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# Validity of Marriage

* **Capacity - voids**
  + *Age*
    - 19+ = able to marry
    - Under 19 = consent of both parents (or if dead: lawful guardian/PGT). – s.28 *Marriage Act BC*
      * If parents outside BC/location unknown after diligent sear/refuses consent, may apply to BCSC for order (only consider whether they are *unreasonably* withholding consent) – sub (2)
    - Under 16 – same above applies, but must always apply to the court (even w consent acquired) – s.29
    - THIS WILL NOT INVALIDATE marriage already completed – s.30
  + *Consanguinity/Affinity*
    - *Marriage (Prohibited Degrees) Act* – rules again affinity in marriage
    - **2(2)** No person shall marry another person if they are related lineally, or as brother/sister/half-brother/half-sister, including by adoption.
      * Lineally = direct, unbroken line of descent: fathers, grandmother, great-grandpas, children etc
    - HOWEVER: **3** (1) Other than prohibited under s.2(2), marriage between persons related by consanguinity/affinity/adoption is not invalid by reason only of their relationship.
  + *Single*
    - Not legally married to anyone else at the time.
    - (even if you find out the person wasn’t dead after all!)
  + *Sanity*
    - Voidable if don’t understand the nature of marriage K and duties/respite creates 🡪 interp narrowly
    - can be ratified by continuance of relationship upon regaining sanity
* **Consent – voids (unless ratified)**
  + Lack of consent = void, by way of:
    - Duress:
      * TEST: genuine and reasonable fear if physical harm
      * only ‘duressed’ party may claim voidable because of it.
    - Mistake/Fraud:
      * must go to the nature of the ceremony *or*  the ID of one of the parties (not just wealth/name/age, something more basic: sex of a party, diff person etc.)
  + Subsequent conduct may ratify consent
* **Consummation - voidable**
  + TEST: “invincible repugnance to the act of consummation resulting in a paralysis of the will.”
    - ***Juretic v Ruiz***: sex but no cuddling. Was not voided because she was willing, despite not in the way he would like.
  + This requirement is not based on procreation (***Baxter v Baxter***), but that the sexual act itself is part of the marriage

***Davidson v Sweeney,* 2005 BCSC**

-F: Married in Vegas, DRUNK, knew each other 4 hours. Went back to city hall to get marriage licence. Attended ceremony- went separate ways.

I: void bcz drunk therefore no consent AND voidable for no consummation

Held :

* not so drunk unable to understand marriage contract
* did not not prove unable to consummate, just that they didn’t
* **Formalities**

🡪 provincial: *BC Marriage Act*

🡪 Compliance with Formalities

* S.9 re: religious marriages AND s. 20 re: civil marriages
  + License
  + 2+ witness present
  + performed in a public manner
  + both parties to the marriage present
* Civil marriage verbal K needed. Both must say… –s.20
  + I solemnly declare that I do not know of any lawful impediment why I \_\_\_\_\_ cannot get married.
  + I call on the witnesses present to bear witness that I \_\_\_ take \_\_\_ to be my wife.. etc.
* s.15: license: bear date of issuance + persons named + wedding must be w/in 3 mos of issue
* S.16: form of applying for license – affidavit

**Act presumes/really wants marriages to be valid!**

S.18: No irregularity in the issue of a marriage license obtained and acted on in good faith invalidates a marriage solemnized under it.

**GET PAGE 98 + BRING IT TO EXAM**

## Validity of Foreign Marriages

1. Must be formally valid under the laws of the place in which it happened.
2. Must meet the essential validity under the place of each party’s prenuptial domicile

(Need not be recognized in location where from).

# Adoption

-Provincial (prop & civil rights).

-Adoption actions in BCSC only

-creature of statute: *Adoption Act*

**Purpose of adoption – s. 2: “**to provide for new and permanent family ties through adoption, giving paramount consideration in every respect *to the child's best interests*.”

## ****Best Interests of the Child – s. 3****

**3** **(1)**All relevant factors must be considered in determining the child's best interests, including for example:

(a) the child's safety;

(b) the child's physical and emotional needs and level of development;

* Courts relying more and more on

(c) the importance of continuity in the child's care;

* Crts reluctant to move children when in one home for a long pd, Esp if doing fine/needs met.

(d) the importance to the child's development of having a positive relationship with a parent and a secure place as a member of a family;

(e) the quality of the relationship the child has with a birth parent or other individual and the effect of maintaining that relationship;

* Partic concern in step parent adoptions.
* Re: ‘stranger’ adoption: Will severing the ties be in BIC to avoid confusion/fighting over overstepping boundaries?

(f) the child's cultural, racial, linguistic and religious heritage;

(g) the child's views;

(h) the effect on the child if there is delay in making a decision.

* Younger = faster!

**3 (2)**If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

* ***King v Low,* 1985 SCC**–
  + F: NWT, hides kid from parents (in ON), gives child up to a couple of friends, 3 mos later changed her mind welfare of child paramount.
  + Continuity of care (enough time for young child to bond in new family), uncertainty/stability of network in birth mother’s new city, and the shared heritage w adoptive mother = critical factors. BIC over birth parent’s rights.
* ***Matter of Female Infant No 99-00733,* BCCA 2000**
  + F did not meet 13(2) definitions (∴ could not simply withhold consent.)
  + Applied for custody/access (see below re: contesting adoption) (M that had avoided telling him about adoption was now backing him)
  + **Did not have a certain plan as to child care**.
  + **Possible conflict amongst caregivers** (M, grandmother that would ‘help’)
  + Could not compare with the stability of the placement/adoptive family re: BIC.

## Reqs for Adoption:

**Who can place a child for Adoption? – s. 4:** a director, an adoption agency, the birth parent/other guardian to another relative or by direct placement if in line w act,

**Who can receive/apply to adopt a child? – ss 5, 29:** 1 or 2 adults (jointly), must be residents of BC

Consent Required – s.13

Each of the following, (in ‘prescribed form’, see s.16)

* Person adopting
* The child, if over 12
* any person appt’d as guardian
* Director (if under constant care of state)
* **The birth mother**
  + *When CAN she consent?*
    - Child must be min 10 days old – s.14
  + *When may she revoke consent?*:
    - Written revocation received any time before child placed – s.18
    - Even if child placed, written revocation received w/in 30 days of child’s birth – s. 19
    - After placement, by order of court, if satisfied that it would be in BIC to do so, only before adoption order – s. 22
      * Argue that consent should be dispensed w (see below) on these apps
* **The father**
  + **13(2)** defines “father” for the purpose of giving consent:
    - (a) has acknowledged paternity by signing the child's birth registration,
    - (b) is/was the child's guardian or joint guardian with the birth mother,
    - (c) has acknowledged paternity and has custody or access rights to the child by court order or by agreement,
    - (d) has acknowledged paternity and has supported, maintained or cared for the child, voluntarily or under a court order,
    - (e) has acknowledged paternity and is named by the birth mother as the child's father, or
    - (f) is acknowledged by the birth mother as the father AND is registered on the birth fathers' registry (s.10) as the child's father.
      * Registry allows that they will get notice that their child is being put up for adoption.

*In what form? –* s.16 + *Adoption Act Regs* –In writing and acknowledgement of the effect of that consent.

***Dispensing with consent* – s.17**

On application on grounds

* Crt satisfied in BIC OR
* Indiv whose consent needed:
  + Not capable of informed consent (coma etc)
    - Only one that applies to consent of the child over 12
  + Can’t be found after proving reasonable by unsuccessful effort made
  + Has abandoned or deserted child
  + has not made reasonable efforts to meet their parental obligations to the child, or
  + is not capable of caring for the child, or
  + “other circumstances” justify dispensing with the consent

### Aboriginal Considerations:

-present in the s.3(2) BIC

- **S.7 *AA* –** Only requirement before placing aboriginal child for adoption: *reasonable efforts to discuss with band/Nisga/treaty FN/aboriginal rep ID’d by child/parent.*

* Child over 12 or birth parents may object to such discussion and it may be dispensed with.

-**S. 46 –** Customary adoptions in bands/aboriginal communities may be recognized by crt as adoptions under this act on application.

* ***Casimel v ICBC*** – first acknowledgement (MVA, dependent adoptive parents seeking to qualify as parents re: ICBC coverage)

## Effects of Adoption – s. 37

* (1) When an adoption order is made,
  + (a) the child becomes the child of the adoptive parent, (Birth Cert changed!)
  + (b) the adoptive parent becomes the parent of the child, and
  + (c) **the birth parents cease to have any parental rights or obligations** towards the child, except as in sub (2)

*Re: step parent adoption:*

* (2) “An adult to become a parent jointly with a birth parent” then
  + the adult joins the birth parent as parent of the child, and
  + the child's other birth parent ceases to have any parental rights or obligations with respect to the child.

* (3) **2nd adoption** has same effect on the child, on the new adoptive parent and on the former adoptive parent.

* (6) An adoption order **does not affect an interest** in property/a right of the adopted child that vested in the child before the date of the adoption order.
  + E.g. a trust/will
  + Child should be NAMED. If just “child” may not follow because they are technically not child any longer

*Similarly…*

* (7) An adoption order does not affect any aboriginal rights the child has.

## Contesting an Adoption

* To get notice of placement (i.e. possible adoption), get on registry (s.10 *AA*).
* Upon notice of placement and before adoption (min time pd between placement and adoption = 6 mos)…
  + HOWEVER notice to the registry father may be dispensed of (s.11) when: in the BIC OR if circumstances justify it (can’t be found, likelihood of violence [child witnessed or was victim])
* **Apply for custody and guardianship**, and then applying christ the BIC test!

# Child Protection + *CFCSAct*

-Child Family and Community Service Act in BC.

-Child centered approach + Purpose: protect the child not just the family. Look at both services/maintenance of the family and if that doesn’t work, removal.

## Significant Sections of *CFCSA*

**Guiding Principles – s. 2** (to implementation)

Safety + wellbeing of child paramount in accordance w these principles:

* (a) children entitled to protection (abuse, neglect and harm/threat of harm)
* (b) **family = preferred** environment for care + upbringing. Protection obligation there, first and foremost.
* (c) If support **services** needed needed to fulfill oblig, should be provided (first);
* (d) **child's views** taken into acct when DMking;
* (e) **kinship** ties + child’s attachment to extended family preserved if possible;
* (f) cultural identity of **aboriginal** children preserved;
* (g) ***timely*** DMking re: children.

**Service Delivery Principles – s.3**

**BIC Definition – s. 4**

(practical identical to Adoption context)

(1) All relevant factors considered *including*

* (a) the child's **safety**;
* (b) the child's physical and emotional needs and level of development;
* (c) the importance of **continuity** in the child's care;
* (d) the **quality of relationship** w a parent/other **+ effect** of maintaining it;
* (e) the child's cultural, racial, linguistic and religious heritage;
* (f) the child's **views**;
* (g) the effect of delay in DMking on child.
  + Younger they are, quicker should be made.

(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

## When is Protection Needed/Mandated? – s.13

**13**  (1) A child needs protection in the following circumstances:

If the child

1. Has been/likely to be physically harmed by parent;
2. Had been/likely to be, sexually abused or exploited by the child's parent;

* *Includes encouraged/helped to engage in prostitution or coerced into it.* (sub 1.1)

1. Has been/likely to be physically harmed, sexually abused/exploited **by another** AND child's parent unwilling or unable to protect the child;
2. Has been/likely to be physically harmed bcz of neglect by parent;
3. is emotionally harmed by the parent's conduct;
   * if the child demonstrates severe: (a) anxiety, (b) depression, (c) withdrawal, or (d) self-destructive or aggressive behaviour (sub 2)
4. is deprived of **necessary health care**;
5. development likely to be seriously impaired by a **treatable condition** + **parent refuses** to provide/consent to treatment;
6. parent is unable or unwilling to care + not made adequate provision for it;
7. is/has been absent from home in circumstances that endanger the child's safety or well-being;
8. parent is dead + no adequate prov for care;
9. has been abandoned and adequate provision has not been made for the child's care;
10. in the care of a director /another by agreement + parent is unwilling/unable to resume care at end.

+ **LEGAL DUTY TO REPORT – s.14**

**14**  (1) A person who has *reason to believe* that a child needs protection under section 13 must *promptly report* the matter to a director or a person designated by a director.

* + Non-disclosure = offence, liabke to $10K fine/imprisonment. – 14(3) and (6)
  + No action for damages against reported unless knowingly falsely reporting – 14(5)
  + Confidentiality of ID of reporter – s.74 *CFCSAct*
  + Falls heavily on doctors, day care workers, teachers etc.
  + No limitation pd on reprting – 14(7)
  + Applies when belief comes from info that is priv’d (except solicitor client), is confidential/disclosure prohibited under an Act – 14(1)

## What action is needed/is available?

### Services and Supports

-first approach because balanced approach of the Act wants to fine the least intrusive solution if possible/appropriate.

-“Services” = VERY BROAD. Contracts out w community agencies that do different work.

* Parenting classes? Alcohol? Dentist or doctor? Food banks? Child care services?
* But limited by size of the community and funding! + assumes want to comply/do the services provided!

### By Consent/Non-Court Ordered

**-Voluntary Care Agreement:** Child goes into state care while parents deal with aspects of life that have made them unable to properly care for child.

**-Kith & Kin Agreements:**

* Child is placed with extended family
* Agreement btwn parent/ministry placing requirements/conditions on all parties involved.
  + May have to comply with services while child is in alt care
  + Access conditions are common
  + Pros: in same community (at times), family and allows for support services as well.
* Common in aboriginal communities

### Removal Procedure + Court Ordered Action

**Removal Procedure:**

* Child removed
* ***Presentation Hearing:*** within 7 days of removal
  + Prove reasonable grounds for removal (low threshold) to maintain custody.
* ***Protection Hearing*:** Within 45 days of removal
  + Bring much more evidence and true investigation to determine the need for and type or protection
  + Different protection orders are available to the court at this point:

**Supervision Orders**  - s.41(1)(a)

* returned to parent care with conditions (like probation), e.g. counseling, AA mtgs, doctor appts for child, school direction etc.

**Temporary Custody Orders** – s. 41(1)(c), 43

* Child in temporary custody of the Director (Depending on age of child, can go fronm 3-6 mos to 1 yr)
* Similar to Vol Care Agree’t: allows
* By end of order social worker can return to court for another temp order or return.

**Continuing Custody Orders – “Permanent Ward of the State”** – Division 5 of *Act*

* Parents lose parental rights/obligations to that child (though there may be access)
* Longer in custody, the more difficult to revoke (though possible). Essentially a permanent order.

**Protection Intervention Orders** – s. 28

* Restraining order between a person (from which they need protection) and the child.

# Divorce Proceedings – *Divorce Act*

-Federal jurisdiction + statute

-corollary relief available in the interim (before order, before divorce etc) as well as under the Act flowing after the Divorce.

1. **Does the *DA* apply? Are they *legally married*?**

* Definition of spouse in s.2 *DA =* “either of 2 persons who are married to each other”

1. **Do they meet the technical requirements for JD in BC Divorce? – s.3**

* one spouse must be ordinarily resident in BC min one year prior to commencing Divorce proceeding **- S.3(1)**
  + Ordinarily resident = “the place where a person regularly, or customarily lives in a settled routine” (*Thomson*)
* Race to file: what if same action in another province?
  + Whoever got application in first, that province has jurisdiction (other application will lapse) **- s.3(2)**
  + If applications are made on the same day, the *federal* court gets jurisdiction **- s.3(3)**

1. **Has the legal advisor met their duty? – s.9**

* Discuss possibility of reconciliation of the spouses,
* Inform client of marriage counseling or guidance facilities known to lawyer that could assist (unless completely inapt)
* Advise about benefits of negotiating matters, of the mediation facilities known to them.

## What are the grounds for divorce? – s.8

**8(2)(a) – *Living Separate and Apart for min 1 Year***

- most common.

- 1 year apart *before Divorce ordered* (no before starting proceeding)

- Year may not be interrupted by: incapacity OR 90+ days cohab w reconciliation as purpose (any less =/= interrupt).

TEST for ‘separate and apart’ – ***Oswell v Oswell,* 1990 ONHC**

Consider subj (stated intentions) *and objective* factors:

* Some degree of physical separation (moving apart, diff bedrooms)
* Withdrawal by one or both from marital obligations 🡪 stopping intimacy/tea in bed?
* Absence of sex not conclusive but considered
* Discussion of family problems, communication, joint social activities, meals, etc
  + How are they presenting themselves to others? The government?
* Changed arrangement re: household tasks / doing them for each other.

**8(2)(b)(i) – Adultery**

-includes adulterous acts w the same sex – ***P(SE) v P(DD),* 2005 BCSC**

-only the non-adulterer may claim the ground. – (sub 2b)

-Proof of the adultery needed:

* adulterer (the respondent) evidence at trial or admissions in affidavit (sometimes will admit to it to get out of marriage)
* evidence of the “other woman”
* evidence of the P or other witnesses (PI, photos, video etc.)

-Advantage = speed.

**8(2)(b)(ii) – Physical or Mental Cruelty**

-only non-abusive partner may bring this app – (sub 2b)

-Est’g cruelty = Q of fact that claimant bears the onus to prove on a BoP (bring real evidence!)

-Post-separation cruelty can still be basis for this ground.

-TEST for cruelty:

* cruelty of such a kind as to “render intolerable the continued cohabitation of the spouses”
* considered of obj and subj standard
  + **Obj:** Conduct capable of causing physical/ mental hurt – acts must be of a “**grave and weighty**” nature – ***Knoll***
    - A conviction for assault is an auto win on this ground
    - Bring *evidence*: hospital reports, psych reports, police reports etc.
  + **Subj:** Conduct must **render** **continued cohabitation intolerable** to the affected spouse
    - Passage of time without incident will likely not meet std (have been able to continue cohab)
    - Intent need not nec be ‘cruelty’

NB: Advantages to an earlier separation date

* valuation of property/assets
* inheritance (dependent on how used and when received, some people will try and backdate to get the inheritance);
* get the divorce quicker

1. **Grounds for Barring the Divorce? – s.11**

* **Collusion –** e.g. agreed to lie about being separate apart, timing of the adultery etc.)
* **Condonation –** Only for adultery/cruelty.   
  Like estoppel, have “condoned” the behaviour. Knowing about cruelty/adultery for a long period of time and remaining in the marriage for sig period may bar certain grounds.
* **Lack of reasonable arrangement made for the support of children of the marriage** – a child support affidavit/proceeding is needed for every divorce.
  + “Child of the marriage” (s.2 def’ns) = under age of majority, at or above age of maj and have not or unable to withdraw from charge.

1. **Has the Appeal period passed/is the order effective? – s.12**-Order become effective 31 days *after* the order granted, i.e. until the appeal pd over.   
   -May waive this pd by agreement.

# Children: Custody, Guardianship, Access

## Guiding Principle: BIC!

**UN CONVENTION ON RIGHTS OF THE CHILD: Art 3(1)**

“In all actions concerning children…the BIC shall be the primary consideration.”

**DIVORCE ACT: s.16(8)-(10)** 🡪 factors, non factors + max contact that is in BIC

– ***Windle,* 2010 BCSC**

(8) In making an order … the court shall consider **ONLY the best interests of the child** of the marriage as **determined by reference to the condition, means, needs and other circumstances of the child**.

* Wishes of children re: primary residence esp when the move w new parent is very far (CAB Kelowna)
* Consider need to maintain *status quo*, how much weight should be given on the evidence?
* Where most emotionally stable home?
* Involvement in school/cmmty + large amts of family?: undue disruption on schedule of activities to have certain access/custody arrangement
* Compelling child to visit access parent can = dysfunction (esp when reach teenage years). Should be done on *child’s* terms.
  + Not in BIC to make order that may be ignored/cause stress, neg impact on boys’ relationship w both parents + stepdad.

(9)  **shall not** take into consideration the **past conduct** of any person **unless** the conduct is **relevant to the ability of that person to act as a parent** of a child.

(10) crt **shall give effect to the principle** that **(1)** a child **should have as much contact with each spouse, (2) as is consistent with the best interests** of the child. Consider willingness of the person seeking custody to facilitate such contact.

* Consider parents’ views/attitudes towards each other
* **High conflict as significant factors against joint custody (and perhaps also guardianship** as in CAB**)** because of high amount of communication needed. Should not be ordered ‘hoping that communication will improve’. Show some evidence that they are able to communicate effectively. – ***Windle*; *Kaplanis,* 2005 ONCA**

**FRA: s.24  
24**  (1) When making, varying or rescinding a custody etc order, court **must give paramount consideration to the best interests of the child** and… **must consider the following** factors and give emphasis to each factor according to the child's needs and circumstances:

1. the health and emotional well being of the child including any special needs for care and treatment;

* conflict level between parents and exacerbation by joint decision making =/= BIC
* Parties views/attitudes towards each other:
* “Child should be with someone who fosters the relationship btwn him/her and the non-cust parent.”
* Extra-marital affairs MAY effect here (children sometimes very upset when discovered)

(b) if appropriate, the views of the child;

(c) the love, affection and similar ties that exist between the child and other persons

* Includes parents, grandparents, other relatives AND non-relatives – 24(1.1)
* – ***Van de Perre v Edwards,* 2001 SCC**
* Stepparents and half-siblings
* real relationships and contact, not just child ‘knowing’ them from pictures etc. BRING EV.

(d) education and training for the child;

(e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted (not just person seeking) to exercise those rights and duties adequately.

* – ***Van de Perre v Edwards,* 2001 SCC**
* Essentially “ability to parent”
* Focus is on determining parenting abilities/merits of each SPECIFIC PERSON/applicant (with regard to whole context)
  + Support network/stepparents/new family unit
    - 🡪 what unit is the child entering if given custody?
    - Weak/unstable marriage? Will this effect the support system that a decision might be made on?
    - Parent’s help w children, likely more indefinite.
  + NOT supposed to use stepparent’s positive factors to determine if they are sufficient to pull along their custody-seeking spouse.
  + = some of *many* factors
* Bring evidence as to *your own ability*, not just lack of ability of other parent
* Some concerns: spanking, who takes care of the kids in his home now?, will (s)he be able to learn day-to-day parenting requirements/how soon/how easily?
* not allowing access: allegation must not be purely speculative. Bring evidence. (also related to sub a)
* RACE: “relevancy of this factor depends on the context, *other factors are more directly related to primary needs and must be considered in priority*”
  + Bring evidence to inform the J about ‘current status of race relations in the cmmty and/or ability of either applicant to deal with them’
  + Also: can this guidance be affected via access anyways?
  + How big of an issue did you make it at trial?
  + Can it really outweigh other findings against or for a parent?
* **EXCERSIZING ACCESS/GUARDIANSHIP**

(3) If the **conduct of a person does not substantially affect a factor** set out in (1), the court **must not consider that conduct** in the proceeding.

(4) ONLY consideration of such conduct = TO THE EXTENT it affects a factor in (1).

* “misconduct” provisions.
* “who is to blame” for an extra-marital affair leading to a child is IRRELEVENT – ***Van de Perre v Edwards,* 2001 SCC**
* CAB e.g.: working long pds of time away from home/travelling extensively + leaving most child care to step-wife + might not learn the skills + having affairs/weak marriage = could effect BIC/future care/wellbeing/stability (mostly goes to e) and a))
* **Physical violence:** 
  + Direct violence towards children obviously conduct effecting sub a)
  + Violence **towards spouse** **may affect emotional well-being** of children as well as suggest danger to them, and therefore **effect custody.**
  + Would disruption to a status quo be outweighed by effects of the abuse on children?
  + **HIGH threshold** (clear ev of probability of harm to child) for terminating **access.**

Other general factors:

* age, physical + emotional constitution + psychology of both child and parents, particular milieu in which the child will live – ***Young v Young,* 1993 SCC**

BIC (i.e. custody) ruling = highly discretional and therefore deferential – ***Van de Perre v Edwards,* 2001 SCC**

## Definitions:

-custody: all of guardianship + day to day care and control of child.

-“joint custody”: technically 50/50, but dependent on access schedule

* starting pt for many

-Access = actual physical time with child.

-Shared custody: kids with each parent more than 40% of time. Closest to a 50/50 sharing.

-Split custody: children of marriage split between parents.

-Guardianship: authority to make and be consulted on major decisions dealing w raising the child.

**Custody**  (based on case law)

* Almost all of the rights incidental to guardianship of the person (ie, right to determine a child’s education, health care, religion), and physical care of/control over a child
* *Divorce Act*, s.1 – “includes care, upbringing, and any other incident of custody”
* *FRA*, s.34 – persons who may exercise custody …
  + Power of court to override custody agreements: s.34(2)(a)

**Joint Custody** *Divorce Act,* s.16(4); *FRA* s. 35(1)

* Orders can be made for sole or joint legal custody (refers to decision making re: the child)
* Or, order for sole or joint physicalcustody (more rare)
* May be fragmented order (joint legal custody, primary physical custody)

**Guardianship**

* The right to direct the course of the child’s life and upbringing; can be sole or joint guardianship
* What is guardianship and how does it relate to custody ...
  + More about decision making part? Order for sole (legal) custody, but joint guardianship?
  + Custody = *all* of the rights associated w/guardianship plus right to the physical care and control
* *FRA,* s.27, s.28; see 27(4) for relationship with *Divorce Act*
  + Mother and father = joint guardians for so long as live together
    - Contingent on parents co-residing
    - Here, notions of genetics (mother/father), but guardianship contingent on living together
  + If separated, whoever has care and control = (sole) guardian
  + Or, can agree on arrangements
* Power of court to override guardianship agreements: *FRA* s.28
  + More power of courts to override agreements (more likely to override than, say, financial K)

**Joint Guardianship**

* Each parent has full, active role in providing a sound moral, social, economic and educational environment for children, and they should consult w/one another in planning religious upbringing, education, athletic and recreational activities, health care (excluding emergency), and significant changes in the social environment
  + – ***Lennox v FRender,* 1990 BCCA**

**Access**

* RIGHT OF THE CHILD – ***Young*, 1993 SCC** (limiting access because imposing religious teaching on kids, *FRA case*)
* At a certain age, it is the child’s decision whether they will see access parent, not the parent’s choice/right. – ***Windle***
  + Compulsion is counter productive and may result in sig dysfunction
* Only circumstances in which voluntary contact w either parent can be limited is when it is not in BIC– ***Young*** (*FRA case*)
  + NOT custodial parent’s wishes, does not have ‘right’ to forbid access
  + Nor is a risk of harm is not a condition precedent for limiting access: can be a factor though (e.g. considering quality of access and possibility of harm flowing from it)
* S.16(10) of *DA* (max contact) significant whne considering access – ***Young***
* Difficult to get access completely terminated unless clear evidence of probability of harm to a child despite witnessing– ***Fullerton*, 1994 NBQB**
  + Remember there are lots of ways to facilitate access: supervision, extremely brief unsupervised, etc.
* Parent granted access has right to spend time w/child, usually in accordance w/terms of access order or agrmt
  + *Divorce Act*, French definition of access includes ‘right to visit’
  + *DA*, s.16(5) – includes right to make inquiries, be given info re: health, education, welfare of child
  + *DA*, s.16(7) – ct can order custodial parent to give notice re: change of residence
  + *FRA*, s.21 – ‘access’ includes visitation
* Definitions are in flux, as orders for sole custody become less popular

Jurisdiction re: custody/access 🡪 shared between federal and provincial gov’ts

* s.16, 17, *DA* – when corollary to divorce
* Pts 2, 3, 4, *FRA* – other than at divorce (married ppl not seeking divorce, unmarried ppl)

Who can apply for custody or access?

* s.16(1), *DA* – either or both spouses or any other person may seek custody or access
  + If person applying isn’t party to marriage, must seek leave of the court, s.16(3)
* s.35(1), *FRA* – one or more “persons” may exercise custody, have access
  + “Persons” includes parents, grandparents, other relatives, non-relatives, s.35(1.1)

Variation of orders – s.17, *DA*

## *Divorce Act*: Custody & Access of ‘Children of a Marriage’

Jurisdiction over custody/access: s.16, 17, *DA* – when corollary to divorce

-*Custody*: Day to day care and control

* “includes care, upbringing and any other incident of custody” – s.2

-Access: Parent granted access has right to spend time w/child, usually in accordance w/terms of access order or agrmt

* + *DA,* French definition of access includes ‘right to visit’
  + *DA*, s.16(5) – includes right to make inquiries, be given info re: health, education, welfare of child
  + *DA*, s.16(7) – ct can order custodial parent to give notice re: change of residence

-*No guardianship provisions*: only applications under *FRA*

**Who can it apply to?**

-“child of the marriage” means a child of two spouses/former spouses who – s.2

* at the material time (at the time of determination)
* is under the age of majority (19 in BC)
* who has not withdrawn from their charge (e.g. runaways, gone off to NY to model etc)
* OR is/over age AND under their charge but unable (illness, disability or other cause) to withdraw from it or to obtain the necessaries of life;
  + Can include kids still at university

**How is custody/access ordered/determined under *DA*?**

**16.** (1) Court, on app by any spouse or any person, may make an order re: custody of or the access to, any children of the marriage.

(2) Interim orders available pending determination of sub(1) apps.

(3) A person, other than a spouse = leave of court for sub (1) and (2) apps.

(4) The court may make an order under this section granting custody to any one or more persons. (i.e. joint and sole custody possible)

*Access Parent Rights*

(5) *Unless the court orders* access parent has **right to make inquiries + be given information, re: health, education and welfare of the child**.

(6) Terms/conditions/restrictions may be attached to the order for specific/indiefinite pds of time

(7) Custodial parents may be ordered to notify access parent of change of residence (time taking place + new residence).

+ GUIDING FACTORS: (See Above)

(8) *BIC!*

(9) *Past conduct*

(10) *Principle of Maximum contact*

## *FRA*: Unmarried/Non-divorcing couples + Guardianship

*Jurisdiction over custody/access:* Pts 2, 3, 4, *FRA* – other than at divorce (married ppl not seeking divorce, unmarried ppl)

**Guardianship ‘defined’** (somewhat): s.25

## Remedies for Denying Access

Options and penalties: Imprisonment (*B v. D*)

Fine (*Cooper* - $10,000)

Varying of custody order

Cancellation of spousal support

Contempt of court + jail

|  |  |  |
| --- | --- | --- |
| Ungerer v. Ungerer (1998) BCCA | **F:** M continued to deny access of ex-husband to daughter + turned daughter against him. Had already been jailed for contempt.  **I:** Can misconduct by former spouse re: access be considered as basis for varying/cancelling an order for spousal support? (YES)  **C:** s.17(6), *DA* (variation order) is no bar to considering misconduct AFTER MARRIAGE (i.e. re: access). Is not misconduct in relation to marriage (barred by s.15.2(5), *DA*). | **Ct terminated spousal support when mother continued to deny access of ex-husband to daughter + turned daughter against him. “sufficiently egregious”** |

... here, mother’s conduct was sufficiently egregious to disentitle her to support (turned child against her father)

|  |  |  |
| --- | --- | --- |
| B(L) v. D(R) (1998) ON | **F:** Mother persistently, wilfully denied ct-ordered access, no evid for valid reason for doing so (allegations of sexual abuse were unsubstantiated, evid of staff at access program suggested child was comfortable around father)  **C:** Mother committed to jail for 60 days (contempt of court), judge wanted to send strong message. | **Mother jailed for contempt of court** |

|  |  |  |
| --- | --- | --- |
| Cooper v. Cooper (2004) ON | **F:** Mother denied access to father, children refused to see father. Father alleged manipulation of children in alienation from him.  **C:** Ct didn’t accept that it was children’s decision. $10,000 fine for mother, JC granted. | **Crt did not believe decision of child not to see father was their own. Mother fined + joint custody granted.**  **.** |

|  |  |  |
| --- | --- | --- |
| JKL v. NCS (2008) ON | **F:** Father originally had primary custody of son, turned him against mother + “women in general”.  **C:** Mother received primary custody. Judge also ordered son (13 yrs) sent to “deprogramming” in US, workshop to gain critical thinking skills, interpret family situations, etc. | **Father lost custody for turning son against mother; son sent for “deprogramming”** |

... Do these programs work? Is it in best interests of child to force them to do this?

* + Cts emphasize destructive effect of turning child against other parent; award custody to other parent

## 3P Access

-3P has onus to show their access is in BIC

-custodial parent has a lot od authority/DMking power in this area. No court interference with

* Court need not agree w reason custodial parent is denying 3P access. Court must defer to these views. --
* Additionally, if there is sig conflict between parents + 3P and access may exacerbate, likely no access.
  + … “cannot ignore the degree of negativity that would pervade the extended family should contact be maintained.” – ***Bridgewater v Lee*, 1998**
* ***Chapman,* 2001** – not in BIC to force children to visit grandmother on regular basis when they did not have a positive relationship with her (although in theory beneficial to see extended family)

## Mobility of Custodial Parent + Variations

– ***Gordon v Goertz,* 1996 SCC**

1. Parent applying to vary a custody/access order must **meet threshold req**: Material change in the circumstances affecting the child.

* A change in the conditions, means, need, circs of the child or in the ability of the parents to meet the needs of the child
* That change materially affects the child
* Not forseen or could not have been reasonably contemplated by the J in the making of the initial order
* + J should assume the correctness of the initial order.

IF MET: applicant must establish proposed move is/isn’t (depending on which parent applying) in the BIC

* **Fresh inquiry on BIC**: having regard to all circs of child’s needs + ability of respective parents to satisfy them.   
  Considering *inter alia*:
  + Existing custody arrangement + rel’p btwn child + custodial parent
  + Existing access arrangement + rel’p btwn child and access parent
  + Desireability of max’g K btwn child and both parents
  + Views of the child
  + Custodial parent’s reason for moving ONLY in exceptional case where it is relevant to the parent’s ability to meet child’s needs
  + Disruption to child of change in custody (*status quo*-ish)
  + Disruption to child consequent to removal from family, schools and cmmty they have come to know.
    - Some new considerations have come up in application: – ***One v One*, 2000 BCSC**
      * Parenting capabilities + relationship w parents/new partners
      * Employment security and prospects of the parents/new partners in respective locations
      * Access to support of extended family
      * Difficulty in exercising proposed access + quality of access if move is allowed
      * Effect on children’s academic situation
      * Psych/emo well bing
      * Separation of siblings
      * Retraining/edu opps for moving parent
* Weighing importance of child remaining w parent now accustomed to in new locale VS. continuance of full K w access parent/extended fam/cmmty
* **If the child’s needs are likely to be best served by remaining w custodial parent + this offsets the loss/reduction in K w access, the J should permit the move**.
* \*\*BIC is the *only* issue. (not ‘rights’ of parents)
* No legal presumption in favour of custodial parent
* Inquiry based on findings of original ordering J + evidence of new circs

Orders may specify conditions of access: notice, where it should be exercised

# Children: Child Support + *CSG*

-parents joint and ongoing legal obligation to support their children. It is the *child* whom has the right to the child support (not the custodial parent)

## Is child support owing?

Divorce Act *–* if proceeding for corollary child maintenance initiated w divorce (only if married)

* ***Are they “children of the marriage”?*** – s.2(1) *DA*
  + a child of two spouses/former spouses who :
  + at the material time (at the time of determination)
  + is under the age of majority (19 in BC)
  + who has not withdrawn from their charge (e.g. runaways, gone off to NY to model etc)
  + OR is/over age AND under their charge but unable (illness, disability or other cause) to withdraw from it or to obtain the necessaries of life;
    - Can include kids still at university 🡪 SEE BELOW CSG s.3(2), – ***Farden,* 1993 BCSC**
    - Crown wards are *not* in ‘charge’ of parent, despite remaining child at law, and at times parent having to pay when she has access + fee for support to Children’s Aid Society – ***JMS v FJM*, 2005 ON Div Crt**
* ***Did the client ‘stand in the place of a parent’ for the child?*** - s.2(2)
  + 2(2) a child of two spouses or former spouses includes:
    - any child for whom they both **stand in the place of parents**; (for when neither is bio/adopt parent)
    - any child of whom **one is the parent and for whom the other stands in the place** of a parent (stepparents)
  + TEST – ***Chartier v Chartier*, 1998 SCC**
    - Look to intention of the parties, though not determinative + not nec expressed formally
    - Infer intentions from actions. Look at nature of relationship between adult and child:
      * Formation of a “new family.” Treats child as member of his/her family
      * Child participation in extended family as if bio child (e.g. seeing/visiting extended family of a stepparent)
      * Provided financially for child (depending on ability to pay)
      * Disciplines child as a parent
      * Represented to child, family, cmmty (explicitly/implicitly) that they were the parent
        + In CAB F had actually fraudulently been added as her birth father on birth cert.
      * Nature of relationship w missing bio parent
    - Once found to stand in place of parent, may not unilaterally withdraw from the obligations flowing from it (i.e. CSG!)
    - Also gets rights, such as ability to apply for custody.

Family Relations Act

*-* unmarried parents, married but separated, etc.

- obligation of “parent”: includes bio parents, guardian of the child, stepparents (if fit leg’d scenario)

*Re: stepparents* need: marriage/marriage like-relationship w a parent of child, + contribution for >1 yr + no time limitation

Are you a ‘stepparent’? – s.1

**A person is the stepparent of a child** if they and parent of child

(a) are/were married, OR

(b) lived together in a **marriage-like relationship for min 2 years** (+ may be of same gender)

*-see ‘marriage like relationship’ under Spousal Support*

Are you a parent of the child? 🡪 (which creates the CSG obligation):

S. 1 def’n of parent.

**“parent” includes:**

(a) a guardian or guardian of the person of a child, or

(b) **a stepparent** of a child **if**

(i) they **contributed** to the support and maintenance of the child **for min 1 year**, AND

(ii) the **proceeding under this Act** is **commenced within a year of the date the stepparent last contributed** to the support and maintenance of the child;

## If owing: default = CSG table amount

Applied to/triggered by *either act:*

- *DA*:s.15.1(3) ­ (CSG apply to final and interim orders)

- *FRA*: s.88 [parental obligation to support child] & 93(1)(a) [using the CSG]

***s.3 CSG: presumptive rule***

(Table amount for spouse’s range of income, # kids) + (% of amt over base income for the range) = monthly award + s.7 proportion of extraordinary expenses = CSOrder

### Calculate income

-easy when it’s a salary, more difficult when contract work etc.

* Court may consider a *pattern of income* over 3 years to fix an income amt (K work e.g.)
* If a shareholder/director/officer of a corp: if crt’s opinion that income doesn’t reflect entirety of $$$ available to them to pay, may make adjustments to income determination.
  + Case law has used pre-tax income of the company – ***McCrae*, 1999 BCSC** citing ***Blackburn v Elmitt*, 1997**

-calculated from “total income” on T1 tax return, after deducting come adjustments (e.g. employment expenses, other support obligations)

- respondent spouse must submit sig amts of income information towards this determination – s.21 outlines it all

*By Agreement if reasonable***– s. 15(2)**

* (2) Where both spouses agree in writing on the annual income of a spouse, crt may consider it the income for CSG application **IF** the court thinks that the **amount is reasonable having regard to the income information provided under section 21**.

*Capability to Earn, not just actual earning* **– s.19**

* s.19 = court may impute income to a spouse as appropriate under the circumstances, including:
  + (a) intentional **unemployment, underemployment** (not for nec of childcare or edu/health of spouse)
    - only kicks in when *could* be going back to work
  + (b) income **tax** exemptions
  + (c) spouse in **foreign country** w sig lower income **tax** rates
  + (d) **diverting** income + would effect level under CSG
    - e.g. income splitting, family trusts – ***McCrae,* 1999 BCSC**
    - will be attributed back to the spouse bcz *can draw on it to support*
    - If a shareholder/director/officer of a corp: if crt’s opinion that income doesn’t reflect entirety of $$$ available to them to pay, may make adjustments to income determination.
      * Case law has used pre-tax income of the company – ***McCrae*, 1999 BCSC** citing ***Blackburn v Elmitt*, 1997**
  + (e) **property** not being reasonably used to general income
  + (f) failing to provide income info
  + (g) unreasonable deductions from income
  + (h) spouse is **beneficiary under a trust** and will receive income/other benefits from it.

### Calculate Extraordinary Expenses – s.7

1. **Are they ‘extraordinary expenses’?** 🡪 Are they covered by 7(1) or 7(1.1)?

* ‘extraordinary’ involves ‘unusual’. NOT based on price. Modest expenses can be extraordinary for parents w low income level, while completely ordinary for those w generous incomes – ***McLaughlin*, 1998 BCCA,** cited in ***McRae***
* **Consider ‘type of income’ dealing w at outset.**

**7.** (1) A CSOrder may provide additional amount to cover all or any portion of the following expenses

(a) **child care expenses** incurred as a result of the custodial parent’s *employment, illness, disability or education or training* for employment;

(b) portion of medical + dental **insurance premiums** attributable to the child;

* Likely not awarded w generous incomes + therefore support – ***McCrae***

(c) **health-related expenses above insurance reimbursement** by $100 annually. **Includes** orthodontic treatment, professional counselling (psychologist, social worker, psychiatrist etc), physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for **primary/secondary school** or **any other educational programs** that meet the child’s particular needs (e.g. testing for disabilities, tutoring);

(e) expenses for **post-secondary education**; and

(f) extraordinary expenses for **extracurricular activities**.

* Likely not awarded w generous incomes + therefore support – ***McCrae***

*RE: edu and extracurricular activities* *(subs d + f)*

(1.1)  **“extraordinary expenses” means**

(a) expenses that exceed those that custodial spouse can reasonably cover, looking at that spouse’s income + amount receivable from table amt/otherwise ordered OR

(b) where paragraph (a) is not applicable (i.e. they *can* cover them), those that crt considers extraordinary taking into account:

(i) amount of the expense in relation to the income of custodial spouse + table amt/otherwise ordered

(ii) nature + number of the educational / extracurricular programs,

(iii) special needs + talents of kids,

(iv) overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant.

1. **Are they necessary and reasonable?**

*Necessary*: in BIC?

*Reasonable:* consider means of the spouse + child + family’s spending pattern prior to separation

* Take into account the unique circs of people with very large incomes, and what is ‘reasonable’ to them
* Unreasonable = “so high that they exceed the generous ambit w/in which reasonable disagreement is possible”

1. **What portion of expenses will each parent pay?**

Usually proportionate to each parent’s income.

Single parent income / (total income of both parents) x 100 = % of expenses to be paid by single parent

## Factors Effecting Deviations from Table Amt

### Agreements & Special Provisions

***DA* s.15(5)**

***FRA* s.93(2)**

*Agreements*

-reasonable agreements will endure so long as circumstances do not change – ***Wang,* 1999 BCCA**

-**Factors re: REASONABLENESS of the child support arrangements:** – ***McCrae,* 1999 BCSC** (all other cases cited in)

* **measure against what the (present) CSG amt would provide.** Compare them, but treat the guidelines as advisory.
* **The child’s needs** at this time
* **Current arrangement** (see below, special provisions)

- ***Fung-Sunter v Fabian*, 1998 BCSC**

-if the agreement has not been turned into a court order, s.14(c) [the coming into force of CSG] does not apply.

-Where there is an existing separation agreement, there is no need to establish a ‘change in circumstances’, when an application is brought for a first CSOrder under s. 15.1 of the *Divorce Act*.

*Special Provisions*

***DA* s.15(5)**

***FRA* s.93(2)**

a court may award an amount that is different from applicable CSG amt if satisfied:

(a) that **special provisions** in an order, a judgment or a **written agreement** respecting the financial obligations of the spouses, or the division or transfer of their property, **directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child**; and

* + e.g. custodial parent can stay in matrimonial home

(b) that the application CSG amt would = inequitable amount of child support given those special provisions.

**-Defined**: a provision “which, in whole or in part, replaces the need for the ongoing support for the children.” – ***Hall v Hall*, 1997**

-special provisions may be used to show that an agreement on child support is appropriate to be continued

-has be interpreted as: paying at guideline amount but in a different way. May not simply reduce the guideline amount by making own provisions under these ss.

### Age of Child – s.3(2)

3. (2) Where child is the age of majority or over, the amount of the child support order is

(a) the default *CSG* amt OR

(b) if the court considers that amt inappropriate, substitute w appropriate amt, considering

- the condition, means, needs and other circumstances of the child

- the financial ability of each spouse to contribute to the support of the child.

**Re: Non-withdrawal due to Post-Secondary Edu** – ***Neufeld*, 2005 BCCA** (application of *Farden*)

\*\*\* applies re: extraordinary expenses too

FARDEN FACTORS re: still a child of the marriage? – ***Farden v Farden*, 1993 BCSC**

* Full or part-time studies?
* Applied for student loans/other financial assistance/burasies/scholarships?
  + Not nec to exhaust every source of funding before looking to parents for support
* Plans parents had made for edu of kids
  + Partic whether those plans were made while cohabiting
* Did child unilaterally terminate the relationship w parent from whom support sought?

-Here looking for: “achievable, realistic and legitimate edu goals” – ***Neufeld***

* Career plans of child
  + Appropriate endeavor? Reasonable costs? Reasonable prospect of advancing the career prospects?
* Ability of child to contrib via part-time/summer work?
* Age of child
* Past academic performance

-entitlement to support may be revived despite a hiatus in studies (in this case the = 10 mos)– ***Haley,*  2008 On Sup Crt**

### Income below or above Guidelines (ABOVE 150K) – s.4

- guidelines do not apply to incomes at or **below $10,819** – no CS owing.

**Above $150K**

4(a) – may proceed by s.3 default: used the CSG table amt + calculate the % of amount above as you would usually.

OR

(b) “if court considers that amount ***inappropriate***”

(i) must pay CSG amount for first 150K

(ii) in respect of the balance, should pay **amount that the court considers appropriate, having regard to:**

* + **the condition, means, needs and other circumstances of the children** who are entitled to support **and**
  + **the financial ability of each spouse to contribute** to the support of the children;

(iii) + extraordinary expenses amt under s.7

* **Defining “inappropriate”** – ***Francis v Baker,* 1999 SCC**
  + UNSUITABLE
  + The amount may be reduced *or increased* from the table amt
  + ONUS to rebut presumption of appropriateness of reg table amt ON party seeking deviation from the 4(a)
    - There must be *clear and compelling evidence* to deviate
    - ALL CIRCS (including Sub (ii) circumstances) are applicable to determining appropo/inapprop of the presumption amt.
    - Partic centrality of the *actual lived situation* of the children (and what they’re used to)
    - Indirect benefit of some amt of ‘wealth transfer’ to the custodial parent = not a reason on its own to consider table amt inapp
  + Parties maintaining *appropriateness of* table amt should bring child expense reports
    - Custodial parent need not justify every single expense
    - Realize the inherent inaccuracy of such reports (over/under estimates all over)
  + Onus on payor parent to demonstrate that a budgeted expense (shown to uphold approp of table amt) is so high that they “exceed the generous ambit w/in which reasonable disagreement is possible” --
    - Understand the unique circs of high income earners

### Stepparents – s.5

* Where respondent = stands in place of a parent , CS amt = such as court considers appropriate w regard to the Guidelines and any other (likely birth) parent’s legal duty to support.

### Split Custody – s.8

* Where each spouse has custody of one or more children, the amount of CS owed is **difference between** the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

### +40% Custody or access/yr (“Shared Custody”) – s.9

Where a spouse exercises access/has physical custody of a child **no less than 40 per cent of the year**, amt of CSOrder determined by considering:

(a)  applicable table amount for each of the spouses;

* Do a **set off** calculation: – ***Contino v Leonelli*, 2005 SCC**
  + (% time w mother x guideline amount of father) - (% time w father x guideline amt of mother)
  + use this as a starting/guiding point.
* **Consider continuing ability of recipient/custodial parent make adequate provision and to maintain a comparable SoL** (recognizing that most costs are fixed)
  + 🡪 who is the low income/who is the high income parent?
* Proceed to…

(b)  increased costs of shared custody arrangements; and

* They must be *directly attributable* to the sharing/increased custody – ***Green v Green,* 2000 BCCA**
  + E.gs: food, heat, electricity, transportation (gas, bus), day-to-day entertainment, school and misc expenses requested by children
* Based on actual budgets/expenditures of parents, has the shared custody increased costs globally?
  + If yes, they should be apportioned btwn parents proportional to their incomes. – ***Contino v Leonelli***
* LEAD REAL EV, not just common sense assumptions.

(c)  conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

* Financial circs of custodial parent:
* **Significant disparity in incomes?:** 
  + Might a reduction in CS **undermine** custodial parent’s **ability to make adequate provision** for the child?
  + Will itexacerbate the diffs in SoL between the two parental homes? Resources of each parent to simply absorb costs to maintain proper SoL
    - This is where you consid does one parent have low income, but is being supported by new spouse etc? – ***Spanier*, 1998 BCSC** cited in ***Green***
  + are they less favourable and/or less secure than those of access parent?
* How well have they been addressed by spousal support?
  + Any real evidence that the recipient parent’s costs have *decreased* due to the increased time w other parent?
    - major child related costs are fixed: housing, vehicle for transportation, clothing.
* LEAD REAL EV
* Financial stmts + child expense budgets are nec to a proper evaluation – ***Contino v Leonelli***

Without 40% access/custody have to rely on HARDSHIP…

### Undue Hardship - s. 10

**10.** (1) On either spouse’s applicationcourt may award differently than determined under 3 to 5 [default, above 150K, stepparents], 8 or 9 [split/shared custody] **if the court finds that the spouse, or a child** would otherwise suffer undue hardship.

**TWO PART TEST**

1. **Show hardship:**

(2) Circumstances that may cause hardship (non-exhaustive):

(a) unusually high level of debts reasonably incurred to support the spouses + children prior separation OR to earn a living (e.g. student loans);

(b) unusually high expenses to exercise access;

(c) legal duty under a judgment/order/sep agreement to support any person (likely spousal);

(d) legal duty to support a child, other of this marriage;

* First families first! – ***McCrae,* 1999 BCSC**
* consider how much longer other kids will be under charge

(e) legal duty to support any person unable to obtain necessaries of life due to illness/ disability.

1. **Consider Standards of Living: may not be varied if claimant spouse’s SoL would be above custodial spouse’s**

(3)  If after the child support determined originally (ss 3-5, 8 or 9) the claimant spouse’s household would still have a higher standard of livingthan the household of the other spouse, despite finding undue hardship above, **application must be denied.**

(4) use the comparison of household standards of living test set out in Schedule II.

(5)  When ordering differing amt under this section, may specify a reasonable time for when undue hardship circs may end what will be payable at that time.  
(6) Court must give reasons.

## Varying/Retroactive Child Support

**SEE: *FRA* s.96 (1-1.2) re: variation proceedings**

***DA* s.17(1)(a) & 17(4): change of circs as in CSGs**

***CSG* s. 14**: circs constituting chg in circs 🡪 (a) change in income changing table amt; (b) if not based on table, change in condition, means, needs, or other circs of either spouse or any child; (c) coming into force of CSGs

### Retroactive

*- Parents have a legal obligation to support their children commensurate o their income, independent of any court order*.

- **Retroactive CS:** enforcing unfulfilled obligation + payments accrued when income of payor has increased since the original CSOrder/settlement agreement/since separation (if no formal order made).

* Receiving party usually applies
* Change in income ‘sig and long lasting’ likely

FACTORS: ***Hiemstra,* 2006 SCC**

* Reasonable excuse from recipient parent for their delay in bring app
  + Should be acting promptly and reasonably in monitoring amts (regularly asking for disclosure)
  + – ***Greene,* 2010 BCCA**
  + Might be able to impute increased income from large purchases depending on the circs
  + Can infer that salary would increase after sig time (CAB: 9 yrs) at same job
  + Also perhaps signaled by increased voluntary payments for certain expenses of children
  + Possible excuse = intimidated by payor to seek increase
* Conduct of the payor
  + Hiding income? Purely didn’t advise of increase?
  + Didn’t understand their obligation?: counsel at time of original order/agree?
  + Acknowledgement by voluntary increasing some payments 🡪 not allowed to decide their own contrib
    - *May* have made up the accrued CS via these payments, but here, not enough to just pay for hockey etc.
  + Privileging their own interests over child’s right to support = (
  + Blameworthy to believe could rely indefinitely on the support provisions / that needs of children would not increase as they grew older – ***Greene,* 2010 BCCA**
* Present circumstances of the child:
  + What is appropriate? How badly needed? Age?
  + May be able to impute knowledge

-“effective notice” of intention to apply to increase = triggers date from which retro CS is owed.

-application must occur before the child is no longer a child of the marriage

-max retro award time = 3 years accruing.

-any hardship flowing from the retro award = onus on payor to est. facts that would = hardship AND court may be able to dea via terms of payment.

### Varying

TEST TO VARY: – ***Earle,* 1999**

* **material change** in circumstances at time of the application
  + if known by the J when making last order, **would have resulted in a different order**.
  + Coming into force of *CSG* may be mat change only if arrangements of parents/prev course are unreasonable vis-à-vis guideline determination
* **Significant and long lasting**

### Cancelling/Reducing Arrears

(type of variance)

TEST FOR CANCELLING/REDUCING ARREARS: – ***Earle,* 1999**

* HEAVY DUTY on person seeking cancel/reduct to show:
* \*\*\*\*\*Complete disclosure of financial situation needed + under oath evidence (aff) THAT time payment were due:
  + **Sig and long lasting** change in circs
    - will not be reduced/cancelled unless GROSSLY UNFAIR no to do so
    - *DA*: material, long lasting change
  + Change was **not by choice** AND– ***Ghislieri,* 2007 BCCA**
    - Purposeful avoidance of CS via intentional under/unemployment = unacceptable.
    - Onus to explain it = on the arrearing/payor parent
  + Show **every effort** to earn money, though unsuccessful
* **Possibility of postponing** payment until a reasonable time OR order **payment over time** in reasonable terms
  + Take into account all circs including present financial situation of payor

Rejection of args to cancel/reduce:

-will only be cancelled/reduced if **unable to pay now AND in the future**.

-**first families first**, new obligations are not an excuse

-**delay** in enforcement by recipient parent is not, on its own relevant, unless can show delay = prej in some material way

-can’t claim **‘hoarding’/windfall** (people would just wait long enough to not pay)

-will not cancel arrears bcz children were looked after in spite of non-payment (did not “suffer”).

-nor will JJ cancel bcz they no longer need the money: should be compensated for what was missed

-**Agreement** between parents ‘not to pay’ does not stand. Right is to the children.

-**prevention of access** not proper factor in reducing/cancelling.

-no **legal advice** upon first order OR while arrears were accruing =/= on its own reason to reduce or cancel.

## Enforcement of Child Support

*-Family Maintenance Enforcement Act* = file order w Director and will proceed to enforce for you.

* Demand from any person/public body location of debtor’s assets/source of income.
* Forward notice to ICBC that they are in default = prohibits issuing/renewing driver’s license

*-Family Orders and Agreement Enforcement Assistance Act* (federal)

* Arrangements between fed and prov gov’ts for release of info about debtor held by feds
* Garnishment of fed gov’t payments
* Suspension/denial of fed licenses (passports) when in persistent arrears

*-BC Interjurisdictional Support Orders Act* = process for enforcing order internationally (reciprocating JDs\_

- ***Dickie*, 2007 SCC** – Dr. fled to Bahamas w outstanding & acknowledged child and spousal arrears

– court may refuse to hear/stay an appeal of someone in arrears until they have purged their contempt

– remedies such as payment of security when outside reaches of prov enforcement mechs

– creative enforcement mechanisms for those fleeing obligations

# Property Division: Enforceability of Marriage/Cohab Agreements

**ONLY APPLIES TO MARRIED SPOUSES**

## *FRA* – Present Scheme

**Starting Point - s.56**: 50% of family assets

S. 56 (1) – each spouse entitled to an interest in each family asset on ‘triggering event’ (sep agreement, declaration of no reas poss of reconcil, divorce, declaring marriage null/void)

* (2) interest is an **undivided half interest** (50%)
* (3) interest is subject to : Prop division orders under part 5 OR a marriage or separation agreement

**Crt power to REAPPORTION** from agreement on *fairness* grounds **on application – s.65(1)**

TEST for setting aside an agreement:

1. **Is it a K?**

**CHECK TECH REQs: Validity of the Agreement** (Technical Reqs) – **s.61**

-(2) entered before or during marriage FOR:

* Mgmt of family prop/assets during marriage or
* ownership/division of family assets/prop during upon marriage’s end: dissolution of marriage, divorce or declaration of nullity

-(3) must be in writing, signed by both and witnessed by 1+ others

-(4) no need for consid.

1. **Entered into properly/valid pursuant to CL laws of K/equity?**

Contract Principles/Remedies: mistake, fundamental breach, issues of capacity etc.

Equitable Remedies:

* Duress = supposed to be threat of physical violence.
* undue influence, coercion, unconscionability,
* fraud/non-disclosure: need to have full understanding of what giving up and what agreeing to
* Reconciliation, ignoring the agreement for a while = can make entirety ineffective

1. **Apply the agreement + other sources**

Assess/award what is provided under agreement + other sources (child/spousal support)

THEN… consider 65(1) factors and ask whether operated unfairly.

1. S.65 Unfairness TEST – ***Hartshorne v Hartshorne*, 2004 SCC**

***Were circs of the parties*** (personal + financial) ***at time of separation within reasonable contemplation of parties at time of agreement?***

* How accurately did they predict their actual present circs?
  + E.g from ***Hartshorne*** – agreement intention to “remain completely independent of the other in regard to their property”. In reality at time of sep: no comingling of funds, no joint accts of sig value, assets remained in respective names. Personal life had played out as planned re: 2nd child and not returning to work.
* Did they consider the impact of these decisions?
* Did they adjust the agreement from time to time (either for changes in sit OR as the provisions unrealistic/inadequate)?

***EVEN IF so, did the parties make adequate arrangements in response to these anticipated circs?*** (i.e. does the agreement/circs surrounding it contemplate and respond to these circs)

* Burden for unfairness will be
* Consider if there is still ability to collect spousal support: if so, can certain disparities be dealt with through that (e.g. forgoing career ops)?

***Is the discrepancy between contemplation + actual circs such that, given the s.65 factors, reapportionment should be made?***

**s.65(1)** If the prop div in agreement **would be unfair** having regard to:

* (a) duration of the marriage,
  + - longer the marriage, the more right to more property.
* (b) duration of pd spouses have lived separate and apart,
* (c) date property acquired or disposed of,
* (d) extent prop acquired by one spouse through inheritance/gift,
* (e) needs of each spouse to become/remain economically independent + 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,

BCSC may order that property covered by… marriage agreement… be divided into shares fixed by the court

**\*\*\*\*\*\*COURTS SHOULD BE RELUCTANT to second-guess individuals initiative and arrangement, *particularly* where ILA has been obtained (esp to such a degree as here).**

-should not find unfairness from mere deviation from the stat regime.

## *FLA* – Incoming Scheme: Raising the Bar

**-Raising the bar for setting aside agreements!**

**-More certainty to advise on.**

-**applies to both married and unmarried** (“marriage like relationship” for min 2 years) couples! - see def’n of spouse s. 3(1)

Definition/Scope of Agreements – s.92

92  Despite any provision but subject to section 93 *[setting aside agreements respecting property division]*, spouses **may make agreements respecting the division of property and debt, including** agreements to do one or more the following:

(a) **divide** family property or family debt, or both, and do so equally or unequally;

(b) **include** as family property or family debt items of property or debt that would not otherwise be included;

(c) **exclude** as family property or family debt items of property or debt that would otherwise be included;

(d) **value** family property or family debt differently than it would be valued under section 87 *[valuing family property and family debt]*.

**Technical Reqs** (stayed the same) – s.93(1) + (2)

**POWER TO REAPPORTION** – s. 93(3), (4), (5)

-only under specific sits OR *significant unfairness*

(3) On application BCSC may set aside or replace with an order all or part of an agreement **only if** satisfied that **one or more of the following** circumstances existed **when the parties entered** into the agreement:

(a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;

(b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;

(c) a spouse did not understand the nature or consequences of the agreement;

(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

(4) BCSC may act under circs of (3) if they would not order anything substantially different from the agreement, nonetheless.

(5) Despite subsection (3), BCSC may set aside/replace with an order all or part of an agreement if satisfied that the agreement is **significantly unfair on consideration of the following:**

(a) length of time passed since agreement made;

(b) intention of the spouses, in making the agreement, to achieve certainty;

(c) degree to which the spouses relied on the terms of the agreement.

# Property Division: Matrimonial Property Division

## Unmarried Cohabitant Couples: Constructive Trust CL Scheme

-No statute covers them. Falls to common law of trusts.

-A constructive trust in property must be found before a CL spouse can have an interest in the property.

-Leaving out CL couples from Matrimonial Property Acts was not discriminatory/contrary to the *Charter*. Decision to cohabit was “insufficiently indicative of deciding to share in each others’ assets and liabilities.” The court couldn’t assume a commonality of intention and understanding of that kind without marriage. – ***NS (AG) v Walsh*, 2002 SCC**

### TEST for finding a Constructive Trust

1. **Has there been Unjust Enrichment?**
   1. An enrichment/tangible benefit/value added/windfall to the owner (often via prop)

* E.g. increased value due to maintenance/cleaning, more time to devote to business,
* Actual unpaid labour, accelerated rate of saving to buy home/farm (***Pettkus v Becker*, 1980 SCC**)
  1. A corresponding deprivation to the contributor
* E.g. no wages, lack of pension, employment, experience, seniority etc because working in informal sector
  1. Absence of juristic reason for the enrichment – developed in ***Kerr v Baranow,* 2011 SCC 10**
* *1st:* No obligation (contractual, employment, statutory or otherwise) to enrich owner, no intention to make a gift, statute denies recovery etc
* *2nd*: Reasonable expectations of the parties  
  “Knows or ought to have known of the reasonable expectation” fulfills this element – ***Pettkus*** 
  + did contributor assume/reasonably expect to receive an interest (i.e. (s)he was building business/prop *together*?);
  + Could owner reasonably assume this would all come free, i.e. should he have been aware of this expectation? Perhaps he made some recognition of it, though less than deserved. – ***Pettkus v Becker*, 1980 SCC**
* Public policy: reasons why certain actions/relationships should not attract unjust enrichment/recovery
  + This is where in ***Pettkus*** args happened about household/childcare responsibilities in CL relationships + limiting recovery

1. **Causal conxn btwn enrichment and deprivation?**

* The contribution must be *sufficiently substantial and direct* as to entitle them to a portion of profits/prop
  + MAY be monetary even if indirect e.g. paying alt stuff to accelerate savings to buy, $$ contrib to one business whose profits help to buy the other – ***Pettkus***
  + Conrib need not be monetary
  + Contrib need not be connected to the acquisition of the property – ***Sorochan,* 1986 SCC**
  + Sufficient nexus exists where contrib goes to to *preservation, maintenance or improvement* of property – ***Sorochan,* 1986 SCC**
    - Egs: enabled/assisted in enabling to acquire assets in contention

\*\*\*Care for children, home, garden (+ some parttime work) satisfied test for unjust enrichment. Household and childcare duties w/o compensation enhance the value of the family home property and sufficient to create a CT and thus an interest in the home. ***Peter v Beblow*, 1993 SCC**

1. **What remedy/interest should follow?**
   1. Money Judgment

* If award of money is sufficient, then this award imposed
  + Consider the probability of a money jdmt being paid in determining sufficiency
* QUANTUM:
* *Value received approach*
  + Actual value of the services contributed (i.e. if someone had been hired for them)
  + NOT that appropriate for property division (usually contribs can’t be categorized that easily)
* Joint family venture = *value survived* (see below). More appropriate because of ‘mutual effort/contribution’
  1. Constructive trust
* When money jdmt NOT sufficient (unique property etc.) AND
* There is a direct link of efforts of plaintiff and the acquisition, maintenance, improvement of the property
* QUANTUM: *value survived method*
  + Amt of trust = Based on what is fair, having regard to contribution of plaintiff to the property
  + i.e. **what portion of the property is attributed to the plaintiff spouse’s services?**
    - Often, the longer the relationship, the closer to 50% trust
    - What was the value added by the P spouse?

### Joint Family Venture: partic constructive trust

– ***Kerr v Baranow*, 2011 SCC**

-**JFV =** joint efforts of enrichment occurs when joint efforts of the parties are linked to the overall accumulation of wealth.

-**Unjust enrichment in JFVs =** one party retains disprop share of assets produced by the join efforts of the couple.-

**-If JFV found:** claimant must show link between their contribs and the accumulation of assets

**-proper remedy:** Monetary remedy determined by proportionate contrib of claimant to the wealth (value survived, above).

-no presumption that a CL relationship = JVF

WHEN = JFV?

* **Mutual Effort:** did parties work collaboratively towards common goals?
  + Pooling of effort + teamwork, decision to have/raise kids together, length of relationship
  + Joint contributions/contrib to a common pool
  + Pooling includes taking on one role (domestic labour) so other can take on another role
* **Economic Integration:** econ interdependence
  + More integrated finances, econ interests + well being, more likely JFV
  + Joint bank accts, operating something as a family unit, sharing expenses
* **Actual Intent:** to share wealth jointly created, to economically tying lives together
  + Expressed or inferred
  + Held themselves out as married?/ relationship equiv to marriage? Stability of relationship, length of cohab
  + Title of property? Property dist on death may = domestic/econ partners
* **Priority of the family**: in decision mking
  + Detrimental reliance/Proceeding on basis of assumption of a shared future/shared wealth
  + Financial sacrifices made for benefit/welfare of the fam
  + Ofte one party relies on the success/stability of the relationship for future econ security, to own detriment
    - Leaving workforce to raise children
    - Moving to benefit other’s career
    - Forgoing edu/career adv for ben of fam
    - Accepting underemployment to balance needs of fam
    - Forgoing promotion for benefit of family life 🡪 re: higher income partner

Mutual benefit conferred “a bargain” of living together = considered at juristic reason stage, considered when looking if there were reasonable expectations of the reward/known ought to have known of that reas exp.

## Married Couples: *FRA –* Present Scheme

*-****NB:*** *default entitlement*: 50% interest in family assets upon triggering event (sep agreement, declof no possibility of recon, order of divorce, decl null/void) – s.56(1)

* “claims” are made under this section (when claiming *more* items are FAs)

-***NB:*** *definition of spouse -* A person who is married to another person (excl marriage-like rel’ps fore Prop Division) – s.1

-***NB:*** *time limit –* **claim w/in 2 yrs** of divorce order/declaration of nullity/decl of imposs recon – s.1

1. **Is it a family asset (FA) (4 main categories)? – ss. 58**

***-****Onus lies with individual opposing something is a FA (s.56 claim) to prove that it is NOT OUFP on BoP* – s.60   
(excellent for have-not spouse. File before this is gone!)

Ordinary use for a family purpose – s.58(2) (*prop owned by one and OUFP by other spouse or minor child*)

Threshold Qs: – ***Jiwa***

-property? 🡪 not intangibles, not income from employment

-owned by a spouse? 🡪 having ‘rights’ to a policy/K/plan etc qualifies

**Ordinarily used, by other spouse or minor child, for a family purpose?**

* “The use pattern must be examined in each case to determine whether, in the ordinary course, the present use cttmt to meet a present or future need includes a use for a family purpose” (not inconsistent with use for other purposes) – ***Evetts,* 1996 BCCA**
* No presumption of intended use from nature/characterization of the actual asset (e.g. for future financial sec). Must bring *evidence* and be proven every time. – ***Lye v McVeigh,* 1991 BCCA**
* **MAY INCLUDE FUTURE USE – *Jiwa,* 1991 BCSC**

**Case Law + OUFP!...**

**Case Law + OUFP!...**

*Income from Assets & Capital*

* “Property” under this section =/= income from the property ∴ income OUFP does not make property itself nec FA (relationship w s.59 excl. biz prop).
* Use of *capital* from a business asset for a family purpose (e.g. remortgaging a rental prop to buy a family home) **will taint the capital biz asset** making it FA. That is true *use* of the prop.
  + ***Samuels,* 1981 BCSC**
  + F: 2 biz properties w rental income. Rental income went into H’s acct, OUFP (conceded as FA). Capital untouched for OUFP. Court agreed that s.59 operated to exclude the properties *unless* he had used the capital.
* Use of **income** from a capital asset/investment property *may* make asset OUFP where: the **use of the asset was to provide financial security and protection against erosion of income or other family misadventure** in the future. – ***Evetts,* 1996 BCCA,** citing***Tezcan,* 1990; *Folk*, 1994**
* May include **capital in investment portfolios** drawn upon time to time to purchase real property that became family assets (full residential and/or recreational needs of family) AND for ordinary living/incidental expenses.
* Investment properties may still have a OUFP: in CAB = use of amenities of lake (store boat, easement to water etc)
  + ***Brainerd*, 1989 BCCA**

*Insurance --* ***Jiwa,* 1991 BCSC** and **1992 BCCA**

Insurance policies whose purpose is to provide a sense of security to the family unit or which are part of the planned family security meet the test in 58(2). –**BCCA**

* May infer life insurance policies owned personally, esp w cash surrender values, are ordinarily acquired and maintained for purpose of security for one’s family. – ***Piercy,* 1991** and ***Leppard,* 1991** cited in ***Jiwa***
* Accident insurance, paying a benefit on disability, no diff from life insurance (pays benefit upon death)
* Relatedly, no difference if supplied by employer or if purchased personally.
  + (Remember s.60 presumption: have to show evidence to the contrary to rebut the presumption)
* If policy deemed FA via OUFP, so too are the proceeds.
  + Cash surrender value on *date of determination* is what is apportioned.

*Hobby Collections*

* Open to a factual determination re: FA or not.
* Some of ‘unfairness’ from being an FA can be dealt with via reapportionment
* Much seems to centre around level of display/sharing + connection w non-owning spouse
* A sports memorabilia collection on “partial but prominent display” in the matrimonial home and shown to guests, + family members enjoyed the collection as a focus of (sporadic) activity by “attendance at sports conventions + discussion” –***O’Bryan,* 1996 BCSC**
  + Apportionment was 80% to H, 20% to W

*Gifts/Inheritances*

* Gifts can depend on *donor’s intention*: jewelry/furs to impress friends/colleagues – ***Hauptman,* 1981 BCCA**
* Inheritances/gifts *may* be FA
  + must prove *more* than ‘possible’ use as retirement income (i.e. family sec) of inheritance $$– ***Hefti*, 1998 BCCA**
  + contribution may create an FA: rental prop helped to maintain + act as guarantor when refinanced – ***Campbell*, 1991 BCCA**
* 58(3)(c) ***money*** *of a spouse* ***in an account*** *if it is* ***OUFP***
  + In general a savings account can be a FA. Need to show *intention for providing for family in future* – ***Graff,* 1987 BCCA**
  + Numerous separate accts + one joint account for family purposes, the latter may be the only one found OUFP…
  + JJ may look to nature of the entire relationship to shed light on the intended use of the accts (esp re: ‘savings’ accts or stocks/bonds.)
    - ***Lye v McVeigh,* 1991 BCCA**
    - made exactly equal contributions to the living expenses etc. despite differences in incomes.
    - Cmtting only so much to the matrimonial pot as chosen/as was equal, thus cannot assume about use of other accounts, *even if some* money drawn out of it for family purpose**.**
      * **Not ordinarily enough.** The joint acct was the one ordinarily used!
    - “Modern” marriage. Did not show “lifelong commitment’ type of dependence.
    - If they had children might be different.
  + No assumption of intended use for ‘future needs/security” of family from nature of asset (bond etc.) – ***Lye v McVeigh,* 1991 BCCA**

### Annuity/pension/home ownership/RRSP: – s.58(3)(d)

*-a right of a spouse under an* ***annuity or a pension, home ownership or RRSP***

**-**A DEEMED FA – no judicial discretion, no need to prove OUFP

* **Pension =** 
  + key aspect = **income replacement** – ***Jiwa,* 1991 BCSC**
  + **personal accident insurance =/= pension** – ***Jiwa***
  + scheme intended to benefit the employee on termination of employment – ***Lye v McVeigh,* 1991 BCCA**
    - Often, lack of ability to withdraw before end of employment
    - Look if there are other *actual* pension plans in addition to other plans from employer.

Venture + contribution – s.58(3)(e)   
*-a right, share or an interest of a spouse in a* ***venture*** *to which money or money's worth was,* ***directly or indirectly, contributed*** *by or on behalf of the other spouse*

**‘Venture’**:

-liberally interpreted

-not significantly different from s.59(1) re: biz assets

-includes any investment in which there is an element of risk, with potential for profit despite primary function may be to serve some other purposes.

-includes “any business” – ***Robertshaw (No 2),* 1979 BCSC**

* NOT: passive deposits/investments (e.g. in ***Brainerd***) such as bank deposits, bonds, term deposits
* YES: most professional practices, real property investments, stock portfolios

**Contribution of $/$’s worth:**

-no sig difference from test in s.59(1)

* **Direct:**
  + paid or unpaid work in venture – ***Robertshaw (No 2),* 1979 BCSC**
  + Contributing family assets or permitting their used to acquire/maintain the business asset;
  + Assuming risks (e.g. mortgaging a family/personal asset or guaranteeing a loan)
  + Need not be *significant* to the business – ***O’Keeffe*, 2002 BCSC**
    - attendance at biz premises to do basic tasks, reception, filling in at tradeshows at times, ‘acting as his hostess’
* **Indirect:**
  + savings through mgmt of household/child rearing – 59(2) AND:
  + “homemaking, entertaining, childcare/help w family, and companionship” – ***O’Bryan,* 1996 BCSC**; ***Piercy*, 1991 BCSC**
  + acting as companion on business trips, hostessing, managing the household– ***O’Keeffe*, 2002 BCSC**

### Business Assets that would be FA if owned – s.58(3)(a-b)

* *(a) IF corporation/trust property that would be a family asset if owned by a spouse, then a* ***share*** *in the corporation, OR an* ***interest*** *in the trust owned by the spouse = fam asset*
* *(b) if property would be a family asset if owned by a spouse, property*
  + *(i)  over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or*
  + *(ii)  disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;*

-liquidating a business would be contrary objectives of the *FRA*. It is the SHARES of the spouse which should be deemed FA and apportioned for fairness. – ***Balic*, 2006 BCCA**

### Doctrine of Tracing

* Property acquired with proceeds from sale of family asset = “traced”, may be classified as a FA – ***Tratch,* 1981 BCSC**
* Applies to prop acquired before or after the separation, in whole or in part with funds from FA – ***Milan,* 1989 BCCA**
* related to s.66(2)(c) – court power to order compensation when property has been disposed of
* codified somewhat in new *FLA* 84(1)(b)

1. **Is it an Excluded Business Asset?** (i.e. *not FAs*) **– s.59(1)**

*-If property is* ***owned by one spouse*** *to the exclusion of the other and* ***is used primarily for business purposes******+ no direct or indirect contribution*** *to the acquisition of property or operation of business from non-owning spouse = NOT a family asset.*

**-NB:** *ONUS REVERSES –* individual claiming a FA must prove they contributed.

**“Business Asset/primarily for biz purposes”**

* Not sig different from ‘venture’
* HAVE INCLUDED: patent rights (***Coulthard***), farm land & operations (***Laxton***), professional practices (***Wilson***), includes shares, the business itself
* NOT: personal qualifications – ***Sampson,* 1996 BCCA** (also ***Caratun*, 1992 ONCA**)
  + intangible assets/not property under 58/59 nor is income stream from them. Thus not subject to division, *regardless* of other spouse’s contribution to the acquisition of the qualifications.
  + Personal employment income *also* immune to this sort of division.
  + deal with this in spousal support – ***De Beeld,* 1999 BCCA**

**“Contribution to acq/operation”**

-No sig diff from test re: ‘ventures’, s.58(e)

* **Direct** contrib:
  + Paid or unpaid work in the business (***Robertshaw***)
  + Contributing family assets or permitting their used to acquire/maintain the business asset;
  + Assuming risks (e.g. mortgaging a family/personal asset or guaranteeing a loan)
  + Need not be *significant* to the business – ***O’Keeffe*, 2002 BCSC**
    - attendance at biz premises to do basic tasks, reception, filling in at tradeshows at times, ‘acting as his hostess’
* **Indirect** contrib:
  + savings through mgmt of household/child rearing – 59(2) AND:
  + “homemaking, entertaining, childcare/help w family, and companionship” – ***O’Bryan,* 1996 BCSC**; ***Piercy*, 1991 BCSC**
  + acting as companion on business trips, hostessing, managing the household– ***O’Keeffe*, 2002 BCSC**

1. **If does not fit under s.58 nor 59? “OTHER ASSETS”**

Remain property of owning spouse. May not be reapportioned.

1. **Does an asset need to be reapportioned from 50/50 default for fairness?** – See ‘Reapportionment’ below.

## All Couples: *FLA* – Incoming Scheme

-***NB:*** *Default entitlement* – each = right to 50% interest as tenants in common + *equal resp for family debt* (New!)

– subject to agreements/orders (see above)

-***NB:***  *Definition of spouse –*married and unmarried(“marriage like relationship” for min 2 years) couples! – s. 3(1)

-***NB:*** *Time limits -* no later than 2 years after divorce order/decl of nullity OR date CL spouses were separated - s.198

-CL separation defined: s.3 communication by one to another of intention to sep perm, or action that demonstrates that intention)

### Is it caught by an EXCLUSION to FP? – s.85(1)

*Onus is on spouse claiming exclusion to demonstrate it is excluded* –s.85(2)

85  (1) The following is excluded from family property:

* (a) property **acquired** by a spouse **before the relationship** began;
* (b) **gifts or inheritances** to a spouse;
* (c) a **settlement/damages** to a spouse for **injury or loss, unless** it represents compensation for
  + (i) loss to both spouses, or
  + (ii) **lost income** of a spouse;
* (d) money **paid or payable under an insurance policy** (NOT respecting property), **except** any portion that represents compensation for
  + (i) loss to both spouses, or
  + (ii) **lost income** of a spouse;
* (e) prop in any of above held in trust for a spouse;
* (f) property in a discretionary trust, to which the spouse did not contribute or settle, of which they are a beneficiary.
* (g) property **derived from property above**, or derived from its sale/disposition

### Is it Family Property (FP)? – s.84

**Note! No OUFP test.**

84  (1) Subject to section 85 FP is all real/personal prop which,

* (a) ON sep is: owned by min 1 spouse, or 1 spouse holds a beneficial interest in
* (b) AFTER sep a spouse buys/acquires a ben interest in, DERIVED FROM PROP in (a) OR FROM ITS SALE

(2) Without limiting (1), FP includes the following:

* (a) share/interest in a **corporation**;
* (b) interest in a **partnership, an association, an organization, a business or a venture**;
  + no longer need to show contribution!
* (c) property **owing** to a spouse (i) as a refund, including an income **tax refund**, or (ii) in return for the provision of a **good or service**;
* (d) **money** of a spouse in an account with a financial institution;
  + no need to show OUFP!
* (e) a spouse's entitlement under an **annuity, a pension, a RRSP or income plan**;
* (f) property, (not excluded by sub 3), that a spouse disposed of after the relationship began, but over which the spouse **retains authority** (alone or with another) **to require its return/direct its use/direct further disposition** in any way;
* (g) the **amount excluded property value has increased** since the later of: beginning of relationship or excluded prop acquired

(3) RE: trust property.

### Is it Family Debt? – s.86

All financial obligations incurred by a spouse (a) **during relationship** (until sep date) AND (b) **after separation**, if for purpose of **maintaining FP.**

## Reapportionment

### *Family Relations Act* - s.65

* default apportionment is 50/50 of all FA (s.56) UNLESS disputed.
* Onus on disputing party to show, on s.65 criteria, why such a split would be **unfair** and the FAs should be reapportioned.

-Authority for Reapportionment = s.65 *FRA*

**s.65(1)** If the prop div in agreement **would be unfair** having regard to:

* (a) duration of the marriage,
* (b) duration of pd spouses have lived separate and apart,
* (c) date property acquired or disposed of,
* (d) extent prop acquired by one spouse through inheritance/gift,
* (e) needs of each spouse to become/remain economically independent + 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,

BCSC may order that property covered by… s.56… be divided into shares fixed by the court

* *Reapportionment of Pensions:* Does the other spouse have a pension of their own? When did each start contributing to the pensions? Who has more capacity to collect? Citing 65(c) and (f) – ***Lye v McVeigh,* 1991 BCCA**
* *DEALING W DEBT via reap (no statute deal w it outright, but mentioned in 65) – CASE LAW Mallen v Mallen (p 193)*
  + **Family debt goes to fairness: don’t load debt on one side.**
  + **Cannot make one spouse jointly liable to the creditors of another, no matter for what purpose occurred.**

-Reapportionment Relief Orders – s.66

**66(1)** authority to make any order nec to give effect to a judicial reapportionment of property under s.65

**(2)** The court may do one or more of the following in an order under this section …

(c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;

\*\*\* key in Property Division relating to couples on reserve land and with reserve homesteads (***Derrickson***)

### *Family Law Act* (Incoming) – s. 95

(1) BCSC may order an unequal division of FP/family debt if it **would be significantly unfair** to equally divide them.

(2) In so doing, may consider one or more of the following:

1. the **duration** of the relationship;
2. the terms of any **agreement** between the spouses, (other than one set aside);
3. a spouse's **contribution to the career or career potential** of the other spouse;
4. whether family **debt** was incurred **in the normal course** of the relationship between the spouses;
5. if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
6. whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
7. the fact that a spouse, other than a spouse acting in good faith,
   1. substantially reduced the value of family property, or
   2. disposed of, transferred or converted property that is or would have been family property, or exchanged it into another form, causing the other spouse's interest in it to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

(3) The Supreme Court may consider also the extent the financial means/earning capacity of a spouse have been affected by the responsibilities et al. of the relationship if the objectives of spousal support under section 161 *[objectives of spousal support]* have not been met.

## Valuation Date

*FRA:* no provisions

* CASE LAW: ***Gilpin*, 1990 BCCA** – dealing w date of valuation of family res, inflation of value mainly from mkt forces
* “Unless there be reason to the contrary, valuation of family assets including the matrimonial home should be chosen as of the date of trial.”
  + Esp for compensation for the asset (s.66 orders)
  + “mere possession + control over a family asset =/= basis to deny other spouse right to share in increased value”
  + both should cary benefit/detriment of mkt forces if they have not agreed/Kd on a valuation date prior.

*FLA:* **s.87**

Unless otherwise agreed: Value based on fair market value, as of date of the agreement dividing it OR the hearing before the court

# Spousal Support (SS)

* Should not cancel spousal support in the future assuming a party will not need it. Arbitrary. Should apply back when really doesn’t need it. – ***Messier v Delange*, 1983 SCC**
* Gender neutral approach to spousal support should be taken. Reason for support = deal with need of a spouse arisinf from actua dependence in that relationship/consequences of breakdown + alleviation of public purse. – ***M v H*, 1999 SCC**
  + Same sex couple breakdown, one applying for support

## Sig/Notable Statutory Sections

### *Divorce Act* Factors: Married and Divorcing Spouses

* 15.2(1) - JD to make SS orders

Factors to consider (or not)

* S. 15.2(4) condition, means, needs and other circumstances of each spouse, including
  + (a) the length of time the spouses cohabited;
  + (b) the functions performed by each spouse during cohabitation; and
  + (c) any order, agreement or arrangement relating to support of either spouse
* S. 15.2(5) not take into consideration any misconduct of a spouse in relation to the marriage

Objectives for Orders/Variations

* S. 15(6) an order/intermin order for SS SHOULD:
* S.17(7) a variation order varying SS should:
* (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
* (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
* (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
* (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

### *FRA* Factors: Unmarried and Married but NOT Divorcing

* 93(1) – JD to make SS orders

Criteria for support

* 93(4) …take into account the needs, means, capacities and economic circumstances of each spouse, including the following:

(a) the effect on the earning capacity of each spouse arising fro responsibilities assumed by each spouse during cohabitation;

(b) any other source of support and maintenance for the applicant spouse;

(c) the desirability of the applicant spouse having special assistance to achieve financial independence from the spouse against whom the application is made;

(d) the obligation of the spouse against whom application is made to support another person;

(e) the capacity and reasonable prospects of a spouse obtaining education or training.

## Are they a Spouse under the respective Acts?

*Divorce Act*: have to be married and apply for SS during petition for divorce

### *FRA* s.1: “Marriage Like Relationship”

“**spouse”** = person who

(a) is married to another person,

(b) or… **lived with another person in a marriage-like relationship at least 2 years** …

TEST: ***Gostlin v Kergin*, 1986 BCCA**

-Apply it ‘modernly’, take into account flexible/diverse nature of ‘marriages’ today – ***M v H*, 1999 SCC** + ***Austin v Goerz*, 2007 BCCA**

* Subjective intention to live as husband/wife/in a marriage like relationship
  + MAY BE OVERTAKEN BY… – ***Takacs v Gallo*, 1998 BCCA**
* Objective indicators: (none determinative) *Emphasis should be here* – ***M v H***
  + Refer to each other/represent themselves to others as husband/wife?
  + Share legal rights to living accommodation?
  + Share their personal property?
  + Share finances/bank accts?
  + Share vacations?
  + did one surrender financial independence in accordance w a mutual agreement?
    - 🡪 not nec today, but perhaps an indication – ***Austin v Goerz***
* More from ***Molodowich v Penttinen*, 1980 ON Dist Crt** and preferred in ***M v H***
  + Live under same roof? Sleeping arrangements? Other ppl occupy/share same house?
  + Sexual relations? Monogamous/fidelity?
  + Eat meals together?
  + How assisted during illness?
  + Gifts on special occasions?
  + Conduct re: household tasks: prep of meals, washing/mending clothes, shopping, household maintenance? Did they do them for each other all the time? Pattern of each doing one task for the other?
  + \*Participate together or separate at neighbourhood/cmmty activities?
  + \*Conduct toward each other’s families? How did families treat them?
  + \*How did the commty view them?
    - \*factors may be less determinative for some same sex couples who are more hesitant to present themselves as openly as hetero couples – ***Charron at the ONCA***
  + How had they presented themselves to the hospital/GOVERNMENT/court in the past?
    - Filing taxes!
  + Emergency Ks? Beneficiary of insurance? Extending health benefits?
  + Financial arrangements: provision/contribution to nec of life: food/clothing/shelter/recreation etc.
  + What sort of planning before purchasing property?
  + Attitudes concerning children? Did they have them together already?

## Are they w/in the Ltn Pd to entitlement?

*DA*: s.

*FRA:* s. 1

* Married = application w/in 2 years of divorce order/decl nullity
* “Marriage like relationship” = app w/in 1 year of ceasing the *marriage like relationship* (not just cohabitation) – ***G(JJ) v A(KM)*, 2009 BCSC**
  + termination of CL relationship
    - “when either party regards it as being at an end, and by his or her conduct has demonstrated in a convincing manner that this particular state of mind is a settled one.” – ***Hodge v Canada,* 2004 SCC**
    - Key factors – ***Gosbjorn v Hadley,* 2008 BCSC**; ***Eisner v Baker*, 2007 BCSC**
      * Absence of sexual relations
      * Clear statement by one party of his/her intention to terminate
      * Physical separation (diff rooms or diff residences)
      * Cessation of presentation to public as ‘couple’

## Is there basis for entitlement to spousal support?

### Compensatory – *Moge*

***Moge v Moge*, 1992 SCC**

* Can the financial need of the spouse be recognized from the role (s)he played in the marriage? (advantages of marriage)
* What impact has the separation had on her financial position? (disadvantages of breakdown)
* STARTIN POINT: **Compensating effects of the marriage in impairing or improving each spouse’s economic process**.

-self sufficiency only 1/4 objectives. Over-stressed in past (*Pelech* trilogy). Seek only as ‘far as practicable’ 🡪 *DA* s.15.2(6)(d)

* Consider: age, lack of training, time out of workforce, lack of ability to upgrade edu/training, difficulty competeing w youngsters

-compensating for economic consequences of staying out of workforce, taking care of children, forgoing employment opportunities

-not just smoothing transition any longer: actual *pay back* from an equitable sharing of the benefits of the marriage.

-trying to equalize the SoL/keeping comparable level as before if possible

### Non compensatory – *Bracklow*

***Bracklow v Bracklow,* 1999 SCC**

F: initially she made more than he did, but fell ill and could not work at all. Completely disabled.

-Applying party need to show they have *need* for support and the other party’s *means* to pay it.

-Here, simply considering the *needs and means;* a much more immediate economic perspective

* OBJ INCLUDE: relieve economic hardship of the breakdown on spouse
  + All of a sudden she not only had no means of earning money, but no financial *or* physical support whatsoever 🡪 sig economic hardship (SoL plummeting)
* No compensation grounds + self sufficiency not possible, SS obligation may arise PURELY from fact of having been married and NEED ALONE
  + No statutory limitation of entitlement to just compensatory or K! (in *DA* or *FRA*)
  + Located in DA 15.2(6)(c) and (d): relieve econ hardship + promote self sufficiency

**\*\*\*Usual situations\*\*\***

* Sick or disabled at some point in relationship
* sudden significant disparity in incomes (suddenly just has $30K a yr)
  + 🡪 ease the person back into this lifestyle. This is ‘hardship’.
  + Look to SoL in the marriage (this is done to a degree w sick spouses too! Consider moral/phys/financial support before and after)
  + More likely to be a temp order/have a time limit

### Effect of Spousal Misconduct – *Leskun*

***Leskun v Leskun*, 2006 SCC**

- we have a ‘no fault divorce system’ but can misconduct effect SS at any point?

-F: loss of opp/employment due to childcare, back injury, to longer able to work. Find out H is having affair and wants divorce.

Divorce Act does not block consideration of non-self sufficiency based (at least in part) on effects of devastation from misconduct of the other spouse

**Can’t consider misconduct itself BUT the *effects* of misconduct are properly considered:**

* Reason unable to work = directly related to effects of breakdown of the marriage
  + (i.e. the breakdown was caused by his adultery/sudden abandonment of her as was her devastation) \*\*best way to claim this is by linking to the breakdown.
  + Crt also considers e.g. of abusive relationship + depression following. Attracts similar treatment.
* EVIDENCE about her condition, inability to work + mental state + how it effected her physical condition of her back injury
  + Med evidence “desirable but not nec”

REMEMBER: other side’s consequences from breakdown are (less overtime, time off for court, loss of opps because of this etc.)

### Contractual (Sep Agreements) – *Miglin*

-\*\*\*difference between sep/marriage agreements: sep agreements dealing w something *right now*, vs cohab/marriage agreements which are prospective

***Miglin v Miglin*, 2003 SCC**

-separation agreement

-relieved her husband from spousal support but RATHER entered into consultation agreement for hotel, which could be reviewed

-only 41/42 yo

2 Step Test:

**1. Consider circs under which made: determine if it was obtained fairly.**

* Coercion, duress, vulnerabilities?, proper disclosure, understand what signing, ILA? Etc
* In CAB: “K should be given significant and determinative weight” BECAUSE at time of formation:
  + Both knew what they were doing
  + Neither vulnerable
  + Both had expert counsel
  + Lengthy negotiation
* Was the outcome anticipated at time of formation was the outcome they got?
  + Had not K’d to auto renew, but to *review*.

**2. Does the agreement substantially comply with the objectives of the *DA*?** (the authoritative legislation).

## If entitled: *Spousal Support Guidelines* to determine duration and quantum.

\*\*\*applies to compensatory and non-compensatory SS

### Without Children Framework

**-**no children or none that *qualify* as children.

-2 main factors = diff in spouses’ gross income + length of marriage

**Quantum:** Lower income spouse can get:

* (1.5-2% of the difference between the gross incomes) PER year of marriage UP TO max of 50% of the combined income (i.e. a 50/50 split of their income)

**Duration:**

* Between **½-full length of the marriage**.

**RULE OF 65:**

* Marriage 20 yrs or longer, presumption = indefinite
* ALSO if add age of recipient + length of marriage = at or above 65 = presumption of indefinite support

\*\*\*will end up with a range in both categories.

Determining where in range:

Quantum: could consider stuff LIKE roles in marriage, impact/severity of effects of the marriage breakdown

Duration: ability to become self-suff, roles, what the basis for support was (comp or non-comp)

### WITH Children Framework

-use “individual net disposable income (INDI) income of spouses, divides combined net incomes.

* **Payor’s INDI:** guideline income – child support amt – taxes and deductions
* **Recipient’s INDI:** guideline income – notional child support – taxes and deductions + gov’t benefits and credits

**Quantum:** Add together INDIs; SS support will be between 40-60% of that combined amount.

**Duration:**

-initially indefinite with outer limits:

- Married <10 yrs: until youngest child is 19 (if marriage is less than 10 yrs) OR

-married 10+ years: limiting length of support to length of marriage

-ALSO subject to rule of 65 re: indefinite amts