were self-represented and the Court did not have the benefit of submissions on the meaning of “significantly unfair.”
* The Court considered s. 95 and found that there were “elements to this case that clearly militate against dividing up the proceeds of sale [of the family home] equally between the parties” (para 15). If the proceeds were divided equally, the result would have been that the husband received a double benefit – giving the wife the family home in lieu of child support and then effectively clawing half of it back, while retaining the benefit of his equipment and vehicles (para 6, 16).
* In the result, the Court concluded that it would be significantly unfair to award Mr. Karreman any of the proceeds from the matrimonial home.

Thomson v. Young, 2014 BCSC 799

* Involved unmarried spouses. The parties resided in the home owned Mr. Thomson. During the relationship, a line of credit secured by the home was obtained in both parties’ names.
* After separation, Ms. Young withdrew $100,000 from the line of credit. The parties orally agreed that she would only have to repay $25,000 and they would give up all claims for any further division of family property or debt.
* In the result, there was an unequal division of family property & family debt in favour of Ms. Young. Mr. Thomson then brought an action for division of family property under the FLA, and that the oral agreement should be set aside.
* The Court held that s. 93 of the FLA **applies only to written agreements**, and did not apply (para 45).
  + The Court held that because Mr. Thomson sought an equal division of family property & family debt in his Notice of Family Claim and in his Notice of Application for Summary Trial, he cannot rely on s. 95 (para 45).
  + In the result, Mr. Thomson must establish that the terms of the agreement are significantly unfair to him on the basis of the common law. In the result, the issue of whether the agreement should be varied or set aside was decided under common law principles, not under the FLA.
    - Under the common law, if the Court finds that married spouses entered into a binding agreement and one spouse challenges the agreement on the ground that it would be unfair to enforce it, the Court will review (and may set aside or vary) the agreement, if it is found to be unfair (para 47).
  + The Court notes that ss. 92-94 of the FLA enact rules similar to the common law, and states that under the common law, the Court “will only set aside an agreement made between spouses respecting the division of property and debt, if the division agreed to would be ‘substantially different’ from the division that the Court would order and ‘significantly’ unfair to one of the spouses” (paras 48-49).
* The Court held that the agreement was not significantly unfair to Mr. Thomson with respect to the division of family property, but was significantly unfair to him with respect to the division of family debt (paras 55, 58). The Court varied the agreement and ordered that Ms. Young pay $20,000 to Mr. Thomson as her share of the family debt.
  + He’s on the hook because there was an agreement

L.G. v. R.G., 2013 BCSC 983 - **sufficiently weight consequences**

* Involved married spouses whose claims were determined under the FRA.
* The Court commented on the interpretation of ***significantly unfair*** in obiter (para 71):
  + The term “significantly unfair” in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve “perfect fairness.” Only when an equal division **brings consequences sufficiently weighty to render an equal division unjust or unreasonable** should a judge order depart from the default equal division.
    - VERY SUBJECTIVE
* The Court noted that its conclusions with respect to the division of assets would have been the same under the FRA and the FLA.

Cabezas v. Maxim, 2014 BCSC 767

* Involved unmarried spouses whose claims were decided under the FLA. Ms. Cabezas sought an unequal division of the value of the family home in her favour. Mr. Maxim or his company provided the down payment for the home, but the parties agreed that Ms. Cabezas would repay 1⁄2 of the down payment. The property was registered in joint names.
* When applying s. 95, the Court considered the parties’ contributions to the down payment for the home (para 46). The Court ordered an equal division.
* Gifts are supposed to be excluded --> judge cited something not in the *Act*

L.G.P. v. C.F.B., 2014 BCSC 750

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

Remmen v. Remmen, 2014 BCSC 1552

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

DIVISION OF EXCLUDED PROPERTY

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

COMPENSATION ORDERS

* s. 90 - can be used to grant one party exclusive temporary use of the family residence and personal property in it
* s. 97 - gives court the authority to make any order necessary to give effect to judicial reapportionment of property under s. 65 or Part 6
* s. 89 - interim distribution of family property
  + When it would not be harmful to the interests of a spouse and will fund:
    - Family dispute resolution
    - All or part of a proceeding under the *Act*
    - Obtaining of information or evidence in support of family dispute resolution or an application to a court

# Matrimonial Property - Debt

Bilawchuk v Bilawchuk - 2014 BCSC 2067

Facts: 18-year relationship ended // sorted out issues at a JCC // sold house for less then debts owing // all that was left was for them to divide debt between them // both earned comparable incomes

Analysis: agreed that debt should be apportioned equally between them // did not agree on value of debts // there were two consent orders - the first one had Mr. taking more debts because he was going to take over the mortgage on house // couldn’t take up mortgage so sold house // Mr. argues that debt should be reapportioned because of this // found that second consent order did replace the first

* Court looks at problem of assessing debts at trial under s. 87 --> Mrs. had paid down $15,700 of her student loans and wouldn’t get any credit for that if debt valued at trial
* Allocation of debt under first CO ≠ fair division --> no equity for Mr. from the house to offset Ms. debts assigned to him
* KMJ v JHDN, 2014 BCSC - a party who by choice or necessity pays down a debt post-separation and pre-hearing would be prejudiced and the other party would have a windfall if debt assessed at trial
* Mr. argues that student loans ≠ family debt -- under the *FLA* s. 86 it is because incurred during the marriage
* Decided to value student loans at date of separation

General rule cannot be applied rigidly without looking at what has transpired since separation

* Look at debts separately
* Adjust the valuation date you might use
* Different types of debts need to be serviced in different ways
  + Ex/ some debts may incur higher interest

Tracing - Example

Redmond?

* At beginning of relationship own a house worth $100,000
  + At end of day house is worth $300,000
* Get what you put in and split the profit?
* What if house is worth less? $50,000
  + FLA would say you get what you bring in ∴ would get everything
* $200,000 in investments all from during the relationship
  + Presumption of dividing equally
  + So far answer is no that you cannot take from that money to make of loss of value of house
* Look at each thing separately
  + Under FLA how do you divide it up
  + Tracing is attached to the property itself
    - Gets tricky because over the course of the relationship you sell and buy things
    - Must be able to trace the asset to what it ends up being

# Spousal Support - Rationales & Models

* *DA* and *FLA* are quite similar --> **must establish entitlement** before amount and duration
  + All of the contractual, compensator and non-compensatory grounds of entitlement are used concurrently

WHAT IS IT?

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

## WHO IS RESPONSIBLE FOR SPOUSAL SUPPORT AND WHY?

Messier v. Delage, [1983] S.C.J. No. 80

* At what stage the state vs. the ex-spouse should be responsible for the economic shortfalls of an individual?
* “That does not mean that the obligation of support between ex-spouses should continue indefinitely when the marriage bond is dissolved, or that one spouse can continue to be a drag on the other indefinitely or acquire a lifetime pension as a result of the marriage, or to luxuriate in idleness at the expense of the other...” - Chouinard J.
* “The current economic situation, the difficulty in finding work and the resulting high rate of unemployment” and asked whether “ a divorced spouse who is working always should bear the consequences of this and provide for the needs of his unemployed former spouse, or is it for the government, if it cannot remedy, at least to alleviate the effects and to what extent?” - Lamer J. (DISSENT)

## SPOUSAL SUPPORT, SAME SEX COUPLES & THE OBJECTIVES OF SPOUSAL SUPPORT

M v. H, [1999] S.C.J. No. 23 - declared unconstitutional the exclusion of same-sex spouses from the statutory right and obligation of spousal support

* Purpose of spousal support is not to remedy systemic inequality associated with opposite-sex relationships
* Purpose is need and actual dependence

## THE LEGISLATION

s. 15.2 of the *DA*

* s. 17(4.1) = basic test for variation

s. 161 of the *FLA*

* s. 167(2)(a) = basic test for variation

**The objectives of spousal support are**:

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

THE THREE CONCEPTUAL GROUDS FOR SPOUSAL SUPPORT

1. **Contractual** - where parties have entered into a marriage or separation agreement, or contractual obligation is implied
2. **Compensatory** - where spouse has foregone opportunities or endures hardships as a result of the marriage
3. **Non-Compensatory** - where the spouse’s need exceeds the entitlement to be compensated -- obligation stems from the “basic social obligation” of the marital relationship itself

## CONTRACTUAL (the *pelech* trilogy and *miglin v miglin*)

* Until Miglin, the authority on how much weight a court should attach to an agreement, was the trilogy of cases, “Pelech v. Pelech; Caron v. Caron and Richardson v. Richardson (the “Trilogy”).
  + These cases held that, subject to limited exceptions the parties should be bound by their agreement. The discretion to depart from the spousal support provisions of an agreement on the application of the supported spouse was limited to cases in which the applicant could show a radical change of circumstances flowing from a pattern of economic dependence caused by the marriage.
  + Story v Story (1989 BCCA)
    - Test in Pelech Trilogy only applies when varying orders or agreements that were intended to be final. Many times it will be unrealistic to assume a spouse will become self-sufficient quickly.
* In Miglin, the SCC ruled that the threshold established by the trilogy is no longer appropriate under the current, broader support objectives under the *Divorce Act*. The court held that the **grounds for ordering support in an amount that differs from an agreement are broader; however, agreements on support are still entitled to deference**.

Miglin v Miglin - 2003 SCC - **test for re-opening a separation agreement \*\*not as strict as Pelech\*\***

* Two-stage test for approaching an originating application for support where there is an existing agreement on support. The court assesses the agreement from two points in time --> the time the agreement was made and the current circumstances
  + **STAGE 1: Court must look at**:
    1. The circumstances in which the agreement was made to determine whether the agreement was obtained **fairly**; and
    2. Whether the agreement **substantially complied with the objectives** of the Divorce Act
  + An agreement that was not obtained fairly or that departed substantially form the objectives of the Act will be given little weight
    - **NOTE**: in N. (D.K.) v. O. (M.J.), 2003 BCCA 502, support was awarded notwithstanding an agreement waiving support because the agreement did not adequately meet the objectives of the Divorce Act.
  + **STAGE 2 - current circumstances**:
    - If the agreement satisfies the first stage, then the court must consider **whether the agreement still reflects the original intentions of the parties and remains in substantial compliance with the objectives** of the Act.
      * If there has been a **material change of circumstances not reasonably anticipated** by the parties that has led to a situation which cannot be condoned, the court may give little weight to the agreement.
      * “It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight” [para. 91]

Pelech vs. Miglin

* Pelech = radical and unforeseeable change in circumstances which has a causal connection to the marriage
* Miglin = look at when agreement was made and current circumstances -- not as strict

Rick v. Brandsema - 2009 SCC - **failure to make honest disclosure while negotiating agreements and exploiting vulnerability is sufficient to overturn an agrement, depending on circumstances of each case.**

* Separation agreement with attention to mental health of one of the parties
* An agreement negotiated with full and honest disclosure and without exploitative tactics will likely survive judicial scrutiny
* 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
* Process should be to every extent possible free from informational and psychological exploitation

## COMPENSATORY (MOGE v. MOGE)

* Relied upon most frequently in situations where one spouse, more often the woman, has left the workforce to care for the children but even in childless marriages, couples may also decide that one spouse will remain at home and any economic disadvantage to that spouse flowing from that shared decision should be regarded as compensable.
* A spouse may also be compensated if they decline a promotion, refuses a transfer, leaves a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities and incurs economic loss (para. 82)
* The financial consequences of the end of the marriage include things like the loss of future earning power, loss of seniority, missed promotions and lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance. Persons who are not in the work force also can’t take advantage of job retraining and the upgrading of skills provided by employers (para. 79)
* You aren’t guaranteed the same standard of living but the longer the relationship, the closer the economic union, the greater will be the presumptive claim to equal standards of living (para. 84).
* **L’HD (concurring) - purpose of spousal support** = “*to relieve economic hardship that results from “marriage or its breakdown”. Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party’s economic prospects.*”
  + “*It would be perverse in the extreme to assume that Parliament’s intention in enacting the act was to financially penalize women in this country.*” - LHD para. 63
  + “*A division of functions between marriage partners, where one is a wage-earner and the other remains at home will almost invariably create an economic need in one spouse during marriage. The spouse who stops working in order to care for the children and manage a household usually requires financial provision form the other. On divorce, the law should ascertain the extent to which the withdrawal form the labour force by the dependent spouse during the marriage (including loss of skills, seniority, work experience, continuity and so on) has adversely affected that spouse’s ability to maintain himself or herself. The need upon which the right to maintenance is based therefore follows from the loss incurred by the maintained spouse in contributing to the marriage partnership*.”
  + “*If the functions of financial provision, household management and child care are divided in any particular way between a husband and wife, the law should characterize this an an arrangement between the spouses for accomplishing shared requirements of the marriage partnership according to their preferences, cultural beliefs, religious imperatives, or similar motivating factors. A spouse who does one of these things should be seen as freeing the other spouse to perform the remaining functions.*” [para. 65]
  + “*However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one*.” [para. 70]

Moge v Moge (1992 SCC)

Facts: Family in a "traditional" relationship. 10 years after divorce, wife's earnings are still minimal.  
Law: Pelech does NOT apply when no agreement is in place. Point of spousal support is not restricted to creating self-sufficiency or simply meeting the "means & needs" criteria. It must deal with the economic consequences of the marriage: to what extent does withdrawal from the labour force during the marriage affect the spouse's current ability to maintain themselves. Support may continue indefinitely, until adequate compensation has been made. Not appropriate to take a formalistic view of causation (e.g./ "She 'chose' to stay home, so economic consequences did not 'arise' from the marriage”).

NOT causal -- not because of relationship that you have issues but just that you bare the burden on the relationship

### “Traditional” vs. “Modern” Dichotomy

* “It would appear that the courts have recognized a substantial change in the nature of marriages and the roles played by the parties. At the one end of the scale we have the traditional marriage where one spouse is the breadwinner and the other the child-rearer, often entitled to be supported for life. At the other end we have the type of marriage where both spouses participate in the economic advancement of the family unit and although one may be disadvantaged for a period of time during the marriage by deserting career opportunities, this can be balanced upon dissolution by provisions promoting the self-sufficiency of that spouse and thereafter both parties go their own ways. In between these two extremes we still find a variety of marital arrangements that must be fairly dealt with upon dissolution...
* In my opinion, a judge today in approaching a maintenance order should continue to recognize the distinction between the traditional and the modern marriage. Upon dissolution of a modern marriage the goal should be the placing of both parties in a position of economic self-sufficiency at the earliest possible time...Temporal limits on maintenance should be utilized to accomplish this end, and illness and other factors not related to the marriage should not be used to justify the continuation of maintenance which otherwise should cease” (Heinemann v. Heinemann (1989), 20 R.F.L. (3d) 236 (N.S.S.C., App. Div.)

### Divorce - Women & Children

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

### Judicial Discretion

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

## NON-compensatory model (basic social obligation)

* Applies in situations where the recipient spouse’s need exceeds the entitlement to be compensated. In such situation, the obligation to provide support derives from the “basic social obligation” of the marital relationship.
  + Consider the standard of living as the primary criteria together with the other party to pay when it is not possible to determine the economic loss of a disadvantaged spouse

Bracklow v Bracklow - 1999 SCC

Facts: Mrs B unlikely to be able to work due to medical conditions.   
Issue: Is a sick or disabled former spouse entitled to support beyond the compensatory model - over and above what is required to compensate for the marriage and its breakdown?  
Law: Heck yes! Premise of compensatory and contractual models is that parties are equal. Marriage also involves complex interdependencies that cannot be easily unravelled and give rise to a fundamental obligation to provide for a disabled former spouse. Need alone can establish support.

* “.*..where compensation is not indicated and self-sufficiency is not possible, a support obligation may nonetheless arise from the marriage relationship itself*.” [para. 37]
* “*The “ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves”(Family Relations Act, s. 89(1)9d)), suggests a concern with need that transcends compensation or contract. Even if a spouse has foregone no career opportunities or has not otherwise been handicapped by the marriage, the court is required to consider that spouse’s actual ability to fend for himself or herself and the effort that has been made to do so, including efforts after the marriage breakdown. Similarly, “economic circumstances’ (s. 89(1)(e)) invites broad consideration of all factors relating to the parties’ financial positions, not just those related to compensation*.” [para. 40]
* “*[E]conomic hardship...arising from the breakdown of the marriage” is capable of encompassing not only health or career disadvantages arising form the marriage breakdown properly the subject of compensation..., but the mere fact that a person who formerly enjoyed intraspousal entitlement to support now finds herself or himself without it*” [para. 41]
* “*A spouse’s lack of self-sufficiency may be related to foregoing career and educational opportunities because of the marriage. But it may also arise from completely different sources, like the disappearance of the kind of work the spouse was trained to do (a career shift having nothing to do with the marriage or its breakdown), or, as in this case, ill health.” [para. 42]*
* **Re Quantum**: *“[T]he same factors that go to entitlement have an impact on quantum*” [para. 50]
  + “*For practical purposes, however, it may be useful to proceed by establishing entitlement first and then effecting necessary adjustments through quantum*.” [para. 50]
  + “*The quantum awarded, in the sense of both amount and duration, will vary with the circumstances and the practical and policy considerations affecting particular cases*.” [para. 53].

VARIATION OF SUPPORT ORDERS

## VARIATION OF SUPPORT ORDER (FLA)

**Changing, suspending or terminating orders respecting spousal support**

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

* 1. Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
     1. a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
     2. evidence of a substantial nature that was not available during the previous hearing has become available;
     3. evidence of a lack of financial disclosure by either spouse was discovered after the order was made.
  2. Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that
     1. the order is necessary to relieve economic hardship that
        + 1. arises from a change described in subsection (2)(a), and
          2. is related to the relationship between the spouses, and
     2. the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

S. 164: provides for when a court can make an order that replaces all or part of an existing agreement for spousal support

* The court cannot make an order for spousal support in the face of an agreement unless all or part of the agreement is set aside (165(3)).
* There are **two tests** in s. 164 that, if met, will allow the court to set aside or replace an agreement with an order.

**TEST 1 - Procedural Fairness**

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

**TEST 2 – “Significant Unfairness”**

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

## Variation of Support Order (DA)

S. 17 (4.1) of the Divorce Act:

* Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and in making the variation order, the court shall take that change into consideration

# Spousal Support (Fault & SSAGs)

SPOUSAL MISCONDUCT

Divorce Act

* s. 11: directed the court to have “regard to **the conduct of the parties** and the condition, means, and other circumstances of each of them” in exercising its discretion in making an award of spousal support
* s. 15.2(5): in making an order under (1) or an interim order under (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage

FLA

* s. 166: in making an order respecting spousal support, the court must not consider any misconduct of a spouse, **except conduct that arbitrarily or unreasonably**
  + 1. causes, prolongs, or aggravates the need for spousal support, or
    2. affects the ability to provide spousal support
* s. 167(1)(c): allows a court to change a support order in certain circumstances, including lack of financial disclosure

Leskun v Leskun (2006 SCC) - **difference between misconduct and emotional consequences of misconduct**

Issue: Despite DA s. 15.2(5), can court consider effect of emotional devastation due to misconduct?  
Law: Needs and circumstances of a spouse are relevant, but attribution of fault is irrelevant. There is a difference between misconduct and the emotional consequences of misconduct. While spouses must attempt "as much as is practicable" to become economically self-sufficient, that is not a duty.   
Analysis: Setting aside fault, facts are that Ms L is unable to return to workforce for a variety of reasons, and so Mr L must still provide support.

### FLA Cases on Spousal Misconduct and Support

Peterson v. Lebovitz, 2013 BCSC 651

A payor’s failure to take meaningful steps toward employment and repeated applications to terminate support are arbitrary actions adversely affecting the ability to pay

Bateman v. Bateman, 2013 BCSC 2026

The cause of the failure of relationship is not a factor to be considered

SPOUSAL SUPPORT ADVISORY GUIDELINES

* Not referred to by FLA, but has been endorsed by BCCA and will often be used. FLA 162 says to determine amount and duration of spousal support based on conditions, means, needs and other circumstances of each spouse, including length of time the spouses lived together, functions performed by each spouse and an agreement or order between spouses.
* Entitlement MUST be determined before using SSAG to determine amounts.
* SSAG based on gross income difference and length of marriage. If there are children, look at net income pool and divide it between spouses, ignoring length of marriage
  + SSAGs suggest appropriate ranges of support in a variety of situations where spouses entitled to support
* Effort to make them more predictable and consistent
* The low, medium, high and suggested duration --> where you fall on that range will depend how strong the claim is
  + The strength of the grounds --> the facts that underpin the grounds

Yemchuk v Yemchuk (2005 BCCA)

Law: SSAG not legally binding and should not replace individualized analysis, but can be considered as a compilation of precedent.

* According to Justice Prowse the Guidelines are intended to reflect the current law rather than to change it and build upon the law as it exists. The Guidelines are not official law, but neither do they constitute evidence or even expert evidence that needs to be proven in court

## Without child formula - p. 281

* **Idea of a merger over time** -- as a marriage lengthens, spouses more deeply merge their economic and non-economic lives
  + Captures ideas in *Moge* and *Bracklow*
* **Two crucial factors**:
  + The gross income difference between the spouses; and
  + The length of the relationship
    - The amount and duration increases incrementally with the length of the relationship
    - If marriage is 20 years or longer, or if the marriage has lasted 5 years or longer, when the years of marriage and age of the support recipient (at separation) added together total 65 or more -- support is indefinite
* **Steps**:
  1. Determine the gross income difference between the parties
  2. Determine the applicable percentage by multiplying the length of the marriage by 1.5-2 percent per year
  3. Apply the applicable percentage to the income difference

### Example

Arthur and Ellen have separated after a 20 year marriage and one child. During the marriage, Arthur had just finished his commerce degree when the two met, worked for a bank, rising through the ranks and eventually becoming a branch manager. He was transferred several times during the course of the marriage. His gross annual income was now $90,000. Ellen worked for a few years early in the marriage as a bank teller, then stayed at home until their son was in school full time. Ellen worked part time as a store clerk until he finished high school. Their son is now independent. Ellen now works full time as a receptionist earning $30,000 gross per year. Both Arthur and Ellen are in their mid forties.

* **Entitlement**: Compensatory and Non-compensatory
* **Amount of Support** = $1,500 to $2,000 per month
  + Step 1:$90,000 - $30,000 = $60,000
  + Step 2: 1.5 x 20 years = 30 percent to 2 x 20 years = 40 percent
  + Step 3: 30 percent x $60,000 = $18,000/year ($1,500/month) to 40 percent x $60,000 = $24000/year ($2,000/month)

## With child support formula (p. 282)

* Raises different considerations -- primary rationale is compensatory
* Priority must be given to child support
* What drives support in these cases is not the length of the marriage, or marital interdependency, or merger over time, but the presence of dependent children and the need to provide care and support for those children
* **Parental partnership rationale** -- looks at the continuing economic disadvantage that flows from present and future childcare responsibilities
* Two test for duration -- length-or-marriage OR age-of-children -- use whichever produces longer duration
* Shared and split custody situations require adjustments
* **Restructuring** - allows the amount and duration under the formulas to be traded off against each other
  + **Front-end load**
  + **Extend duration**
  + **Lump sum**
* Ceilings and floors -- ceilings and floors WRT income to prevent a cliff effect (p. 383)

### Differences between the formulas

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

### Steps

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

## CASES

W v W (2005 BCSC) - **SSAGs are consistent with the law in BC**

Law: Moge means ensuring approximately equal standards of living – not assessed against the average Canadian, but compared to each other. SSAG in line with this rule. SSAG are just guidelines, but provide a crosscheck against judicial assessment.

* SSAGs are just guidelines and advisory and an example of one useful tool for lawyers

Redpath v Redpath (2006 BCCA) - **if award deviates substantially from SSAG with no reason, appellate court can intervene**

Law: If a particular award deviated substantially from the Guidelines with no exceptional circumstances to explain it could be a grounds of appeal. The court increased an award of $3,500 per month to $5,000 per month even though the trial judge considered all of the factors and did not misapprehend the evidence

Intersection of Matrimonial Property and Spousal Support

Family Relations Act

* s. 65(1)(e): allows the court to consider whether division of property was unfair having regard to the needs of each spouse to become or remain economically independent and self sufficient)

The Family Law Act

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

Lodge v Lodge - BCCA

* The BCCA overturned a lower court decision dividing family property equally between husband and wife.
* The parties had been married for almost 20 years. Except for the occasional part time work she had been home caring for the kids.
* After separation, she obtained secretarial work for $100/month.
* At trial, the parties had assets of $440,000 that were divided equally.
* The BCCA reapportioned one property in her favour 75%. The Court added that Mr. Lodge had the means to remain economically self sufficient whereas she was significantly handicapped in this regard.

Boston v Boston (2001 SCC)

Law: If pension equalized in property division, support can only be ordered based on the remaining portion of the pension in order to avoid “double-dipping”.

* This has since been criticized as ignoring the goals of spousal support which is meant to ensure spouses don't experience economic hardship. Should consider the relative positions of the parties at the time of retirement.
* Have an asset that has already presumably been divided because it was an asset and is then income
* Double dipping vs. dual entitlement

Meiklejohn v Meiklejohn (2001 ONTCA)

Law: If property division to one spouse is in a form that doesn't generate income, then support payments from the pension are appropriate. Focus on current needs and means.

* See also s 169 of FLA.

# Child Support

ENTITLEMENT TO CHILD SUPPORT

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

## Federal Child Support Guidelines

* Before guidelines used judicial discretion
* s. 150(1) FLA - incorporates the guidelines, requiring courts to determine support in accordance with them
  + s. 150(2) - court can order a different amount where parties consent and the amount of support is reasonable
  + s. 150(4) - allows the court to order an amount of support that differs from the guidelines where an agreement reached by the parents benefits the child directly or indirectly and the guidelines would produce an inequitable result in light of this agreement.
    - Ex/ where one parent may give up their right to compensation for their portion of the family home so the other parent and child can remain there with the child with the understanding that this would be compensated for through a reduction in child support
* Objectives of the Guidelines are to establish fairness, to reduce conflict and tension, to improve the efficiency of the legal process, and to ensure consistent treatment of parents and children in similar circumstances in the determination of child support (s. 1)
* SET-OFF -- if you have children more than 40% of the time you pay each other

## Divorce proceedings

* It is the duty of the court to ensure that reasonable arrangements have been made for child support, “having regard to the applicable guidelines”. If reasonable arrangements have not been made, the court must stay granting the divorce until such arrangements are made (s. 11(1)(b) of the Divorce Act).
* Hansen v. Hansen, [1997] B.C.J. No. 1226: a Desk order divorce application was stayed because the child support payable under the separation agreement was not satisfactory in light of the Child Support Guidelines. The agreement stipulated he would pay $350/month for the support of two children, but the Guidelines dictated it should be $564/month for two children.

STEP-PARENTS AND CHILD SUPPORT

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

## Divorce Act and Step-Parents

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

* 1. any child for whom they both stand in the place of parents; and
  2. 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)

Facts: Child in question is from wife's previous relationship. New husband played an active role as father.. Formal adoption by husband discussed, but not carried out.  
Issue: Can an adult who has been in the place of a parent withdraw from that position?  
Law: Since part of DA involves BIC, allowing an adult to withdraw from supporting a child would not be consistent with the objectives of the act. Whether or not a person stands in loco parentis is to be determined by reference to when the family was together as a unit, NOT at time of trial. Factors to consider include intention (inferred by actions), how the child is referred to by the adult, the participation in extended family activities, financial support, existence of relationship between child and biological parent, etc. There cannot be conditional parenthood.

**TEST**:

* “Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively” [para. 39].
* “The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child’s relationship with the absent biological parent.” [para. 39]
* “Once it is shown that the child is to be considered, in fact, a “child of the marriage”, the obligations of the step-parent towards him or her are the same as those relative to a child born of the marriage with regard to the application of the Divorce Act. The step-parent, at this point, does not only incur obligations. He or she also acquires certain rights, such as the right to apply eventually for custody or access under s. 16(1) of the Divorce Act.”
* “The contribution to be paid by the biological parent should be assessed independently of the obligations of the step-parent.” [para. 42]
* “If a parent seeks contribution from another parent, he or she must, in the meantime, pay support for the child regardless of the obligations of the other parent.” [para. 42]

Chartier does indicate that a stepparent cannot unilaterally withdraw from the relationship, thereby relieving themselves of the obligation to pay child support. However, a few BC Supreme Court cases have held that it is appropriate to take into account the stepparent’s ongoing (or lack of) involvement with the child post-separation.

Elliott v. Elliott

* Interim child-support order made
* Appropriate to take into account the child-rearing costs from each parent
* Examine the legal duty of both natural parents, determine a fair standard of child support of the child based on needs
* Lists the factors the court considers with discretion with step-parents --> NOT THE SAME AS WITH A BIOLOGICAL PARENT
  + Secondary to biological parent obligation
    - Have to look at what each persons obligation is independent of the other --> then look at circumstances to determine what would be paid
    - Can look at need --> in this case need played a big role

## STEP-PARENTS + CHILD SUPPORT UNDER THE FLA

S. 1: “**stepparent**” means a person who is a spouse of the child’s parent and lived with the child’s parent and the child during the child’s life.

S. 147: introduces changes to the duty of stepparents to pay child support by **imposing limits on the scope of that duty** and framing the court’s exercise of discretion in determining the appropriate amount of support.

* **Two conditions under the FLA**:
  1. The stepparent contributed to the children’s support for at least one year; and
  2. The application for child support is made within one year of the stepparent’s last contribution to the children’s support

S. 147(1): provides that the duty to provide support extends until the child (a) is a spouse, or (b) is under 19 years of age and has voluntarily withdrawn from his or her parents’ or guardians’ charge, except if the child withdrew because of family violence or because the child’s circumstances were, considered, objectively, intolerable

S.147(3): makes a duty of a guardian who is not the child’s parent second to the duty of the child’s parents.

S. 149(3): addresses stepparent obligations directly, codifying the obligation on a separated stepparent of support, but expressly makes the **obligation secondary to that of a child’s parents**. The section overall gives discretion on judges to set an amount that is appropriate given all of the circumstances.

S. 149(5): States that the stepparent’s obligation is secondary to that of the child’s parents and guardians and extends only as appropriate on consideration of the standard of living experienced by the child during the relationship between the stepparent and is or her spouse, and the length of time during which the child lived with the step-parent.

### some FLA case law

C.L.P. v. N.D., 2014 BCPC 154

Mom + S-Dad both on disability // S-Dad has duty to provide support but its set at zero // take-home message is that primary responsibility lies with the parents // IF ON EXAM ADDRESS FACTORS THAT WOULD LEAD TO RESULT -- EX/ FACT SITUATION WHERE SEPARATE WRT FINANCES

* Purpose is to ensure children have a consistent and reasonable standard of living; primary responsibility lies on parents and if parents can adequately provide stepparents are exempt, if parents cannot provide stepparent may be ordered to contribute.
* However, it is possible that the stepparent will not have to pay support and it is also possible that the stepparent will have to pay the full amount.

“**Voluntary Withdrawal**” (s. 147)

D.Z.M. v. S.M., 2014 BCPC 198

Removal of children by state is not “voluntary withdrawal” intended by the FLA

Henderson v. Bal, 2014 BCSC 1347

Child’s refusal to visit does not amount to “voluntary withdrawal”

M.A. v. F.A., 2013 BCSC 1077

Child who is incarcerated for more than one year has voluntarily withdrawn

Doe v. Alberta, 2007 ABCA 50

You cannot override the provisions of the Act pertaining to “standing in place of a parent” even by contract

JMS v FJM, 2005 Ont. SCJ

Court found that a Crown ward is no longer in the charge of his parents, even though he remains their child in law. As such, the parent was not in a position to claim support for him under the Guidelines

## RANDOm TidBits

S. 147 - If don’t make it within year --> lost ability to claim under FLA

* Could still claim under Divorce Act if it applies to situation
* Government bodies can make applications for child support if someone is on social assistance

**Important Notes**

* Based on income
* Dealing with primary caregiver scenario --> look straight at table
* Child support payable until 19, or over 19 and unable to withdraw from parents charge (includes post-secondary) --> but not an automatic thing

# Child Support - Application & Enforcement

* Mandatory, except for FLA 150(2): different amount OK where parents agree and amount of support is reasonable.
* Common issues involve calculating income, special provisions under DA 15.1(5), shared custody, and special or extraordinary expenses. Shared custody applies when each parent has the child(ren) for at least 40% of the time.
* s. 7 FCSG - expenses:
  + Special and extraordinary expenses --> isn’t payor pays and recipient gets // generally share the expenses in proportion with respective incomes
    - Needs to be a necessary and reasonable expense -- ex/ childcare
  + Other expenses are extraordinary expenses
    - Definition on these things is that unless the child is going to go to the Olympics, it is not extraordinary —> you are supposed to take it all out of the child support you get
      * Some courts have been known to order it if there has been a pattern of payment
      * Often there will be an agreement
      * Extraordinary must actually be extraordinary —> not included under s. 7
      * Extraordinary —> s. 7(11)
        + Not expenses of swimming class —> must be extraordinary expenses for swimming class
* FCSG s. 19 --> **impute income**, generally start with total income on income tax

McCrea v McCrea (1999 BCSC) - **\*\*imputing income - saying parent should be earning more\*\***

Law: DA 15.1(5) requires more than asset division, must replace the need for ongoing support. When income is disbursed through a corporation, support should be calculated on pre-tax income of the company. Extraordinary expenses must be determined based on combined income of the parties, the nature of activities, needs or talents of the children, overall cost and any other relevant factors.If they are extraordinary, then must be shown they are necessary and reasonable. Retroactive order appropriate if application was delayed (p 325).  
Analysis: In this case (p 323), child care expenses are extraordinary, medical and dental premiums are not, orthodontics are, counselling is, testing and tutoring are, dance, piano and catechism classes are not, education fund is.

**Illegal Income**

* What if there is illegal income —> court will not require you to engage in criminal activity to pay child support
  + Amount imputing has to be real
  + Won’t say you have to continue dealing drugs to earn more money

S.A.B. v. C.D.B., 2004 BCSC 314, Mr. Justice Paris, March 8, 2004

[4]         The defendant is a drug trafficker.  He has a long criminal record (including living off the avails of prostitution), having earned virtually all his income during the marriage from trafficking (his “work” as it was referred to during the trial).  He says that he has not trafficked since about when this action was started.  He faces an enormous assessment of income tax arrears—between $200,000-$300,000—which he is contesting.  The plaintiff has been an exotic dancer since before she met the defendant.  She now has a cleaning job in a hospital in Victoria although she supplements her income a bit by some dancing.

**Maintenance – Child and Spousal**:

[30]    In this case I have to “impute” income to the defendant for the purpose of child maintenance pursuant to s. 19 of the Federal Child Support Guidelines.  Needless to say I hesitate to impute it on the basis of what I might determine (if I could) that he can earn as a drug trafficker.  I am concerned that the court would appear to be encouraging or requiring him to continue his criminal activity.  I will calculate and impute it the best I can on the basis of his legal earning power.  At trial, the defendant insisted and his friends, the A.s., agreed that he is quite capable of earning a good income legally.  How he has been making money since the separation is somewhat mysterious although he talks of doing so by “buying and selling things”.  Counsel pointed out that at one point, he professed to have earned $40,000 in a year from a small service company he was associated with.  The Guideline amount for that income for two children is $566.  However, s. 5 of the Guidelines mandates that in the case of a person standing in loco parentis, the amount of any child support payment is what the court considers appropriate having regard to any other parents’ legal duty to support the child.  The plaintiff still receives from T.’s natural father, S.P., support of $400 per month.  I order that the defendant pay child support to the defendant of $400 per month for B. and $200 per month for T. on the first day of every month as of March 1, 2004.

**Guidelines**

S. 3(1) —> amount provided for children under age of majority is what is under the table

**Split Custody**

* Each parent pays child support to each other based on their incomes
* Children are split up
* Then set-off support

**Shared Custody**

* S. 9 —> always takes into account not just the tables but household income, etc.
  + When one parent crosses over 40%
  + **Not just supposed to do a straight set-off**
    - Supposed to look at tables
    - Increased cost of custody arrangement
    - Means and conditions of each party
      * Ex/ if they have a new partner that is helping with expenses
  + Supposed to do all three parts of the test not just stop at the set-off
  + Trying to equalize out standards of living
  + In these custody arrangements shouldn’t stop with just straight table amount and split —> but a lot of courts do this

**Income**

* Can you say income is zero if really rich?
* No —> you’d probably have interest which = income
* Or court would impute income
* It is the right of the child to have proper financial support from both parents

Green v Green (2000 BCCA)

Law: Court does not like 40% rule – arbitrary and doesn't inform about what costs are involved. Parents focus on counting # of hours. Even once threshold is met, reducing support costs may not be in BIC. Courts should consider comparison between amounts each parent would have to pay to each other under the guidelines, additional expenses the access parent incurs, and relative financial circumstances when reducing support amounts pursuant to s. 9 of the Guidelines.

Contino v Leionelli-Contino (2005 SCC) -- **\*\*three stage test for s. 9 claims\*\***

Law: s. 9 of the Guidelines must be applied flexibly. Parties must provide sufficient evidence to determine issues under ss. 9(b)(c). See p 335.

Francis v Baker (1999 SCC)

Issue: How to apply s. 4 of the Guidelines, for incomes over $150,000?  
Law: Can use the section to increase OR decease amount owing. Must rebut presumption that the table amount is appropriate. See factors on p 339.

Greene v Greene (2010 BCCA)

Facts: Parents made an arrangement to supersede the Guidelines

Law: If reasonable arrangements have been made, with regard to the principles in the guidelines, for the chlid, then agreement between parents can be upheld.

WPN v BJN (Neufeld) (2005 BCCA)

Law: In determining whether a child in post secondary education remains a child of the marriage, consider: full- vs part- time studies, availability of student loans, career plans, possibility of part-time employment, age of child, past academic performance, plans made by parents for education, especially if they were made during cohabitation, whether the child has unilaterally terminated their relationship with the payor parent. Amount to be determined like normal.

Haley v Haley (2008 Ont SC)

Law: Entitlement to support can be revived despite hiatus in studies.

RETROACTIVE CHILD SUPPORT

DBS v SRG (2006 SCC)

Law: Since parents have an obligation to support their child relative to their income, if their income increases and they do not increase their support, then they have failed to fulfil that obligation. Must consider all relevant circumstances, including whether there is a reasonable excuse for the recipient's parent delay in bringing an application, the conduct of the payor parent, circumstances of the child and potential hardship a retroactive award would entail. Usually goes back to date payor parent was given notice, but can go earlier if there was blameworthy conduct.  
See application of DBS in Greene, p 343-346

ARREARS AND VARIATION IN CHILD SUPPORT

Earle v Earle (1999 BCSC, apprv'd by Ghislieri (2007 BCCA))

Law: Responsibility for child support based on capacity to earn, not actual earnings. Do not have to show that there was intention to avoid paying child support. In order to vary child support, there must be a material change of circumstances, which is significant and longstanding, that would have resulted in a different order. Cancellation or reduction of arrears is a form of variance which can only be done if the person is unable to pay now and will be unable to pay in the future. . Can postpone payment of arrears of make reasonable terms for payment. New responsibilities usually do not override support obligations. Numerous other common failing arguments are canvassed.

ENFORCEMENT OF CHILD SUPPORT - 353

**BC Family Maintenance Enforcement Act and Federal Family Orders and Agreements Enforcement Assistance Act.**

Dickie v Dickie (2007 SCC)

Law: When a party is willfully non-compliant with family court orders, and has the ability to pay, the consequences can be severe – up to jail time.

McIvor v The Director of Maintenance Enforcement (1998 BCCA)

Law: Problems with access, including children refusing to see payor parent, do not justify reduction or cancellation of support.

1.

* DA does not apply because not married and DA doesn’t apply to property
* Under FLA has same rights as married because have been together for 2+ years in a marriage like relationship
* Only option is FLA
* Property rights:
  + Start with s. 3 of FLA —> are you a spouse?
    - Yes, why?
  + Why separated? —> address evidence
    - Basically just one person communicating that they’re done
    - When got together and when separated matters a lot
    - Must make claim within 2 years
    - One year separate and apart is ONLY relevant to DA
  + Entitlement
    - 1/2 interest in value Family Property
    - 1/2 increased value of Excluded Property
  + Family Property
    - New piece of property bought since together; Joint account; Value of pension that accrues in the relationship —> 1/2 to Sarah; If work that was put into the boat increased the value of the boat —> 1/2 of that; Both also have exclusion in boat —> inheritance; One case said that a gift put into a house (and only a house) was it was a gift to both (Cabezas v. Maxim); Could argue get that back + 1/2 of the increase in value; RRSP —> family property, but part of it is excluded, increase in value is family property; Could address unjust enrichment claim —> put in effort and the other got a benefit from it
  + Won’t need to know tracing —> ex/ how it works, don’t need to know who gets value out first
  + Excluded
    - Furniture from Grandma; Car; Pension before; Sarah’s pre-Kim boat, condo, RRSP;
  + Possibility of dividing unequally
    - Based on whatever factors applicable
    - But limited case law that defines what it means - S. 95(3)

2

* Need to establish entitlement
  + No contractual —> ex/ pre-nup, separation agreement
  + Compensatory —> for lost-opportunities during the relationship
  + Non-compensatory —> ex/ depression demonstrates need
    - Ex/ 45 —> chances of getting a job with same standard of living low
  + Apply for support quickly —> limitation period, 2 years after separation
  + Objectives of spousal support —> in FLA
  + s. 162 FLA and SSAGs
    - Talk about SSAGs —> low, medium, high
      * Explain what they are —> academic paper, advisory, throw in a case or two
      * Explain that it is now law
      * Possible to get a lump sum instead of monthly —> tax consequences
        + Payor can deduct if monthly
      * Duration as well
      * Is bonus included?
        + If recurring —> should be entirely included
        + If didn’t occur in previous year —> shouldn’t be included
    - Factors that go to strength of claim —> would you get low, medium or high
      * Things that may reduce and increase strength of claim
      * Child could affect ability to earn