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# Marriage

## The Legal Framework

### Federal Authority – right to marriage, who can marry, etc.

* Only supreme court can hear applications for divorce under *Divorce Act,* for custody, child support and spousal support
* Divorce Act doesn’t deal with division of assets (provincial)

### Provincial Authority – process of marriage (ex: solemnization of marriage)

* Most laws concerning marriage have been enacted by provinces, courts tend to construe provincial power liberally.
* **Adoption, legitimacy, custody, guardianship, child welfare, affiliation and maintenance of children are within provincial power**
* Property rights (**s. 92 (13)**) – **a claim for division of property must be under the *Family Relations Act***

Federal Paramountcy when there is a conflict

***Alimony =*** payments made to a **separated** spouse during the marriage

***Maintenance*** – payments made **after** dissolution of the marriage

🡪 now we don’t distinguish… “***support***” for both

# Charter and Family Law

**s. 15** – equality or **freedom from discrimination**

 Two part test (***Pratten v BC****)* 2011 BCSC:

1. Does the law create a distinction based on an enumerated or analogous ground?
2. If so, does the distinction create a disadvantage by perpetuating prejudice or stereotyping

**s. 2** – freedom of **religion** and **freedom** of **expression**

**s. 7** – right to ‘**life, liberty and security of person**’

Charter applies only to situations where ‘an element of gov’t action is implicated in the litigation

* **Court order is not gov’t action per se**, so there have been questions of whether Charter has effect on so called “private law”, including family law or on common law generally

## Creating the Family

### *Ascription* – refers to treating unmarried cohabitants as if they were married,

**without their having taken any positive action** to be legally recognized (ex: **common-law relationships**)

* A way for gov’t to **prevent risks of exploitation** inherent in contractual model
* Imposes a set of obligations on people in conjugal relationships

Ascription **doesn’t replace contractual** model – Canadians must have the appropriate tools to define for themselves the terms of their relationships

### BC *Marriage Act*

(processes of solemnizing marriage)

### *Civil Marriage Act*

Act respecting legal capacity for marriage for civil purposes

**s. 2** – marriage is the lawful union of two persons to the exclusion of all others

## Requirements of Legal Marriage

4 requirements:

1. Both parties must have **legal capacity** to enter the marriage
2. Both parties must **consent** to the marriage
3. There must be **compliance** with the formalities of marriage
4. Both parties must have the capacity to perform (**copulation**) the sexual aspects of marriage
* Requirements 1, 2 and 4 are within federal jurisdiction and go to the **essential validity** of the marriage
* Non compliance with 1-3 can render a marriage null and void **except where incapacaity is due to non-age**.
* Where 4 is not complied with, marriage is voidable, and thus valid until court grants **annulment**.
* 3 relates to the **formal validity** of marriage and is within provincial jurisdiction

If a persons religious background makes them averse to divorce proceedings, annulment may be a preferable remedy.

## CAPACITY

1. **Age**
	1. **S. 28** **BC *Marriage Act*** *-* Marriage of **minor requires consent of parent** or guardian
		1. Parents have right to refuse based on BIC – courts will review their decision on reasonableness standard
	2. **S. 29** – Person **under 16** can’t marry without **consent** of parents and **the court**
	3. **S. 30** indicates that a marriage instituted without complying with either **s 28 or s 29** is **not for that reason invalid**. **(Bias of the law in favour of validity of marriages)**
	4. While lack of age generally renders a marriage voidable**, if either party is below 7, marriage is void ab initio**
2. **Consanguinity and Affinity**
	1. Can’t have blood relations
	2. *Marriage Act*(federal) eliminated prohibitions based on affinity (relations based on marriage) – **s. 2**
3. **Single**
	1. You’re not guilty of bigamy if you reasonably believe your spouse is dead; however, any **subsequent marriage is void if your former spouse is alive** regardless of belief
4. Same Sex
	1. Legit
5. **Sanity**
	1. Test is whether parties were able to understand the nature of the marriage contract and the duties and responsibilities it creates (*Reynolds)*

## CONSENT

1. **Duress**
	1. There has to be genuine and reasonable fear; duress also includes non-violent but controlling parental coercion – Australian case (*Marriage of S)*
2. **Mistake or Fraud (Misrepresentation)**
	1. Fraud itself does not invalidate a marriage unless it vitiates consent
	2. No grounds to annul marriage if one partner lies about name, age, race, wealth, occupation, etc.
3. **Formalities**
	1. **S. 18** - An irregularity in the issuance of a marriage license, if made in good faith, does not invalidate the marriage
4. **Consummation**
	1. House of Lords rejected husband’s application for a decree of nullity sought on the ground that the wife refused to have sex without a condom

## Same Sex Marriage

**Bill C-38 (Civil Marriage Act) 2005** – codifies that marriage is lawful union between two persons to exclusion of all others

## Polygamy

**s. 293(1)(a)** makes it an indictable offence to enter any form of polygamy – whether or not it’s a form of binding marriage

# What is a Legal Parent

Presumptions about parenthood can no longer be drawn from facts of either birth or marriage

### Gill v. Murray (BC Human Rights Tribunal) 2001 - *refusing to register same sex partner on b/c = discrimination*

|  |  |
| --- | --- |
| **Gill** v. Murray (BC Human Rights Tribunal) 2001 | *Was there discrimination in refusing to register same sex partner of birth mother on birth registration form b/c no biological relationship to child?*Purpose of registration and naming provision of the Act: to ensure that live births are recorded accurately and promptly so info can be used for gov’t and statistical purposes. Nothing in Act that suggests another purpose is to collect biological or genetic info about parents of childBirth certificate not a declaration of legal parentage, but it does provide prima facie proof of relationshipBirth Registration regime has not kept up with reproductive technologies – its possible for a child to have legal social parents, biological parents, and a birth mother who is neither a legal social or biological mother**Discrimination is established.**  |

### *AA v BB* (ONCA) 2007 – 2 Mothers + a Father = okay

Case with two lesbian mothers, and a biological father. All want to be given legal status as parent. **Court held that it would be contrary to childs best interest to deny legal recognition of both his mothers.**

# Adoption

Order for adoption results in child becoming in law the child of an adoptive parent and ceasing to be the child of a birth parent (creature of statute)

Normally, court order required for adoption to have legal effect. **S. 46** of ***Adoption Act***, however, now says that court MAY recognize that an ***adoption effected by custom (Aboriginal) has the same effect as an adoption order***.

### *King v Low* (SCC) 1985 – dominant consideration to which all other considerations must remain subordinate must be the welfare of the child

* Custody case – **dominant consideration to which all other considerations must remain subordinate must be the welfare of the child**
* Welfare must be decided on a consideration of all relevant factors: including general psychological, spiritual and emotional welfare of child.
* Consider which course will provide child healthy growth, development and education so that he will be equipped to face the problems of life as a mature adult
* **Adoptive parents** in this case keep child because they have **developed bonds with child and to pass child back to birth mother would be traumatic** on child because mom is stranger

## Who can adopt:

One adult or two adults jointly may apply to adopt, provided they are BC residents.

### Same sex:

“it is reasonable to conclude that children raised by gay or lesbian parents should not be expected to differ substantively in any aspect of their development. Therefore, it is my opinion that **gay and lesbian persons have the same capacity to care for children as do heterosexual persons**” – ***Re K* (ON)** 1995

* No evidence that hetero’s better able to meet needs of children than homos

# DIVORCE

**The Legal Framework**

## Grounds for Divorce

**Section 8** of the ***Divorce Act***

* Includes fault-based and no-fault grounds
* Spouse who invokes a fault-based ground must prove the fault of the respondent, rather than their own fault.

### Adultery

Defined judicially as voluntary sexual intercourse between a married person and another person of the opposite sex other than his or her spouse (***Orford***)

* Other sexual acts not enough, must be a “***voluntary surrender to another person of the reproductive powers or faculties of the guilty person***”

**Common law** definition of adultery **includes same-sex acts** – ***P(SE) v P(DD)* BCSC**

### Cruelty

See **s. 8(2)(b)(ii)** of ***Divorce Act*** on cruelty (mental or physical)

Treatment must be grave and weighty, going beyond incompatibility. Issue is **not intention** of spouse to be cruel, but rather the **subjective effect of the treatment** on the other spouse.

## Bars to Divorce – s. 11 *DA*

### Capacity to Separate

Minimum capacity required to form intent to separate is the ***capacity to instruct council*** (***Wolfman-Stotland***)

* Capacity to form intention to live separate and apart has been accepted as equivalent to the capacity to enter into a marriage.
* The requisite capacity is not high, and is lower in the hierarchy than the capacity to manage one’s affairs
* “If a marriage is simple, divorce must be equally simple”

### Living Separate and Apart

Must be separated at least a year.

If spouses resume cohabitation during that time to try and reconcile, ***not deemed to interrupt that one-year until it lasts 90 days***.

### Criteria for spouses living :separate and apart” (outlined in *Oswell*):

1. There must be **physical separation** (***can be*** as much as spouses occupying ***separate bedrooms*** – just b/c still in same house for economic necessity doesn’t mean this fails) (***Dupere****)*
2. Must be a ***withdrawal*** by one or both spouses ***from matrimonial obligation*** ***with intent*** of destroying matrimonial consortium (***Dupere***)
3. ***Absence of sexual relations not conclusive*** but is a factor (***Dupere***)
4. ***Other factors*** considered are: ***discussion of family problems and communication b/w spouses, presence or absence of joint social activities, meal pattern*** (***Cooper***)

### Oswell v. Oswell (HC) 1990 - *vacations together, lots of sex, got counseling, supported wife through father’s death, shared household duties ≠ separate & apart*

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| **Oswell** v. Oswell (HC) 1990“Separate and apart” | *Kept appearances of marriage, vacations together, lots of sex, got counseling, supported wife through father’s death, shared household duties.*Despite Mr.’s stated desire to separate in 1984, court can’t conclude that was true intention from which he never wavered and that there was no reasonable prospect of resumption of cohabitation from this date. It wasn’t until Mr gathered material for financial statement that he began to make plans for his assets as a separate person. Spouses must live separate and apart with no real prospect of resumption of cohabitation. That is the separation date used for valuation.  |

### Corollary Issues

Grounds for divorce may be relevant in deciding the corollary issues. Ex: if partner was ***physically or mentally cruel, may be relevant to some cases involving custody*** of children.

### Women in Canada Stats “Child Penalty” – measures how far the earnings of women WITH children fall below those WITHOUT children (on average, women w/ children 12% lower earnings)

Dual-income families has increased over time

Lone parent families have higher incidence of low income than other family types

## Procedural Issues

### Charter and Availability of Legal Aid

### *J.G. v. NB (SCC) 1999* - *State removal* of child - Denial of legal aid to JG by NB was inconsistent w/ principles of fundamental justice

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| **J.G.** v. NB (SCC) 1999 | *JG, single mother on income assistance w 3 children in custody of NB Minster of health. Charter claim against the Legal Aid scheme.* ***State removal* of child** from parental custody constitute a substantial interference with s. 7’s protection of security of the person and protection of psychological integrityDenial of legal aid to JG by NB was inconsistent w/ principles of fundamental justice.  |

Subsequent cases make clear JG is limited in application. Doesn’t apply to all child custody cases, only those which the actions of state threaten security of person and state-funded counsel is necessary to ensure fairness.

* ***Miltenberger – Charter*** does **not** guarantee legal counsel **for individuals involved in private civil litigation**
* ***NB v RW (NBCA)*** – 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.

### Concerns with BC Legal Aid

* Inability to address family and poverty law matters
* Lack of accessible legal aid resources in rural communities
* Many people get access to it after its too late
* Legal info not adequate sub for legal assistance and representation

# Enforceability of Marriage Contracts

### *Hartshorne v Hartshorne (SCC) 2004* - *agreement re division of property, entered after legal advice = binding*

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| **Hartshorne** v Hartshorne (SCC) 2004Division of assets | *Whether marriage agreement re division of property, entered after legal advice, without duress, can be found unfair and set aside.* **Primary policy objective** guiding courts’ role in division of assets on marital breakdown in BC is **fairness** (fairness judged at time of application)* Individuals may choose to structure their affairs in a number of different ways, and it is their prerogative to do so
* Spouses should respond to changing circumstances of their marriage by reviewing and revising their own contracts for fairness when necessary (may be fair if marriage lasts 1 year, but not 30 years) = **contextual**
* When speaking of **“fair” or “unfair**”, it is the **apportionment under the contract** that is under scrutiny – **doesn’t mean bad faith or intention to cheat**.
* **Balance** respect for parties’ intent and assurance of an equitable result.
* Also, use of agreement for predictability and managing one’s affairs – **if independent legal advice sought when executed, reluctance in second-guessing agreement**

**Courts should generally respect private arrangements** that spouses make for division of their property on breakdown. (***Miglin***)* **Favour a contextual assessment of all the circumstances**
* Judge must exercise discretion

**Court should be loathe to interfere with a pre-existing agreement** unless it is convinced that the agreement does not comply substantially with the overall objectives of the ***Divorce Act*****TEST – Two-stage Approach:**1. Look to the **circumstances of the negotiation and execution** of the agreement
2. Viewed from time application is made, ***does agreement still reflect original intentions of parties*** and still in substantial compliance with objectives of ***DA***?
	1. **Consider** changes in circumstances or subsequent, **unforeseen circumstances** that give reason to agreement fair at execution no longer fair at separation.
	2. **If no unanticipated changes occur**, a decision to deem agreement unfair should not be made lightly

**To determine if agreement fair:**1. Assess and award entitlements provided for under agreement, and **all other entitlements like spousal and child support**
2. Then **consider factors listed in** **s. 65(1)** ***FRA*** to determine if that is fair(the two part test above likely drops into this stage of analysis)
 |

Can opt out of legislated property provisions by entering into a domestic contract.

* **Contracts are subject to common law rules of contractual validity**
* **Equitable principles will apply** though – “fairness” of contract

## Unmarried Cohabitants (s. 120.1 of *FRA*)

If **spouses who are not married make an agreement***,* ***judge retains discretion under s. 65 to reapportion the property*** if the division of property would be unfair under the terms of the agreement.

* This does not apply retroactively (***Wiest***), only **applies to agreements made after Feb 4, 1998**

**Statutes not to be construed as being retrospective** unless expressly or by necessary implication

**Fairness of marriage agreement (including cohabitation agreement in** ***s. 120.1***) must be approached using ***Hartshorne*** *(****Johnstone***)

* Changes in **Will** **do not have bearing** on fairness issue, doesn’t have anything to do with an agreement that provides for the ***termination of relationship BEFORE death (same with trusts***) (***Johnstone***)

# CUSTODY AND ACCESS

## Best Interest of the Child

## Guardianship

Guardianship is **the right (and the responsibility) to make major decisions for a child** about such things as **education, health care, and religious training, as well as how to manage anything the child may own, such as property or money**. When a family lives together, the parents share these rights and responsibilities.

After separation or divorce, **guardianship can go to one parent** (the **sole guardian**), or **the parents can share it** (and be **joint guardians**).

If one of the joint guardians dies, the surviving guardian automatically becomes the child’s sole guardian and may also be responsible for managing any inheritance until the child turns 19.

### Laws about guardianship

The federal [Divorce Act](http://laws.justice.gc.ca/en/D-3.4/index.html) lumps all of the rights of guardianship in with custody: **If you have** [**custody**](http://www.familylaw.lss.bc.ca/resources/fact_sheets/custody.asp)**, you automatically have guardianship**. (It also deals with a separate category called access; for more information, see our fact sheet on [access](http://www.familylaw.lss.bc.ca/resources/fact_sheets/access.asp).)

Under the provincial [Family Relations Act](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96128_01#part2) (**part 2**), **guardianship can be separate from custody**. If parents separate, **the parent with whom the child normally lives is considered the sole guardian** — but you can [ask for a court order](http://www.familylaw.lss.bc.ca/resources/fact_sheets/guardianship.php#WhatIncludeGuardianshipOrder) or [file an agreement with the court](http://www.familylaw.lss.bc.ca/resources/fact_sheets/separation_agreements.asp) that says otherwise.

## Guardianship versus custody

To show the difference between custody and guardianship, here's an example: If one parent has custody but the parents share guardianship, then the parent with custody can make a decision about which summer camp to send the child to without having to consult the other parent. However, a decision about whether to enrol the child in a French immersion high school would have to be made together.

## What to include in your guardianship order

In most cases today, people apply for orders for both custody and guardianship to be very clear about their rights. Parents can also sign an [agreement](http://www.familylaw.lss.bc.ca/resources/fact_sheets/separation_agreements.asp) and file it with the court, which gives it the same force as a court order. Often, an order or agreement will say whether guardianship will be sole or joint (or on rare occasions, shared jointly among the parents and another person, such as a grandparent). It will also define guardianship itself, so that there's no doubt about each parent's responsibilities.

The most common one is known as the

**"Master Joyce model":**

* The parents are to be the **joint guardians** of the child's **estate** (any property the child owns).
* In the event of the **death of either parent**, the **remaining parent will be** the **sole guardian** of the person of the child (meaning the child him or herself; the child’s property can be considered separately).
* The **custodial parent**, who has the primary responsibility for the day-to-day care of the child, **must inform** the **other parent** of any **significant matters** affecting the child.
* The custodial parent **must discuss** with the other parent any significant decisions that have to be made about the child, including significant decisions about the child's **health** (except emergency decisions), **education, religious instruction, and general welfare**.
* **OTHER parent** who doesn't have custody **must discuss** these issues with the custodial parent and both parties **must try to agree** on those major decisions.
* If the two parties **can't agree** about a major decision despite their best efforts, the **custodial parent has the right to make the decision**.
* If the non-custodial parent believes that a decision isn't in the child’s best interests, that parent has the right, under [**section 32 of the Family Relations Act**](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96128_01#section32), to ask the **court to review the decision**.
* **Each parent** has the **right to get information** about the child directly **from third parties**, including teachers, counsellors, medical professionals, and third party caregivers.

**"Master Horne model”**

* **to be informed** of the child's **medical and dental practitioners**;
* to **contact** the child's medical and dental practitioners **and obtain** the child's **medical and dental records**;
* to be **consulted with respect to** the selection of the child's alternative caregivers, such as **daycare and preschool**;
* to be **consulted with respect to** the selection of the child's **schools and school programs**;
* to **consult** **with** the child's alternative **caregivers and teachers**;
* to be **informed of events** at the child's school or daycare so they may attend;
* to be **informed of parent/teacher ni**ghts so they may attend;
* to be **consulted with respect to** any significant **health issues** relating to the child; and
* to be **consulted with respect to** any significant **change** in the child's **social environment**.

**Joint-custody** often allocates these rights and responsibilities between parents

**Best Interest of the Child**

The guiding principle in determining outcome of child custody and access disputes

* Making children’s needs paramount safeguards children’s right to continuity
* Also requires due attention to the uniqueness of each relationship and child – no universal formula for custody/access disputes

### *Young v Young* (SCC) 1993- Content of (Best Interests of the Child) BIC

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| **Young** v Young (SCC) 1993Best Interest of the Child | **Content of (Best Interests of the Child) BIC**Courts must attempt to balance such considerations as age, physical and emotional constitution and psychology of both the child and his or her parents and the particular milieu in which the child will liveCustody and Access decisions are exercises in **discretion*** Case-by-case consideration of the unique circumstances of each child is the hallmark of this process.
 |

## Race, Sexual Misconduct and Family Status

**s. 24(3) *FRA*** – court must **not consider conduct of a party unless that conduct substantially affects** the **BIC**

***s. 16(9) DA*** – court shall **not take past conduct of any person into account** **unless** it is **relevant to the ability** of that person to parent the child

### *Van de Perre v Edwards* (SCC) 2001- NBA player custody battle

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| **Van de Perre** v Edwards (SCC) 2001 | *NBA player custody battle*In appealing custody decisions – **finality** is a significant consideration and reinforces deference to TJs decision. **Custody/access decisions are inherently exercises in discretion so big hurdle to appeal**. * (error in law or material error in application of facts)
* Not role of CA to reconsider the evidence and determine if it was properly weighed.

TJ can’t consider a parent completely in isolation from his/her support network. Step-parents and siblings important in child’s life. Play a role in emotional well-being… **negative and positive traits and influences of step-parents must be considered**Edwards was having lots of affairs and away a lot – it was considered because it raises doubts as to his ability to parent on his own. (How would these affairs impact the child if he found out about them?)Conduct must impact one of the factors in s. 24(1) to be considered. **Race** as a factor depends greatly on factual considerations. Racial identity may be considered in determining personal identity. Because its connected to culture, identity and emotional well-being of the child, it can be a factor in determining BIC. Comes down to evidence too though.  |

## Violence – ability to be a parent

Sexual promiscuity may not be relevant to a party’s ability to parent, but many argue **violent behaviour does matter, even when not directed at the child**. (***Carlson***)

* Courts are **careful** though **in alienating a parent** based on **spurious accusations** (***TS v AVT***)
* Case where **judge refused to suspend access where children witnessed severe abuse** (***Fullerton***)
* Cases turn on the facts though!

Judges are **reluctant to cut off access entirely** – but clear evidence of the probability of harm to a child will likely result in denial of access. (**Can always go to supervised access**)

## Sexual Preference – Lesbian Custody

Discrete homosexuality **does not interfere with the BIC** (***N v N* – 1992 BC**)

Court says **wife’s relationship after separation with a same-sex partner has no impact** on her ability to parent (***MMG v GWS*) SK 2006**

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| **JT v SC-T** (Ont) 2008 | *Lesbian parents, two children through artificial insemination. Parents divorcing.*Case stands for BIC test focusing on maximum contact with parents as the presumption. Court sees it as a negative that after separation, biological mother started making decisions about child without consulting other parent.  |

REMEMBER – race and sexuality MAY be factors to consider, as with anything else under the stars, AS LONG AS IT HAS AN IMPACT ON ABILITY TO PARENT! **BIC test** doesn’t care about factors that play no role in ones ability to parent. (*JSB v DLS)*

## Joint Custody and Primary Caregiver Presumption

Joint custody **doesn’t necessarily mean equal time** with each parent.

In joint custody awards, both parents are given joint ***legal*** custody, which affirms both parents’ **decision-making authority** over the children, and presumes relatively equal access to the children.

HOWEVER – doesn’t necessarily mean joint ***physical*** custody of children.

###

### Joint Legal Custody

* + Parents, following separation, will share decision-making authority for major decisions with respect to education, healthcare, and religious upbringing of children
	+ In practice, court ordered joint custody almost always means joint legal custody

### Joint Physical Custody

* + Refers to a divided living arrangement
	+ Doesn’t need to be equal
	+ Different than “generous access” in 2 ways:
		- Parents generally both provide homes for the child (child has a room and personal effects in both houses)
		- Time division more equal than in traditional access arrangement

An award by the court of custody removes from non-custodial parent the exercise of custody, but not the enjoyment thereof. Therefore, if **custodial parent dies**, **custody is automatically transferred** to the other parent, who has retained parental authority all along. (***CG v V-FT****)*

**Joint custody orders should be made rarely** and only under circumstances where the parties are totally in agreement and for all intents and purposes do not need the assistance of the court (***Stewart v Stewart***)

* In case**, parties were unable to communicate without being hostile**. Both good parents. Joint custody was **deemed inappropriate**. **Sole custody to mom, access to dad.**
* *This isn’t a hard fast rule though, some subsequent cases have ordered joint custody despite high conflict. See next note:*

**BUT** – **there is no presumption for or against joint custody!**

* Legal and factual presumptions have no place in an enquiry into BIC, however much predictive value they may have (*Robinson v Filyk*)

## Access

Access is **defined in *DA* in french only**, to include “the right to visit”. **S. 16(5)** also says access parent has right to make inquiries, and to be given information as to health, education and welfare of the child.

### Young v Young (SCC) 1993 - *should be able to offer his children his religious views over the objection of the custodial parent*

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| **Young** v Young (SCC) 1993 | *Whether a divorced parent, who does not have custody, should be able to offer his children his religious views over the objection of the custodial parent.*[Majority]* BIC is the only test – parental preferences and “rights” play no role.
	+ BIC should not require extensive expert evidence. Common sense requires us to acknowledge that person involved in day-to-day care may observe changes in behaviour, mood, attitude and development of a child that could go unnoticed by anyone else. Custodial parent normally has best vantage to assess interests of child. *[said in Dissent]*
* BIC test is broad, left to judge to determine by reference to the ‘condition, means, needs and other circumstances’ of the child.
* In making an order, court shall give effect to principle that child of marriage should have **max contact** with each spouse **as is consistent with BIC** ***D.A.*** (***s. 16(10)***).

Risk of harm is not a condition precedent for limitations on access. BIC is the positive right to the best possible arrangements in the circumstances of the parties. **Custodial parent has no “right” to limit access**. [Dissent]Access rights do not confer entitlements on non-custodial parent other than those which are specified in court order. **Role of Access Parent** is that of a very interested observer, giving love and support to the child in the backgroundA child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligationsParent granted access has no obligation to exercise that right; can’t be forced to exercise it either even if it was determined to be in BIC. *No attack on religious freedom, parents beliefs aren’t at risk.* |
| **Johnson-Steeves** v Lee (1997) AB | *Mom seeking full-custody. He went to* ***Vegas*** *with her before married, she wanted him to impregnate her. She wanted him to be the* ***sperm donor****. Despite conditions set, court finds no paternity contract and is not legally binding.* Social fathers are sometimes declared to be fathers of children even if they are not the biological father. **Even though he’s clearly the father, not enough to entitle access rights – must determine whether its BIC**. Judge was pissed because mom paid little attention to child’s interests. **It is the child’s right of access to his father and not his mother’s right to bargain away.*** Consideration is given to relationship between mom and dad so that any differences b/w the two are minimized and do not interfere with the BIC
 |

### What is the Remedy when access is denied or frustrated?

Ex: when custodial parent interferes with access parent’s rights.

***Contempt of court*** and ***Termination of spousal support***

* No cause of action in tort or breach of fiduciary duty against custodial parent (*Frame*)

### Ungerer v Ungerer (BC) 1998 - *Court terminates spousal support because Mrs. U refused or failed to cooperate with access- found in contempt of court and imprisoned.*

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| **Ungerer** v Ungerer (BC) 1998 | *Court terminates spousal support because Mrs. U refused or failed to cooperate with access, such that he virtually had no access for almost five years. She was found in contempt of court and imprisoned.* **Test for terminating spousal support:** Whether **misconduct is of such morally repugnant nature as would cause right-thinking persons 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* Conduct which has the effect of frustrating a court order can be sufficient to deprive a former spouse of her right to continue to receive support
* (uses the word “egregious” conduct)
 |

### Contempt of Court:

Cases where custodial parent persistently and willfully denies court ordered access (*BL v DR)*

Case where access was being denied, mother said children didn’t want to see father, assessor realized they were **being made to think by the mother that father was bad, so it was contempt** – ***Cooper v Cooper* 2004**

Just because parent has access rights, doesn’t mean they have to be exercised.

* Very harmful to the kids though (CBA report)

## Grandparents’ Access

**s. 35 *FRA*** and **s. 16(1) & (4) *DA*** **permit order** of access in favour of third party. ***Onus on third party to show that access is BIC.***

### Bridgewater v Lee (AB) 1998 Where an access order would disrupt nuclear family, courts must exercise extreme caution

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| **Bridgewater** v Lee (AB) 1998 | *Grandmother wants access, she’s had disagreements with parents though.*Even when applicant has a genuine belief that their actions are in the BIC, the court can’t ignore the degree of negativity that would pervade the extended family should contact be maintained. **Where an access order would disrupt the child’s nuclear family, courts must exercise extreme caution in evaluating the effects of access on BIC.**  |

BUT! Courts won’t focus on a parent’s animosity towards her own mother ahead of the child’s feelings for and close relationship with grandparents. **BEST INTEREST OF CHILD.** (***Parsons v Parsons***)

Although in theory its beneficial for children to have contact with members of extended family, it is **not in their best interest to be forced to visit** them when they don’t have a positive relationship with them. (***Chapman***)

### Non-Parental Access

A non-parent or non-biological relative can apply for custody or access in Saskatchewan if they have **some connection or “sufficient interest”** in the child. (***GES v DLC****)*

# Restrictions on Mobility of Custodial Parent

Mobility or relocation cases arise where one parent (usually the custodial parent) wants to move to a new location with the children and the other parent opposes the move.

## Two-Part Test for a parent who wishes to vary a custody or access order in relation to a proposed move (*Gordon v Goertz*)

*This test is now used for provincial and federal custody/access decisions.*

1. Applicant must meet the threshold requirement of demonstrating a **material change in the circumstances** **affecting the child**

**For threshold to be met, must satisfy:**

* + 1. A **change in the condition, means, needs or circumstances** of the **child** or in the **ability of the parents to meet the needs** of the child,
		2. **Which materially affects the child**, and
		3. Which was **either not foreseen or could not have been reasonably contemplated by the judge who made the initial order**
1. **If the threshold is met**, 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 them.

Consider

* Existing custody arrangement and relationship b/w child and custodial parent
* Existing access arrangement and relationship
* Desirability of maximizing contact
* **Views of child**
* Parent’s reason for moving ONLY if its relevant to that parent’s ability to meet the needs of the child
* **Disruption to the child of a change in custody** (BE AWARE: in a minority of cases, custody is being changed to the other parent)
* Disruption to the child consequent on removal from family, schools, community

 (*Can’t use an application to vary custody as an indirect route of appeal from initial custody order*)

**When applying this test**:

* **No legal presumption in favor of custodial parent**, though their views are entitled to great respect
* **Focus is on BIC, not interests and rights of parents**
* Most requests to move are not allowed

In cases where one parent wants to move with child and there is **no existing custody order**, **court must first decide issue of which parent should have custody**, then decide whether to allow that parent to relocate with child.

### Karpodinis v Kantas (BCCA) 2006 - *If she doesn’t relocate, she’ll lose job-* Not enough to overturn the TJ

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| **Karpodinis** v Kantas (BCCA) 2006 | *Mom wants to move to Texas with son. She is the custodial parent. He is access. If she doesn’t relocate, she’ll lose job.* ***Applying the test***:1. Threshold met – demonstrated material change in circumstances affecting the child
2. All familial connections are in Vancouver; child too young to travel on his own; ***although a move for financial or family reasons can conduce to the best interests of the child***. Not enough to overturn the TJ though.
 |

# ECONOMIC CONSEQUENCES OF FAMILY BREAKDOWN

## Matrimonial Property *FRA*, Part 5, ss. 1, 120.1

Property is a provincial thing!

### PROPERTY CLAIMS BY UNMARRIED COUPLES (CASE LAW)

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| Nova Scotia v. **Walsh** (SCC) 2002 | *10 year common law relationship, two children, seeking equal division of assets.* ***Constitutional challenge to Matrimonial Property Act because it discriminates towards married persons****.***Doesn’t discriminate**. * The relationships are different, dignity of common law spouses can’t be said to be adversely affected – no deprivation of a benefit
* All cohabitants have the **liberty to make fundamental choices** in their lives
* Although there are similarities between the two groups, they are fundamentally different.
* To ignore the differences among cohabitating couples presumes a commonality of intention and understanding that simply does not exist.
* **Decision to marry**, which requires consent of each spouse, encapsulates within it the spouses’ consent to be bound by the MPA property regime. Unmarried cohabitants haven’t provided this consent though.
* A **decision not to marry should be respected** because in that decision also includes the conscious choice of not aligning economic interests fully.
* The fact that some unmarried couples have relationships similar to those of married couples does not undermine the central distinguishing feature of the institution of marriage: permanent contractual commitment.
 |
| **Pettkus** v. Becker (SCC) 1980**Constructive Trusts** | *Pettkus runs a* ***beekeeping business****. Becker contributes substantially to it. They’ve lived together for 20 years.* ***She wants half****.* Resulting Trusts* Arise through the test for common intention
* Fails in this case because Judge not prepared to infer, or presume, common intention.

**Constructive Trusts*** Principle of unjust enrichment lies at the heart of constructive trust
* Principle is one of equity, so courts can shape it to accommodate changing needs and mores of society in order to achieve justice
* Three requirements to be satisfied before an unjust enrichment can be said to exist:
1. An **enrichment**
2. A **corresponding deprivation**
3. **Absence of any juristic reason** for the enrichment (i.e. it would be unjust to not interfere)
* **This case was clearly a valid application of Constructive trust.**

\*No reason not to apply this doctrine to common law relationships.  |

### *Sorochan v. Sorochan* (SCC) 1986 - *Lived together 42 years.-* Constructive trust

* Constructive trust can be imposed on Ms. Sorochan’s contribution to the preservation, maintenance or improvement of property, even though her work did not contribute to the acquisition of the asset (Mr. S bought it on his own, she just worked the farm with him). **Clear link between the contribution and the assets.**

### *Peter v. Beblow* (SCC) 1991 - *Lived together 12 years.-* Contribution to care of household and childcare duties without compensation

* Based on domestic services contribution, Ms. Peter was found to have satisfied all 3 requirements for unjust enrichment.
* **Contribution to care of household and childcare duties without compensation enhanced value of property, sufficient to make out a proprietary claim.**

**Kerr** v. Baranow (SCC) 2011 - \*\*BIG Unjust Enrichment Case - **common intention resulting trust should no longer be applied -** replaces it with a different approach, one called the "joint family venture."

|  |  |
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| **Kerr** v. Baranow (SCC) 2011\*\*BIG Unjust Enrichment Case | *Common law relationship break down*Resulting TrustDoctrine of **common intention resulting trust should no longer be applied** in domestic property and financial disputes. Unjust EnrichmentNotion of restoring a benefit which justice does not permit one to retain. * Affirms the 3 point test in Pettkus
* (3) Absent any juristic reason for enrichment: means that there is no reason in law or justice for D’s retention of benefit from P.
* **2 Step analysis for absence of juristic reason:**
1. Application of the established categories of juristic reasons (intention to make a gift, a contract, or a disposition of law)
2. Consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied.
* Overall, test for juristic reason is flexible, and fact specific.

**Before Kerr v. Baranow, successful plaintiffs in unjust enrichment cases were compensated via a "fee for service"** method called "quantum meruit." This involved a highly **unsatisfactory and unscientific method of trying to calculate the value of the service or services provided** by the plaintiff which benefited the defendant and led to the unjust enrichment and contrasting it with the impact the value of said contributions on the current value of the property in question. In Kerr v. Baranow, the Court **does away with this notion and instead replaces it with a different approach, one called the "joint family venture."**The concept is simple enough. **Where the contributions of both parties over time result in an accumulation of wealth, the unjust enrichment occurs following the breakdown of the relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts.** In contrast to the traditional analysis, the required link between the contributions of the plaintiff and a specific property may not exist, but as long as there is a clear link between the joint efforts of the parties and the accumulation of wealth, a claim for unjust enrichment may be made out. Consequently, regardless of who actually owns the property in question, when the parties have engaged in creating wealth in a common enterprise, the wealth created during the period of cohabitation will be treated by the Court as the fruit of their domestic financial relationship and not solely the property of the titled spouse.The Court's elimination of the need to show a contribution to a specific property represents a broadening of the parameters of the claim and has led many lawyers and commentators to presume that we will now see more claims of unjust enrichment in the future. Of course, proving a joint family venture may not be as simple as some think. **Whether or not the proper facts can be mustered to prove such a claim will be a challenge for some. Whether or not the couple was working together for the same economic goals, whether their economic lives were integrated and whether they had the same priorities are all questions of fact a trial court will have to satisfy** itself before a finding of JFV can be made. In addition, the Court was careful to note that mere **cohabitation does not, under the law of unjust enrichment, entitle a party to a share of the other's property or to any remedy in the absence of proof of contribution**. **In addition**, simply because a joint family venture is established does not mean the non-titled spouse will receive 50 per cent of a specific property or 50 per cent of all the total of the parties' assets. **The Court always retains the ability to select a certain percentage.**Joint Family VentureNo presumption of a joint family ventureFactors to consider when identifying a Joint Family Venture:1. ***Mutual Effort*** – whether parties worked collaboratively towards common goals
2. ***Economic Integration*** – degree of economic interdependence; the more extensive the integration of finances, economic interests and well-being, the more likely joint family venture.
3. ***Actual Intent*** – concern for the autonomy of the parties; courts may infer from parties’ conduct that they intended to share in the wealth they jointly created; length of relationship can be an indicator, title to property also.
4. ***Priority of the Family***- whether and to what extent they have given priority to the family in their decision making; ex: leaving workforce for a period of time to raise children, accepting underemployment to balance domestic needs

To be entitled to remedies of this nature, claimant must show both (a) there was, in fact, a joint family venture, and (b) there was a link b/w his contributions to it and the accumulation of assets/wealth.* While determining proportionate contributions, not exact science w/ minute examination of every give & take of daily life – **calls instead for a reasoned exercise of judgment in light of all the evidence**

RemedyTraditionally, 2 remedies in unjust enrichment claims:1. ***Monetary Award*** – assessed by fee-for-service (value received)
2. ***Proprietary Award*** – where claimant can show he or she contributed to a specific property (remedial constructive trust); share of the assets

Cromwell J. rejects the remedial dichotomy – since equitable principles are flexible, corresponding remedies should also be. * Judges assessment of damages (value) is treated with considerable deference on appeal.

**Mutual Benefit Conferral** – Can be taken into account at existence of juristic reason stage, but usually taken into account at the defence or remedy stage.  |

## FAMILY ASSETS UNDER THE *FRA*

Four ways for asset to be a family asset:

1. **S. 58** - “**Ordinary Use for a Family Purpose**” (OUFP) test
2. **S. 58(3)(d)** - It is a **right under an annuity or pension, home ownership or retirement savings plan**
3. **S. 58(3)(e)** – It is a **venture** to which non-owning **spouse has directly or indirectly contributed**
4. **S. 59** – It is a **business asset** towards which non-owning **spouse has made a direct or indirect contribution**

**Onus of proof is on spouse opposing the “family asset” designation** **for OUFP assets** – **otherwise, Onus is on applicant**. (**s. 60**)

***Family assets are subject to a prima facie equal division between spouses on occurrence of a triggering event (s 56).***

However, equal **division may be adjusted by court** to favour one of the spouses (**s 65**).

**Therefore Two stages**:

1. **Characterization** stage (is it a family asset?)
2. **Reapportionment** stage (should 50/50 division be appropriate?)

In BC, assets acquired prior to marriage is immaterial – excluded assets

## ORDINARY USE FOR A FAMILY PURPOSE

ALWAYS open to other party to rebut OUFP presumption and show an item should be excluded as personal property.

**Intention**, the **s 60** presumption, and the **value of asset in context of family economy** are **important factors**.

* Inheritance funds are not family assets where the only proven use was as a ‘possible’ source of retirement income.

### *Jiwa* (BCCA) 1992 – Insurance policies (similarly pensions) had no cash surrender value, and were used to provide a sense of future security of the family unit, deemed a family purpose and were family assets, so too were the proceeds of the policies.

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| **Martin** v. Martin (BC) 1992 | ***Parties mainly kept own assets separate and apart, but contributed equally to a living expense fund****. Separated after almost 5 years cohabitation.*Savings made during a marriage to provide retirement income would normally be a family asset, but this is not universal – fact specific. **Equal distribution of family assets in this case would yield an unfair result.**  |
| **Lye** v McVeigh (BC) 1991 | Facts: 7 yr marriage. He earned more than her, but both contributed equally to living expensesIssues: Were husband's savings family assets? Was it fair to distribute pension funds unequally?**Savings*** **These are personal but not family assets. Wife insisted they maintain separate assets and neither made life-long commitment to marriage** (modern marriage consideration). If they had children, the assets MAY have been assumed to be of a communal nature
* **Only quasi-family purpose was contribution to family home, but wife made equal contributions from her own assets**. This was also not a pension or retirement fund

**Re-apportionment of Pensions*** Pensions are by definition family assets and subject to equal division unless re-apportioned
* **Here equal division would ignore that husband contributed to his plan before marriage and that wife has her own pension. Also wife is 5 years younger and has more time to build hers up**

Ratio: If something is held jointly, there is a presumption of joint ownership and therefore family asset to split **unless presumption can be rebutted b/c of circumstances.**  |

### *Samuels v Samuels* (BC) 1981 - The use of income from an asset for a family purpose does not for that reason make the asset itself a family asset

### *Brainerd v Brainerd* (1989) BC - Property acquired through inherited funds. But it was acquired primarily so that family could enjoy amenities and rental income went to joint bank account to parties. Family Asset!

### Evetts v. Evetts (BCCA) 1996 - *What constitutes “ordinary use” for OUFP?-* Unwise to establish any rules for determination of whether a capital asset will be considered a family asset.

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| **Evetts** v. Evetts (BCCA) 1996 | *What constitutes “ordinary use” for OUFP?** Fact driven
* Unwise to establish any rules for determination of whether a capital asset will be considered a family asset.
* Guidelines though:
	+ Just b/c income from capital asset is used occasionally for family purpose doesn’t of itself make capital asset a family asset.
	+ Fact that capital from asset used from time to time, when required, for famly purpose may be indication that asset is family.
 |

## Hobbies

Two lines of authority:

1. Subject matter of a hobby of one spouse is a family asset, but should not be equally divided. (***Papineau*** *–* 1981 BC)
2. **Contextual – whether pursuit results in property ordinarily used for a family purpose is a question of fact in each case**, with burden that it was not for family purpose

Authority seems to suggest that hobbies with high worth are family assets, low worth are not, but this is contextual!

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

**If a property is acquired with the proceeds from the sale of a family asset, that property can be ‘traced’ back to the original family asset** and thereby can itself be classified as a family asset (***Tratch*** – 1981 BC)

## DEBTS

***FRA*** allows divide of family assets, but **does not refer to allocation of debts**.

Debts **taken into account only under** **s. 65(1)(f).**

### s. 65(1) of the *Family Relations Act*:

If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(**a**) the **duration of the marriage**,

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

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

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

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

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

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

### *Young*, 1990, BCCA - Court cannot make spouse jointly liable to creditor for a debt of other spouse, no matter for what purpose

…it was incurred, nor can they make one spouse liable to indemnify the other in whole or in part for liability of later.

### *Mallen*, 1992 BCCA - *FRA* doesn’t sanction the approach of setting off the total value of family debts against total value of family assets. (but… there is still s. 65)

* No provision requiring burden of liabilities incurred for family purposes be shared equally or at all at breakdown
* *FRA* precludes creating a freestanding obligation between parties for a debt

**In s. 65 though, court has discretion to re-apportion family assets on account of the “liabilities of a spouse”, BUT – no presumption:**

1. Onus on party seeking re-apportionment to satisfy court that it is required as a matter of fairness
2. Court must limit their vision of fairness to the factors circumscribed in **s. 65**.

### *Stein*, 2008, BC *FRA* does not preclude an order dividing between spouses a contingent liability which cannot be valued at time of trial (ex: in this case it was tax shelter benefits).

* The fact that it is not feasible to precisely value an asset or debt at time of separation does not alter principle that the complete financial situation of both spouses needs to be considered in order to ensure just result.
* In context of assets, **spouses have a right to claim an interest even where the asset itself is ‘inchoate, contingent, immature or not vested.**
* Act does not place any temporal limits on the division of assets, nor does it say that once assets subject to initial division, a reapportionment can’t occur at some point in future.

## PENSIONS s. 58(3)(d) defines it as a family asset.

In case of pension plan, not necessary to satisfy the “family purpose” test because **s. 58(3)(d)** defines it as a family asset.

* In some cases, severance payments or disability payments may be held to qualify as pensions

### Dividing Pensions - Part 6 of the *FRA* deals with division of pensions; requires pension plan administrator be involved in process of dividing pension

Basic Models for Dividing Pensions

1. A **Matured Pension** (where member is retired) is **divided by a benefit split**; spouse becomes a ‘limited member’ of the plan
2. An **Unmatured Pension** (member not yet retired) in a defined contribution plan is **divided by transferring the spouse’s share, on marriage breakdown, to another pension vehicle**
3. An **Unmatured pension** in a **defined benefit plan** is **divided by making the spouse a ‘limited member’ of the plan**. Limited member can either (a) wait for member to retire and receive separate pension or (b) not wait, direct plan at any time after member becomes eligible to retire to transfer share to another pension vehicle.

### Agreements Concerning Pensions

* Spouses **may waive a division** of pension entitlement (**s. 80(1)(b) and (c)**) – **subject to fairness**
* An agreement varying division **may not give non-member more than half** of pension.

## VENTURES AND BUSINESS ASSETS

### Venture: an undertaking attended with risk (interpreted liberally to include any investment which there is an element of risk)

… and which has the potential for profit even though its primary function may be to serve some other purposes

### *Robertshaw,* 1979, BC - wife made a contribution to the operation of the business, either direct or indirect. Nothing in wording of the Act mentions consideration of compensation. - Therefore, assets of husband’s medical practice are not excluded, they are family assets

* *Wife is a paid employee of the husband’s medical practice.*
* Fact that she was paid for her work, whether reasonably or otherwise, is irrelevant.
* Fact is, wife made a contribution to the operation of the business, either direct or indirect. **Nothing in wording of the Act mentions consideration of compensation.**
* Therefore, assets of husband’s medical practice are not excluded, they are family assets

***TEST:***

1. **Are they family assets?** (**s. 58**)
2. **Are the assets excluded?** (**s.** **59**)

**No legal difference between ventures and business assets.**

The following have been **held to be business assets**:

* **Patent** Rights (***Coulthard***, 1984, BC)
* **Farm land** and operations (***Laxton***, 1981, BC)
* **Professional practices**, such as medical practices (***Wilson***, 1982, BC)

### *Samson*, 1996, BCCA Professional qualifications and stuff like that are intangible assets personal to the holder, w/o market value – there for they are NOT property within s. 58, s. 59 meaning – regardless of any contributions towards them.

* Husband’s employment nor the capitalization of a stream of income derived from it can’t be considered “property” for which order can be made under Part 3 of Act. **Error in principle to treat husband’s income from employment as if it were property subject to division.**

### *De Beeld*, 1999 BCCA Contributions made by a spouse towards the other spouse’s university degree or professional designation may be considered in the context of a spousal support claim. (the B.C. Court of Appeal awarded a $40,000 lump sum as compensatory support on the basis of the wife’s contribution to the husband’s education.)

Think of the asset’s **transferability** when considering it as a divisible property – right to work in a particular profession for example, can’t be transferred, therefore its not “property within the meaning (***Caratun***, 1992, ONCA)

### Contributions to Ventures and Business Assets

***Onus*** – **burden on the non-owning spouse to show she made either a direct or indirect contribution**

 **Direct contributions**:

* + Paid or unpaid work in the business
	+ Contributing family assets or permitting use of family assets to acquire or maintain business asset
	+ Assuming risks by, for ex, mortgaging a family asset or guaranteeing a loan

**Indirect contributions**:

* + Can include contributions other than the household management and child rearing mentioned in s. 59(2)
	+ Courts have a VERY broad interpretation of indirect contributions. In *Piercy*, 1991, BC, court held wife’s responsibilities of home care, entertaining and helping with family was indirect contribution to business and found it to be a family asset.

### Dividing a Business Liquidation only in exceptional circumstances – *Balic,* 2006, BCCA

* It is the **valuation of the shares of company, not valuation of company’s business which can be deemed family asset** and apportioned for fairness.

## REAPPORTIONMENT AND DISSIPATION OF ASSETS (S. 65)

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| **Narayan** v. Narayan (BCCA) 2006 | *Husband appealing 100% of matrimonial home going to wife. Argument is that he was apportioned the RRSPs, which are a depreciating asset with taxes, whereas she got the home which is an appreciating asset without taxes.* Court rejects this argument – he cashed his RRSPs too soon. Dissipation of assets and material non-disclosure are relevant circumstances which the court is entitled to take into account in making compensation orders, and in determining whether and to what extent, the evidence of non-disclosing party is trustworthy. Judge found that husband’s actions leading up to and following the separation severely undermined the stability of the family and left her with an even greater need for economic security to enable her to maintain the family unit.  |

## VALUATION DATE Valuation date doesn’t come up in *FRA –* valuation date should be date of trial unless there is some reason to depart from that (*Gilpin*, BCCA, 1990)

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| **Gilpin** v. Gilpin (BCCA) 1990 | *Parties agree on equal division of assets, but disagree on valuation date. Is valuation date at date of triggering event or date of trial?* Unless unfair, **valuation date for family assets should be the date of trial**. (Fairness is the legislative goal)* Mere possession and control over family assets cannot constitute a valid basis for denying the appellant the right to share in the increased value.
 |

## COMPENSATION ORDERS (And Aboriginal Property)

### s. 124 – can be used to grant one party exclusive temporary use of family residence and personal property in it

### s. 66 – gives court authority to make any order necessary to give effect to a judicial reapportionment of property under s. 65 or Part 6 of the *FRA*

### Federal gov’t has exclusive jurisdiction over Indian land – this has resulted in BC courts dismissing applications around division of property. Compensation in lieu of division also encroaches on federal authority.

### *Derrickson* (SCC) - Provincial *FRA* is inapplicable, either on its own or as a law of general application that extends to Indians by virtue of section 88 of the *Indian Act*

* Provincial *FRA* is inapplicable, either on its own or as a law of general application that extends to Indians by virtue of section 88 of the *Indian Act.*
* Provisions of the *FRA* on compensation could be extended to Indians, as these were not inconsistent with the property aspect of the *Indian Act*, particularly when awarded for the purposes of adjusting the division of family assets between spouses.

No Indian can own reserve lands in fee simple.

# Spousal Support

**Who is responsible for support and why?**

### *Messier* (SCC) 1983) - no reason to cancel support on the assumption that she will no longer need it.

While recognizing the principle of individual responsibility implying an obligation on the part of a divorced spouse to work towards self-sufficiency, there is no reason to cancel support on the assumption that she will no longer need it.

* Doesn’t mean obligation of support should continue indefinitely when marriage bond is dissolved, or that one spouse can continue to drag on the other indefinitely or acquire a lifetime pension as a result of marriage.

**Majority struck out termination date**

**Dissent pushed for clean break – ability to work leads to the end of the divorce and the beginning of the truly single status for each former spouse.**

### Spousal Support and Same-Sex Spouses (*M v. H.*) - SCC agrees to read out the words “man and woman” in definition of spouse and replace with “two persons”

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| **M v. H** (SCC) 1999 | *Same sex relationship, constitutional challenge for validity of “spouse” in Act.* SCC agrees to read out the words “man and woman” in definition of spouse and replace with “two persons”**Objectives of Support:*** A means to provide for the equitable resolution of economic disputes that arise when intimate relationships b/w individuals who have been financially interdependent break down
* To alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals
 |

### Test for Proving Conjugality: *Gostlin v Kergin -* lived together in ‘marriage-like’ relationship for a period of at least 2 years.

In order for unmarried cohabitants in BC to make spousal support claims, they must show that they have **lived together in ‘marriage-like’ relationship for a period of at least 2 years.**

* Ask whether the unmarried couple’s relationship was like the relationship of the married couple
* Weird test also mentioned by the BCCA: **If, at anytime during the cohabitation/relationship period, whether they would consider themselves committed to life-long financial and moral support of that partner in the case of sudden disablement for life of the other partner.** If both say yes, “they are living together as husband and wife.” (***this subjective test is later undermined****)*

Other less weird questions to ask about the relationship (*Gostlin* cont.):

* **Did they share their lives?**
* **Did one of them surrender financial independence and become economically dependent in accordance with a mutual arrangement?**

Subjective test is undermined (***MacMillan-Dekker***), the **emphasis should be on the objective facts** that are indicia of both a conjugal/spousal relationship and the parties objective intentions.

### The *Molodowich* test has been widely applied and is preferred by SCC:

1. **Shelter**
	1. Did the parties live under same roof?
	2. What were the sleeping arrangements?
	3. Did anyone else occupy or share the available accommodation?
2. **Sexual and Personal Behaviour**
	1. Did the parties have sex? Why not?
	2. Did they maintain fidelity to each other?
	3. What were their feelings?
	4. Did they communicate on personal level?
	5. Did they buy gifts for each other?
3. **Services**
	1. Preparing meals
	2. Washing clothes
	3. Shopping
	4. Household maintenance
4. **Social**
	1. Did they participate together or separately in community activities?
	2. What was relationship with respective families?

(*for same-sex couples, be flexible with this, they may not have been public for fear of reprisal)*

1. **Support (Economic)**
	1. What were the financial arrangements?
	2. Property ownership
2. **Children**
	1. Attitude and conduct of parties concerning children.

### “The extent to which the different elements of the marriage relationship will be taken into account must vary with the circumstances of each case” – *Molodowich*

### Courts must determine whether a relationship is conjugal with the utmost flexibility – (*M v. H*)

### *Gostlin* is the authority for BC… *Molodowich* has been criticized for not being helpful, use the factors to help inform the content of *Gostlin* though.

### G. (JJ) v. A. (KM) (BCSC) 2009 – First marriage-like relationship for at least 2 years, Then bringing application for support within one year after Cessation of marriage-like relationship– not the cessation of the cohabitation

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| **G. (JJ) v. A. (KM)** (BCSC) 2009 | **First**! For spousal support claims, start by establishing that client is in **marriage-like relationship for at least 2 years**. **Then** that you are **bringing application for support within one year after ceasing to live together**. **Subjective tests not determinative for establishing marriage-like relationship –** if the reality of the relationship and living arrangement is that of a marriage-like relationship, doesn’t matter if subjective intent isn’t present (*Takacs*)* (Objective tests not determinative either in and of themselves)
* **Must examine the relationship as a whole and consider all the various objective criteria while being flexible to the unique formations we have today.**

**Cessation of Relationship*** **Cessation of marriage-like relationship starts the limitation running – not the cessation of the cohabitation**
* **Key indicia** of ceased relationship:
	+ Absent sex
	+ Clear statement by one party to end relationship
	+ Physical separation into different rooms or homes
	+ Cessation of presentation to outside world that they are couple

All of this on Standard of Probabilities |

## Three Conceptual Grounds for Support (all three in current use)

Judge must consider them all and any or all of them may figure in the ultimate order, as may be appropriate in the circumstances of the case (***Bracklow***)

1. ***Contractual (Miglin)***
* Applies in situations where parties have entered into a **marriage or separation agreement**, or a contractual obligation is implied
1. ***Compensatory (Moge)***
* Applies where a **spouse has forgone opportunities or endured hardships** as a result of the marriage
1. ***Non-compensatory (Bracklow)***
* Applies in situations where the recipient **spouse’s need exceeds the entitlement to be compensated**

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| Test for Variation to Order (s. 17(4.1) – Divorce Act) *Change in the condition, means, needs or other circumstances of either former spouse* |

### *(1) Contractual Model* Sourced in s. 89(1)(b) of *FRA*; and s. 15.2(4) of *DA*

The “Trilogy” 🡪 ***Pelech****,* ***Caron****,* and ***Richardson***

### *Pelech - Divorce, lump sum maintenance to wife was spent, husband now much more wealthy years later. Wife wants further maintenance. SCC dismisses appeal.*

* *Divorce, lump sum maintenance to wife was spent, husband now much more wealthy years later. Wife wants further maintenance. SCC dismisses appeal.*
* Must be a “radical” change in circumstances related to a pattern of economic dependency caused by marriage, n order for court to consider application for increase of maintenance

### *Caron - Separation agreement provided support until wife remarried or cohabitated with man for more than 90 days. She does that but the guy doesn’t support her, so she wants the agreement nullified. SCC dismisses appeal*

* *Separation agreement provided support until wife remarried or cohabitated with man for more than 90 days. She does that but the guy doesn’t support her, so she wants the agreement nullified. SCC dismisses appeal.*
* She doesn’t qualify for a variation based on test used in ***Pelech***(above)

### *Richardson- Doesn’t involve variation of divorce decree incorporating agreement. In settlement, they do 1-year support. After a year, she applies for maintenance. SCC dismisses*

* *Doesn’t involve variation of divorce decree incorporating agreement. In settlement, they do 1-year support. After a year, she applies for maintenance. SCC dismisses.*
* ***Pelech*** test applies whether the applicant is seeking an initial support order under ***Divorce Act*** (as per ***Richardson****)* or a variation of such an order (as per ***Pelech***& ***Caron***)
* Underlying rationale is the same under both, namely (1) the importance of finality in the financial affairs of former spouses and (2) the principle of deference to the right and responsibility of individuals to make their own decisions

Policies Underlying the Trilogy

### *Separation Agreements* – should not be lightly disturbed so parties feel encouraged to settle their disputes

* People should be encouraged to take responsibility for their own lives and their own decisions
* Courts may simply be incapable of dealing with the ever increasing mass of matrimonial disputes
* Importance of certainty and finality (lawyers must be able to advise clients with some degree of certainty

**Gender Inequality**

The gender inequality may result in an unequal bargaining position and unfair domestic contracts is not considered sufficient cause for overriding such agreements. (*Ross v. Ross*)

* It ultimately reinforces gender bias to maintain a system whereby women have to argue that they are stupid, emotional or pressured in order to convince the court to exercise discretionary, paternalistic power to protect them. (*Pelech* – Madame Justice Wilson)

**Causal Connection Test and the Clean Break Approach**

BCCA has quickly clarified the application of the trilogy and the causal connection test.

* Causal connection test is only applied when there is an application to vary an order where the order was intended to be final, or where the order reflected an agreement which was intended to be final, or where s. 17(10) of the *Divorce Act* applies. (*Story v Story* – BCCA 1989)
* There may be cases where self-sufficiency is never possible due to the age of spouse at marriage breakdown. In such cases, spousal support obligation is permanent (*Story v Story* – BCCA 1989)

*Moge* (SCC – 1992) case continues in that direction: it limited the application of the causal connection test to fact situations involving contracts rather than applying it to all support cases.

NOTE: LHD makes clear in judgment that she is explicitly not dealing with agreements - so Pelech arguably survives Moge.

### *(2) The Compensatory Model* Sourced – s. 89(1)(a) and (d) of *FRA*

– role of each spouse in their family embraces the contributions made by the spouses to the family for which compensation may be appropriate on the collapse of the marriage

### Moge v. Moge (SCC) 1992 - *Marriage around 20 years. After 15 years of maintenance, husband applies to terminate child support and spousal support. Wife appeals on spousal support only. CA orders indefinite support. SCC affirms decision*

|  |  |
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| **Moge** v. Moge (SCC) 1992 | *Marriage around 20 years. After 15 years of maintenance, husband applies to terminate child support and spousal support. Wife appeals on spousal support only. CA orders indefinite support. SCC affirms decision.* * Court looks at social science re: divorced women and poverty (first time to do so!)
	+ 2/3rds (66%) of divorced women live below the poverty line, post-separation
	+ When we exclude spousal support, that number increases to 74% of divorced women living in poverty
	+ **Can take judicial notice on impact of divorce on women** (as long as it can’t be reasonably questioned)
* **Purpose of SS:** to relieve economic hardship that results from the breakdown of the marriage
	+ Marriage is an equal economic partnership that creates financial benefits for both parties and on marriage breakdown.
	+ Spouses benefit each other by either staying at home, or going out to work
	+ Post-separation, those same arrangements may either impair or improving each party's economic prospects
	+ Court must look at what the effect of the marriage has been in either “impairing or improving each party’s economic prospects, regardless of gender”.
	+ In reality, impact of gender is going to be apparent; women generally suffer economically post-separation
	+ LHD rejects "modern marriage" model; based on stereotypes - marriage is a far more complicated matter, and that a spouse should not have to fit into a stereotype in order to succeed in their case

Any economic disadvantage to a spouse flowing from a shared decision in the interest of the family should be regarded as compensable. * Standard of living of wife after dissolution is a good indicator of the disparity in economic advantage between spouses. The longer the relationship, the closer the economic union, greater the presumptive claim to equal standards of living.
* SCC **rejects the emphasis** in ***Pelech* on economic self-sufficiency**.
	+ Self sufficiency is only 1 of 4 objectives of SS (***s 15.2(6)***) and should not be prioritized over others.
	+ No single objective is paramount, all must be borne in mind. The objectives reflect the diverse dynamics of the many unique marital relationships
	+ No hard and fast rule for determining this weight – **judge discretion**
* In dismissing the husband's appeal, SCC relies on these factors
	+ Wife spent a lot of time out of the workforce
	+ Janitorial work supplemented husband's income, but wife otherwise responsible for childcare & housework
* **Length of marriage was a key factor - 18 years** - SCC makes clear that if this was a short marriage, the wife would be unlikely to succeed to the extent to the length of the actual arrangement
* **Causal connection test rejected in cases where there is no private agreement.**

While analysis of impact of marriage and its breakdown applies equally to both parties, in most marriages, it is the wife who remains partner who is more likely to be economically disadvantaged. ***Moge***recognized the future economic harm that a traditional division of labour within a marriage can cause, and seeks to compensate women who undertake this work at the expense of their own careers and future earning capacity.**McLachlin J. (concurring):** Notes that Court's obligation under 2 sections means that strict causal connection test in ***Pelech*** has been overruled. Incorrect to focus on economic self-sufficiency b/c to do so, = the exclusion of the other factors.**Judge holds considerable discretion** in light of the factors set out in **s. 15** of ***DA*** |

### Compensatory support should be awarded where it would be just to compensate a spouse for his or her contributions to the marriage or for sacrifices made or hardships suffered as a result of the marriage (*Bracklow*)

### *(3) Non-Compensatory Model (Basic Social Obligation)*

### Bracklow v. Bracklow (SCC) 1999 *What does a healthy spouse owe to a sick one when marriage collapses? 2 years marriage, wife to hospital, one year later he skips out on her.* CA rules that no link between economic disadvantage and marriage breakdown + not a long marriage

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| **Bracklow** v. Bracklow (SCC) 1999 | *What does a healthy spouse owe to a sick one when marriage collapses? 2 years marriage, wife to hospital, one year later he skips out on her.* CA rules that no link between economic disadvantage and marriage breakdown + not a long marriageWhen spouses are married, owe each other a mutual duty of support. Default presumption of socio-economic partnership is mutuality and interdependence. * This expectation can be altered through explicit contracting or through unequivocal structuring of their daily affairs to show disavowal of financial interweaving.

When marriage breaks down, presumption of mutual support no longer applies. The economic variables of marriage breakdown and divorce do not lend themselves to the application of any single obligation. Two theories;1. **Independent, clean-break model**: sees each party to marriage as an autonomous actor who retains his economic independence throughout the marriage
* Equality and independence for both spouses
* Encourages rehabilitation and self-maximization of dependent spouses
* Recognizes social reality of shorter marriages and successive relationships
* ***Supports the compensatory theory of support***
1. **Mutual obligation theory**: posits marriage as a union that creates interdependencies that cannot be easily unraveled; these interdependencies create expectations and obligations that law recognizes and enforces
* Loss individual autonomy doesn’t violate equality, b/c autonomy is voluntarily ceded
* Recognizes reality that in long relationships, affairs intermingled and impossible to disentangle neatly
* Recognizes the artificiality of assuming couples can actually have a clean break from mutual support to absolute independence
* Puts burden on spouse rather than State

***Divorce Act*** not confined to one type of marriage or one type of support. **Non-compensatory Factors**Courts must also consider spouse’s actual ability to fend for himself and the effort that has been made to do so. * Can incorporate ‘condition, means, needs and other circumstances of each spouse’ (from ***DA***) in a non-compensable way too.

**Objectives**: **of support** – **s. 15.2(6)** ***DA****:*1. Recognize the **economic consequences** of the marriage or its breakdown (***compensatory***)
2. Apportion b/w spouses financial **consequences of child care over and above child support** (***compensatory)***
3. Relieve any **economic hardship** of the spouses arising from the breakdown of the marriage (***non-compensatory)***
4. In so far as practicable, **promote the economic self-sufficiency** of each spouse within a reasonable period of time (***non-compensatory***)

**Non-compensatory principle has come to play a large role in providing very generous basis** for support (***Ashworth***)In some circumstances, law **may require healthy party continue support disabled party, absent contractual or compensatory entitlemen**t. **Justice** and considerations of **fairness** may demand no less. **Quantum of the Award** (refers to both amount & duration)While its easier on exams to separate arguments for entitlement and quantum, the same factors have an impact on both.  |

## Spousal Misconduct and Economic Self-Sufficiency

Can spousal misconduct be considered in determining if a spouse has failed to achieve economic self-sufficiency?

### Leskun v. Leskun (2006) SCC *SCC decided wife should continue receiving spousal support from cheating ex b/c she was too emotionally devastated by his conduct to return to work.*

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| **Leskun** v. Leskun (2006) SCC | *“Her life is this litigation.”* *SCC decided wife should continue receiving spousal support from cheating ex b/c she was too emotionally devastated by his conduct to return to work.* **Spousal support** regime is designed to **deal with consequences** of marriage **on a no-fault basis**. Attribution of fault to the other spouse is irrelevant (i.e. irrelevant that he cheated on her)* **Distinction between the emotional consequences of misconduct and the misconduct itself**. If the spousal abuse resulted in depression, then its relevant. If it’s the misconduct itself in question, its irrelevant.

Self-sufficiency is one of the goals set out in s. **15.2(6)** in ***DA**** **Failure to achieve self-sufficiency is not breach of a ‘duty’ and is simply one factor amongst others to be taken into account. Wife doesn’t have a duty to move on**.
 |

## Separation Agreements and Variation of Support

In ***Miglin***, SCC held that the narrow test set out in ***Pelech*** trilogy for interfering with a pre-existing agreement is **not appropriate** in the current statutory context.

(*Pelech* test only allowed orverride of agreement where there has been a radical and unforeseen change in circumstances that is causally connected to marriage)

### Miglin v. Miglin (SCC) 2003 - *Separation agreement, wife waived spousal support. Wife now wants support.* *• Court should be loathe to interfere with a pre-existing agreement UNLESS it is convinced that the agreement does not comply substantially with the overall objectives of DA*

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| **Miglin** v. Miglin (SCC) 2003 | *Married, co-owners of hotel, both have duties. Separation agreement, wife waived spousal support. Wife wants support.*SCC allows appeal – **separation agreements should be accorded significant and determinative weight** (nothing in surrounding circumstances at time of formation indicates that there were vulnerabilities, both had counsel, no significant departures from overall objectives of Act)* **Court should be loathe to interfere with a pre-existing agreement UNLESS it is convinced that the agreement does not comply substantially with the overall objectives of *DA***
* More must be shown than mere deviation from what a trial judge would have awarded
* Exclusive focus on s. 15.2(6) objectives leaves no room for the parties to apply their own values and pursue their own objectives in reaching a settlement (equitable sharing requires deference towards their own objectives)
* **Listed objectives relate only to orders for spousal support – that is, to circumstances where the parties have been unable to reach an agreement**

Compelling policy goals of certainty, autonomy and finality* Require TJ to consider extent to which agreement represents a final settlement of these issues, negotiated under unimpeachable conditions, to which both parties agreed and on which each of them intended to rely.
* Only then will judge consider whether agreement must nevertheless be set aside in full or in party because non-compliant with broader objectives

Narrow test of *Pelech* for interfering with pre-existing agreement is not appropriate. **BUT** – an agreement is only one factor among others, not binding and subject only to contract law remedies. * Court should be guided by objectives of spousal support, while treating parties reasonable best efforts to meet them as presumptively dispositive.
* Set aside party wishes only where shown that **agreement fails to be in** **substantial compliance with overall objectives of the act**. (Including s. 15 objectives AND the three policy goals)

**TWO STAGE APPROACH****1…**1. **The Circumstances of Execution**
* Be alive to the conditions of the parties, including oppression, pressure or other vulnerabilities; professional assistance, etc.
* Emotional stress not enough to presume party incapable of binding agreement
* Presence of professional assistance will often overcome any imbalances between parties
1. **Substance of the Agreement**
* Extent agreement takes into account factors and objectives listed in Act
* Only significant departure will warrant intervention on basis that there is not substantial compliance with Act
* Determination that agreement fails to comply substantially does not necessarily mean entire agreement must be set aside

**2…**1. Where circumstances of execution are not impugned and agreement is substantially compliant, **court should defer to wishes of parties and afford agreement great weight.**
2. Unlikely that the court will disregard the agreement in entirety **but for a significant change in the parties’ circumstances from what could reasonably be anticipated at time of negotiation – show that the agreement no longer reflects the parties’ intention**
	1. A certain degree of change is foreseeable
	2. Each person’s health cannot be guaranteed as a constant; housing prices may fluctuate, etc.
	3. Not a test of strict foreseeability – rather, ***extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at time of application***
 |

### *Rick v. Brandsema (SCC) 2009* *- Duty on separating spouses to provide full and honest disclosure of all relevant financial information when negotiating*

* Duty on separating spouses to provide full and honest disclosure of all relevant financial information when negotiating
* An agreement negotiated with full and honest disclosure and without exploitative tactics will likely survive judicial scrutiny

### Spousal Support Advisory Guidelines: A Draft Proposal

*Spousal Support Advisory Guidelines*

* Not legally binding, intended as informal guidelines operating on an advisory basis only
* They don’t address entitlement or the effect of a prior agreement on spousal support, but rather **focus on the amount and duration (quantum) of spousal support once entitlement has been established**

2 basic formulas in the proposal:

1. ***Without Child Formula***
2. ***With Child Formula*** – deals with claims in the presence of children (either dependent or of the marriage) resulting in a concurrent child support obligation at time of spousal support determination

Both use income sharing method (as opposed to budgets) to produce a range (rather than single number) of amounts and durations for support – allows judicial discretion in assessing each particular case.

### ‘Without Child’ Formula- To determine amount of support: take each of parties’ gross incomes and suggest 1.5% to 2% of the difference in incomes for each year of the marriage. (25 year marriage would be 37.5% - 50%). Don’t go beyond 50%.

Based on two factors:

1. Gross income difference between parties
2. Length of marriage

To determine amount of support: take each of parties’ gross incomes and suggest 1.5% to 2% of the difference in incomes for each year of the marriage. (*25 year marriage would be 37.5% - 50%).* Don’t go beyond 50%.

In determining actual amount between the range, can consider several factors:

* Strong compensatory claim
* Recipients needs
* Property division
* Needs and limited ability to pay on part of payor spouse
* Self sufficiency incentives

Duration of spousal support ranges from 0.5 to 1 year for every year of marriage. If marriage is over 20 years, support is indefinite.

Trade offs can occur: ex, Can front-end load awards by increasing amount over shorter duration; extending duration by decreasing monthly amount, formulating a lump sum by combining factors.

### “With Child” Formula

Primary consideration is the **priority of child support** over spousal support

3 main differences to “without child” formula:

1. The with child formula uses the net incomes of the two spouses, not gross income
2. With child formula divides the pool of combined net incomes and not the differences of gross incomes
3. Upper and lower limits in the with child formula do not change with the length of marriage

**Amount**: Applies the Individual Net Disposable Income (INDI) of each party. INDI is amount of income set out in *Child Support Guidelines*, minus child support payable (table amounts + extra ordinary expenses), minus taxes and deductions, plus gov’t benefits and credits. Once calculated for each party, add them together and use factors to decide where in range of 40-46% to be received.

**Duration** of with child awards is initially indefinite, but subject to outer limits. Shorter marriage (under 10 years) limitation set to when youngest child finishes high school.

### W. v. W. (BCSC) 2005 - Spousal Support Guidelines - not binding

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| **W. v. W.** (BCSC) 2005 | *Married 22 years.* Based on ***Moge***, in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become. Typically, **Primary earner usually has 3 benefits**1. **Benefit of a share of the assets**
2. **Benefit of having had children**
3. Benefit of a higher income earning ability because of **full participation in work force, substantially unencumbered by child care responsibilities**

Secondary earner has first two benefits, but the disadvantage of not having the third is addressed by a compensatory spousal support award. **Spousal Support Guidelines**Advisory Guidelines formulas are consistent with the law in BC, but they are **not binding** and there is no intention to legislate them. They can be used as part of the argument though. * Important step towards rationalizing and bringing some uniformity to the computation of spousal support
* Can provide a crosscheck against assessment made under existing law
* Formulas can be used to consider extent of reapportionment range
 |
| **Redpath** v Redpath, (BCCA) 2006 | **If a particular award deviated substantially from the Guidelines range, with no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention** |

# Intersection of Matrimonial Property and Spousal Support

### *Moge* (SCC) 1992 support awards should play a role in compensating a spouse for the economic consequences of caring for children, remaining out of the labour force, etc

* Principle that support awards should play a role in compensating a spouse for the economic consequences of caring for children, remaining out of the labour force, etc.
* BC courts have imported these principles into the scheme for division of matrimonial property via s. 65(e) of the *FRA*

### *Lodge v Lodge* (BCCA) 1993 rental properties reapportioned under s. 65(e); permitted where equal division would be unfair having regards to the needs of each spouse to become or remain economically independent and self-sufficient

* ***Moge***principles adopted;

## *Double Recover – “Double Dipping”?*

Issue of whether a pension should be counted as both a capital asset upon equalization and a source of income for calculation of spousal support

### *Boston v. Boston* (SCC) 2001 - rightfully entitled to recovery from pension twice under two separate legislative regimes: property sharing and spousal support

* It is by virtue of the legislative scheme that pension may be treated as both a capital asset on separation as well as a source of income. Therefore, non-pensioned spouse **rightfully entitled to recovery from pension twice** under two separate legislative regimes: property sharing and spousal support
* The two systems serve different purposes

**But, there was a strong dissent…** so to resolve the matter, majority followed reasoning in ***Shadbolt*** and held:

* To avoid double recover, court should, where practicable, focus on that portion of payer’s income and assets that have not been part of equalization or division of matrimonial assets when the payee spouse’s continuing need for support is shown.
* BUT! Where spousal support agreement is based mainly on need, rather than compensation, double recovery may be permited.

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| **Meiklejohn** (ONCA) 2001 | *23 years married. When retired, husband’s income decreased. Applied to vary support based on material change in circumstances.* **General rule against double dipping does not apply to this case:** |

# Child Support

### Can a person who stands in the place of a parent unilaterally give up that status? No (*Chartier*) (plus Test for “stand-in” parent who owes support)

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

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| **Chartier** v Chartier (SCC) 1998 | *Separated after a year of marriage. Husband played role of dad to her kids. Husband contested claim of being in place of parent.* Provisions of the *Divorce Act* that deal with children focus on what is in the best interests of the children of the marriage, not on biological parenthood or legal status of children. * Once someone has made at least a permanent or indefinite unconditional commitment to stand in the place of a parent, jurisdiction of courts to award support under *DA* is triggered and that jurisdiction is not lost by a subsequent disavowal of child by the parent.
* Duty of the courts to protect interests of the child
* It takes a properly informed and deliberate intention to assume parental obligations for support of a child, on an ongoing basis = “***loco parentis***” status (in the place of a parent). B/c of that, its difficult to conclude this status is meaningless or can be negated at whim.

**Once a person is found to stand in the place of a parent, that relationship cannot be unilaterally withdrawn by the adult.** **Test for whether person stands in place of a parent:**Take into account all factors relevant, viewed objectively:* Intention – court will also infer intention from actions
* That step-parent treats child as member of his family
* Whether child participates in extended family as would a biological child
* Whether person provides financially for child
* Whether person disciplines child
* Whether person represents to child, the family, the world, either explicitly or implicitly, that he is responsible as a parent to the child
* The nature or existence of the child’s relationship with the absent biological father

Once established that child is “child of the marriage”, obligations of step-parent towards him are the same as those relative to a child born of the marriage wrt application of ***Divorce Act***Fact specific – as usual |

## Definition of Step-parents in *FRA (as opposed from DA)*

The term “**stands in the place of a parent**” must be read to meet the criteria of the definition of “**parent**” under **s. 1** of ***FRA***

**NOTE – *Chartier* principles don’t apply under *FRA*, that was a *Divorce Act* case.**

Person that is **standing in place of a parent can’t override their obligations, even by express contract** (***Doe v Alberta***, ABCA, 2007)

If a child is in the care of Children and Family Services, no longer consider a “child of the marriage” because he is no longer in the charge of his parents, even though he remains their child in law. So mother not entitled to claim support for him. Mom is “now in the position of an access parent”, primary responsibility for child’s custody, care and control assumed by gov’t (*JMS v FJM*, ON, 2005)

## Guidelines Approach to Child Support

Guidelines mainly premised on assumption that one spouse will be custodian and other will not.

Table with income and number of children on each axis, guiding figure for child support. Departure from judicial discretion which used to determine levels of support.

Spouses Income, for table purposes, is their Total Income listed on their T1 form issued by Revenue Canada.

* **Guidelines permit court some leeway in determining income**
* (ex: may look at patterns of income over 3 years to fix an income that most fairly represents what is available to pay child support – in case of shares or directors for ex
* **Court may impute income as it considers appropriate**
* in the circumstances (ex: intentional underemployment or if spouse has failed to provide required info on income)
* **Spouses may agree in writing as to annual income of spouse**
* , court will accept it if it thinks the amount is reasonable having regard to info provided.
* **Spouse required to provide info every year should payee spouse request it**
* thereafter child support order.

## Special or Extraordinary Expenses (s. 7 Guidelines)

Court may award amounts in addition to the table amounts for certain identified expenses that, presumably, were not at all or inadequately accounted for in the calculations that produced the table amounts. The expenses identified are:

* **Child care expenses**
* Portion of **medical and dental insurance** premiums of child
* **Health-related expenses** that exceed insurance reimbursement (incl. ortho, counseling, psychiatrist, speech therepy, glasses, etc)
* Extraordinary expenses for **primary or secondary school** **education**
* Expenses for **post-secondary education**
* Extraordinary expenses for **extracurricular activities**

The court **MAY** (not “must”) **add an amount for these expenses** to the table amount after taking into account:

1. The **necessity of the expense in relation to the child’s best interests**, **AND**
2. **Reasonableness of the expense**, having regard to the means of the spouses and those of the child and to the family’s spending pattern prior to separation

**\*\*Spouses share the approved expenses in proportion to their respective incomes\*\*\***

## Factors Affecting Departure from Guideline Amounts

### Agreement and Consent Orders (s. 15.1 *Divorce Act*)

Court may award on consent “an amount that is different from the amount that would be determined by guidelines” where parties have made reasonable arrangements for the support of the child.

### Special Provisions for Child

Where **special provisions have already been made** for child and application of Guidelines would then result in amount of child support that is inequitable, court may award a different amount.

* The provisions must be within a court order or written agreement and must directly or indirectly benefit the child

### Age of Child (s. 3(2) Guidelines)

Spouses are required to support children of the marriage who are **over the age of majority and unable to withdraw from spouses charge** for approved reasons.

* Fact specific, no strict upper limit legislated

### Relation to Child (s. 5 Guidelines)

**Spouses who are not genetic or adoptive** but parents of intention, are **not necessarily req’d to provide support to children in amounts of table** but online in such amounts as court considers appropriate having regard to Guidelines and any other parent’s legal duty to support child.

### Size of Income

**Guidelines don’t apply if income below** certain threshold **($6,700**)

**If above $150,000**, amount either table amount or if court thinks that’s inappropriate, the **base amount from table plus an appropriate amount** considering the childs circumstances and financial ability of spouse to contribute

### Custody Arrangement (s. 8, 9 Guidelines)

Split custody scenario does a set-off of amounts payable.

In some shared custody arrangements though, put aside Guidelines and take into account:

1. Amounts in tables for each spouse
2. **Increased costs of shared custody arrangements**
3. **Conditions, means, needs and other circumstances of each spouse** and of any child for whom support is sought

*This is* ***applied where a spouse exercises right of access or physical custody of child for not less than 40% of time*** *over course of a year*.

Important rationale: children should be able to benefit from the means and assets of both parents as much of the time as is possible and **not have to alternate between high and low standards of living**.

### Undue Hardship (s. 16 Guidelines)

Court may deviate from Guideline amount if it finds that awarding that sum would cause “undue hardship” to the child in respect of whom the request is made or to the spouse who seeks the deviation.

SOME hardship is expected and accepted, circumstances must cause suffer of UNDUE hardship, such as:

* **Spouse has unusually high debt**
* **Unusually high expenses in relation to exercising access**
* Etc.

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| **McCrea** v. McCrea (BC) 1999 | *Variation application for a term in separation agreement. 4 year marriage. Agreement made before Child Support Guidelines.* ***Guidelines gave people the “change of circumstances” needed to vary support.*** Order for child support may be varied pursuant to *DA* & *FRA* when there is a “change in circumstnaces”Financial obligations to a child exist from time child is born. When parents separate, obligation continues, thus, it exists irrespective of whether an action has been started by the custodial parent against the non-custodial parent to enforce the obligation |

### Shared Custody s. 9 of the *CSG* contains the “40%” rule:

*Where spouse exercises right of access to, or has physical custody of, a child for not less than 40% of the time over the course of the year, amount of child support must be determined by:*

1. *The amounts set out in the applicable tables for each of the spouses;*
2. *The increased cost of shared custody arrangements; and*
3. *The conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.*

(assumption is that substantial access would increase expenses to a parent - *Green*)

BCCA decision below about it:

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| **Green** v. Green (BCCA) 2000 | *Couple has joint custody and guardianship; dad wants children in public school, mom wants private school.* Looking at s. 9 of the *CSG* (40% rule)* Problem with rule is courts now required to track hours which children spend under the care of each parent. Questionable whether such an exercise is in BIC.
* Concern also that access parents will seek increased access solely to reduce support payments, rather than wanting to spend time with child
* Critique that time doesn’t necessarily tell you who arranges the children’s material needs

In a shared custody case, if you want more money, argue that the increase in access requires more spending. If you want to pay less money, increased access spreads the costs. BUT, many major child costs are fixed, so dollars spent by access parent may not result in dollars decreased by custodial**Reduction in support can’t have a detrimental effect on the well-being of the child!** “Cliff effect” – term describes the dramatic drop in income received by custodial parent as threshold is crossed from 39% to 40%. * This loss of income has a disproportionate impact on lower income custodial parents
* It is more readily justified if the access parent has means similar to or lesser than the custodial parent and does not have the ability to meet increased expenses occasioned by an increase in access.

As a result – **courts have not succeeded in finding a s. 9 formula which can be applied in an equitable way in all cases****🡪** therefore discretion is critical to the equitable application of this |

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| **Contino** v. Leonelli-Contino (SCC) 2005 | *Child support in shared custody arrangement – 40% threshold reached*s. 9 of Guidelines warrants emphasis on flexibility and fairness to ensure that the economic reality and particular circumstances of each family are properly accounted for. * No presumption in favour of awarding at least the Guideline amount under s. 3
* No presumption in favour of reducing parent’s child support obligation downward from Guidelines amount

**Three stage analysis for s. 9 claims:**1. Under s. 9(a), court required to consider Table amounts. Then do a simple set-off between parents. Must follow this with an examination of continuing ability of recipient parent to meet needs of child, especially in light of fact that many costs are fixed 🡪 court retains discretion to modify set-off amount
2. Court must consider s. 9(b) which recognizes that the total cost of raising children may be greater in shared custody situations than in sole custody situations
3. S. 9(c) gives court broad discretion to analyze the resources and needs of both parents and children. Consider objectives of Guidelines.

Court shouldn’t make common sense assumptions about costs incurred, s. 9(b) and (c) demand evidence.  |

### S. 4 of Guidelines – applies in cases where paying parent has annual income over $150,000

Pursuant to **s. 4(b)** where a court considers the Table amount to be inappropriate, it is to award the Guidelines figure in respect of the first $150,000, PLUS an amount it considers to be appropriate for the balance of the paying parents income, having regard to the **conditions, means, needs and other circumstances of the children** as well as the financial ability of each spouse to contribute to the support of the children.

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| **Francis** v. Baker (SCC) 1999The leading case on s. 4 | *Net worth 78mill. Arguing reduction of family support.* Onus on person wanting to rebut tables presumption 🡪 must show evidence to supportThe word “inappropriate” in s. 4(b) provides wide discretion to court to make a conclusion that amount is unsuitable. * This can apply to increases and decreases alike… not limited to increases – any amount above threshold can be reduced or increased if it is deemed inappropriate
* S. 7 (special expense provisions) & s. 10 (undue hardship) are the other provisions that permit deviation from this figure also

Proper construction of s. 4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual “condition, means, needs and other circumstances of the children” on the other. **Presumption in favour of table amounts** – party seeking deviation can rebut that presumption**Factors to consider** listed in s. 4(b)(ii) – condition, means, needs and other circumstances of the children, and the financial abilities of both spouses, are both relevant to determination of inappropriatenessProper balance for **unreasonable payment:** proper balance is struck by requiring the paying parents to demonstrate that budgeted child expenses are so high as to “exceed the generous ambit within which reasonable disagreement is possible” |

### Summary of principles from *Francis (Metzner BCCA 2000)*

1. **Presumption in favour of Table amounts**
2. **Rebuttable presumption**
3. **Must be clear and compelling evidence to depart Guidelines**
4. S. 4(b)(ii) **factors relevant to determine appropriateness and inappropriateness of table amounts or any deviation therefrom**
5. **All the circumstances** test
6. Centrality of **actual situation of children**
7. Consider **objectives of child support** payments
8. Court must have **all necessessary information**
9. **Reasonableness of expenses** test

## Can parents come to agreement that supercedes Guidelines; can access costs be taken into account when determining the appropriate amount of support?

### *Greene v Greene (BCCA) 2010 - • Child support is a right belonging to the child, not the parent*

* **Child support is a right belonging to the child, not the parent…** parents cannot waive or bargain away the rights of their children to appropriate child support.
* **Another fundamental tenet of child support**: on an application to vary an order, court must assume the order was correct at the time it was made
* Parents are welcome to reach their own agreement wrt sharing access costs, as long as those agreements do not short-change the children with respect to child support – sharing of these costs should not be at the expense of child support
	+ An agreement reached b/w parties can’t be relied upon to deprive the children of the amount of child support they would otherwise be entitled to under the Guidelines

### *DA* s. 15.1(1); *CSG* s. 3(2): Post-secondary Education

*Obligated to pay child support up to age of majority even if child has ended relationship. But, strong argument for obligations to be over if child ends relationship when over age of majority.*

### Child of the Marriage: *Farden v Farden-* child that is enrolled in post-secondary education still a “child of the marriage”?

Is a child that is enrolled in post-secondary education still a “child of the marriage”?

Several factors to consider in this question:

* Is the child enrolled in full or part time studies
* Has child applied for student loans or other financial assistance
* Career plans of child
* Ability of child to contribute to their own support through part-time employment
* Age of child
* Child’s past academic performance
* Plans the parents made for education of child
* Whether or not child has unilaterally terminated a relationship from the parent from whom support is sought

### Neufeld v. Neufeld (BCCA) 2005 - • No general principle that a child seeking a second degree did not qualify for support

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| **Neufeld** v. Neufeld (BCCA) 2005 | *Is child still a “child of the marriage”*Factors in *Farden* were not “a set of minimum criteria” but rather factors to be considered along with all relevant circumstances to make fact-specific determinations* WRT child seeking student loans, not necessary to exhaust every source of funding before looking to parents for support
* **No general principle that a child seeking a second degree did not qualify for support**
 |

### Entitlement to child support can be revived despite a hiatus in studies – *Haley v Haley (ON) 2008*

### Determining amount of child support for Adult Child

**s. 3(2)** of Guidelines provides two ways:

1. Use same methods as if child is under age of majority (Guideline tables)
2. **S. 3(2)(b)** … If that is inappropriate, may determine appropriate amount considering “the **condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child**.

### Retroactive Child Support - No general principle that a child seeking a second degree did not qualify for support

When support is sought on this basis, it is not creating a new liability, but instead seeking compensation for something that is legally owed.

* When a payor does not increase child support payments in accordance with his income, payor had not fulfilled his obligation to the child of the marriage
* Parent will not have fulfilled obligation to child if child support payments isn’t increased when income increases significantly
* **Courts have power to order retroactive award that enforces the unfulfilled obligations that have accrued over time**
	+ In doing so, court should consider whether the recipient parent has supplied a reasonable excuse for delay, the conduct of the payor parent, circumstances of the child, and the hardship the retroactive award might entail
	+ Retroactive award should be made to date when effective notice was given to payor parent; but where payor parent engaged in blameworthy conduct, date when circumstances changed materially will be presumptive start date of award
	+ **Onus** on recipient spouse to give “effective notice” to payor in order to trigger date from which retroactive support is owed

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| **Greene** v. Greene (BCCA) 2010 | Reasonable excuse for delayConduct of the Payor* Parliament has placed responsibility on BOTH parents to ensure that their children are receiving a proper amount of support
* No child support analysis should ever lose sight of the fact that support is the right of the child
* Just because court order is for a certain amount doesn’t mean you don’t have further obligation if income increases
* Conduct of Payor can militate AGAINST a retroactive award – ex: if Payor contributes for expenses beyond statutory obligations that may have met increased support obligation indirectly… HOWEVER – Payor parent doesn’t have the right to choose how the money going to child support is to be spent!

Hardship Occasioned by a Retroactive AwardNot unreasonable to assume a substantial award of retroactive support may work some degree of hardship, but evidence must establish that the degree is high enough.  |

## Arrears and Variation of Child Support

### *Ghislieri* (BCCA) 2007- • Parents have a positive duty to earn as much as reasonably they can to provide child support and must provide a satisfactory explanation for failing to do so

Court states that parents’ responsibility for child support is based on parental CAPACITY to earn, not actual earnings. Judges may thereby impute income to individuals who do not work, do not work full-time, or at the level of remuneration they are able to earn.

* **Parents have a positive duty to earn as much as reasonably they can to provide child support and must provide a satisfactory explanation for failing to do so**

### Earle v. Earle (BC) 1999 Three fundamental principles apply to all child support applications

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| **Earle** v. Earle (BC) 1999 | **Three fundamental principles apply to all child support applications** (including the first decision about what payments should be made, applications to vary or change that amount, and applications to cancel or reduce arrears)1. **Joint Legal Obligation** – parents have a joint and ongoing legal obligation to support their children. It is considered such an important obligation that a divorce can’t be granted until parents make satisfactory arrangements for the care of their children.
2. **Right of the Child –** It is the child, not the parent with custody, that has right to maintenance
3. **Ability to Pay –** Payment of maintenance is based on ability to pay. Result is that parents have legal obligation to earn as much as they are capable of earning.

**Variation – Basic Principles**There must be a **material change of circumstances** since the original order was made – that change must be of the kind that, if known by the judge when the last order was made, would have resulted in different order. The change must be significant and long lasting* If not – questionable that it is in best interests of child

**Arrears – Basic Principles**Cancellation or reduction of arrears of maintenance is a form of variation. * Substantial onus (heavy duty) on person asking for reduction or cancellation to show significant long lasting change in circumstance
* Under *FRA* arrears won’t be reduced/cancelled unless it is grossly unfair not to do so.
* Court can postpone payment or payment over time if more reasonable

**Common Arguments:*** I can’t afford to pay – *FAILS*
* My financial circumstnaces paid – *HEAVY ONUS*
* I had new obligations – *FAILS…responsibility for second family can’t relieve obligation to first family*
* Spouse delayed in coming to court to enforce payment – *NOT A RELEVANT FACTOR*
* No Harm Done To Child – *FAILS*
* Child doesn’t need the money – *FAILS*
* Spouse said I don’t have to pay – *FAILS*, *child’s right.*
* I spent lots on child, even though not req’d by court order – *FAILS, receiving parent gets to choose how its spent*
* Former spouse prevented access – *FAILS, not a proper factor, obligation doesn’t go away*
* I didn’t have legal advice - *FAILS*
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