**Family Law – Spring 2012 – Ramsbotham**

# INTRODUCTION: THE FAMILY AND FAMILY LAW

## Introduction, Histories, Cultures and Legal Change

* Two fundamental values should guide development of govt policies about relationships: equality & autonomy
* Other principles: personal security, privacy, freedom of conscience and religion, coherence and efficiency
* *Miron v Trudel* (1995, SCC): common law spouses should have same advantages are married spouses
  + Govt should look at functional attributes of relationships, not marital status
* *M v H* (1999, SCC): same-sex conjugal cohabitants should have same advantages as common law spouses
* *Modernization of Benefits and Obligations Act* (2000) – eliminated differences between married/common law
* *Bruker v Marcovitz* (2007, SCC): civil courts can oversee cases with a religious aspect
* *Charter* affects family law in 3 ways: (1) govts change legislation to comply, (2) direct challenges, (3) invoked indirectly to argue that judges must consider *Charter* values even in absence of govt/state action
* Costs: successful party will normally receive a costs award (*Gold v Gold*, 1993, BCCA)

## Legal Framework: Family Law in the Federation

Division of Powers

* Federal authority over marriage: s. 91(26) of *Constitution Act*
  + Includes capacity to marry
* Federal govt also has authority over divorce (*Divorce Act)*
  + Only applies to marital relationships and children of a marriage (*Papp v Papp*, 1969, ONCA)
    - Must have a rational & functional connection to the marriage
  + Includes corollary relief (spousal/child support, custody/access orders, variation of custody orders)
* Provincial authority over “solemnization of marriage in the province”: s. 92(12)
  + Pre-ceremonial requirements (licences, parental consent, banns, qualifications to perform ceremony)
* Provincial powers under 92(13) property and civil rights:
  + Matrimonial property (exclusive), succession, spousal support, child support, adoption, guardianship, custody and access, legitimacy, affiliation, naming 🡪 these come from *Adoption Reference* (1938)

Jurisdiction in Canada

* Jurisdiction: orders can be made in province child is ordinary resident in due to best interests (*McKee*, PC)
* *Divorce Act*, s. 20: orders have legal effect throughout Canada and may be registered in any province
* Paramountcy: if a provincial order is in “express contradiction” of a federal statute, provincial order is inoperative
* Provincial court has no jurisdiction to vary order for custody of child made under *Divorce Act* in different province (*Re Hall*)
* If order was under a provincial statute, an order could be made now in a divorce proceeding (federal statute).
* If divorce granted but no order for corollary relief made under *Divorce Act*, provincial order for relief is valid if consistent
* If valid order is later made under *Divorce Act* it will render provincial order inoperative, provided the orders are inconsistent.
* Orders made under provincial law can be changed by a subsequent order under the *Divorce Act* (*Gillespie v Gillespie*)

Jurisdiction in BC:

* Supreme Court only: applications for divorce under *Divorce Act*, adoption, matrimonial property matters
* Provincial court only: division of property and assets (*FRA*), child protection (usually)
* Both courts: custody, support/maintenance
* Note: reserve land cannot be dealt with under provincial legislation
* Note: legislation only applies to status Indians if it doesn’t conflict with the *Indian Act*

# CREATING FAMILY TIES

## Adults: Cohabitation, Contracts and Marriage

* *Civil Marriage Act*: “marriage” is between two people to the exclusion of all others (not gender specific)
* Marriage: voluntary, provides for certainty/stability, allows publicity
* Ways to legally regulate relationships:
  + Private law: contracting into a marriage
  + Ascription: statute gives you relationship status if your relationship takes a certain form
    - See definition of spouse in s. 1(1) of *FRA* (2 years of cohabiting marriage-like relationship)
  + Registration: register your relationship for recognition

## Validity and Jurisdiction in Marriage

Requirements of Legal Marriage:

* Marriage: lawful union of two persons to the exclusion of all others
* Marriage not voidable because spouses are same sex
* 4 requirements of a valid marriage: (a) both parties have legal capacity, (b) both must consent, (c) compliance with formalities of marriage [provincial], (d) both have capacity to perform sexual aspects of marriage
  + A-C result in marriage being null/void, D is voidable
* Capacity (generally void except in some age cases):
  + - 1. Age
    - CL age of consent is 14 for males and 12 for females 🡪 void if under 7, voidable if over 7 and under CL
    - s. 28 of BC *Marriage Act* requires minors (under 19) to have consent of parent/guardian 🡪 can be dispensed with under 28(2) if it’s withheld unreasonably or from undue motives 🡪 reasonableness standard
    - s. 29: can’t marry under 16 without a court order
    - s. 30: marriage not invalid due to ss. 28 or 29 🡪 voidable (unless under 7)
      1. Consanguinity and Affinity (fed *Marriage (Prohibited Degrees) Act*, 1990*)*

Consanguinity: s. 2, marriage invalid if within prohibited degrees (linear, siblings) 🡪 includes adoption

Affinity: no longer invalid if related by marriage

* + - 1. Single – both parties must be single at time of marriage or it is void
      2. Opposite Sex – no longer a rule
      3. Sanity – test: whether parties were able to understand nature of marriage contract and duties and responsibilities it create at time of the marriage ceremony (*Reynolds v Reynolds*)
* Consent
  + Lack of consent renders marriage void but it can be ratified by subsequent conduct
  + Can be vitiated by:
    - * 1. Duress: strict test – genuine and reasonable fear party had to marry or life/health/liberty would be threatened

Voidable at request of the party under duress

* + - * 1. Mistake/Fraud: strict – mistake/fraud must go to nature of ceremony (don’t know it’s wedding) or ID of party
    - Does not include name, age, race, wealth, occupation, etc
* Formalities: provincial domain, *Marriage Act* has tendency to uphold validity of marriages (see ss. 18, 30)
  + S. 9 for religious marriages, s. 20 for civil marriages
  + Must have public ceremony, must get license (s. 15), must have 2 witnesses, both parties must be present
* Consummation:
  + Strict test: “practical impossibility of consummation” 🡪 must be caused by physical or psychological defect
    - Requires “invincible repugnance to consummation, resulting in paralysis of will” (*Juretic v Ruiz*)
* *Davidson v Sweeney* – drunk marriage ok, they got license, could understand marriage, and were able to consummate
* SEE TABLE OF IMPEDIMENTS AND DEFECTS, P. 98 (effect on marriage of various scenarios)
* Validity of foreign marriages: equality rights require recognition of these as long as they were valid in home country

Non-Traditional Marriages

* Same Sex:
  + Same-sex couples have been entitled to marry in BC since July 8, 2003
  + *Reference re Same Sex Marriage* (2004 SCC):
    - Marriage is a civil institution and must be separate from religious concepts of marriage
    - Determining legal capacity and definition for marriage is federal jurisdiction (but not regulating officials)
    - Recognition of equality rights of one group can’t constitute a violation of rights of another
    - Gay marriage is required under s. 15 equality rights
  + Bill C-38, *Civil Marriage Act* 🡪 “lawful union of two persons to the exclusion of all others”
  + *Smith & Chymyshyn v Knights of Columbus* (2005 BCHRT):
    - Balancing of equality rights to marriage with rights to religious freedom
    - Hall available for public rent but Knights refuse wedding after finding out it is same-sex
    - Held: Knights can refuse access on basis of religious beliefs but in making their decision they must consider the effect their actions would have on the complainants and accommodate them in every way short of acting contrary to their religious beliefs
  + Marriage commissioners:
    - *Nichols v MJ* (2009 Sask HRT): Marriage commissioner appointed to perform civil ceremonies w/o religious content is “govt” for constitutional purposes
    - *Re Marriage Commissioners* (2011 SKCA): legislated exception violates s. 15 equality rights
    - *Civil Marriage Act* says officials don’t have to perform gay marriage if against their beliefs
  + Validity of Canadian same-sex marriages are generally not recognized in other jurisdictions
* Polygamy:
  + CC s. 293(1)(a): indictable offence to enter into any form of polygamy or conjugal union with 2+ people
  + Polygamous marriages are considered null and void but parties may qualify as common-law spouses
* Customary Marriage – *Casimel v Insurance Corp of BC* (1993, BCCA)
  + Man takes on a wife according to Cree custom and then later has civil marriage with another woman
  + Customary marriages should be recognized unless their status is explicitly taken away by statute
  + Note: only marriages performed by an official in the BC *Marriage Act* can be registered
    - Doesn’t explicitly exclude customary marriages but prevents their registration without conformity

## Children: Who is a Legal Parent?

What is a Legal Parent?

* Ways to become a legal parent: biological ties, social parenting, spousal relationships between parents
* Statutes seem to lean towards biological parents as legal parents
  + E.g. birth registration is presumption proof of parentage (*Vital Statistics Act*)
    - Presumes mother as person who gave birth, presumes husband to be father
* *Pratten v BC* (2011 BCSC)
  + Successful s. 15 challenge to practice of allowing gamete donors to remain anonymous
  + Immediate effect: BC clinics can only get donor sperm from US
* *Gill v Murray* (2001 BCHRT):
  + Same sex couples use fertility clinic and put name of non-genetic parent as “father” on birth certificate
  + Men could register without proof of biological relation, mothers with donor eggs could register too
  + Birth certificate has advantages to listed parents and significant effects
  + Vital Statistics registration process causes differential treatment to access 🡪 violates equality
* *Trociuk v BC* (2003 SCC):
  + Birth registration is not just a public record but it also a means of affirming biological ties with child
  + Fathers must be able to apply to have their information included on the birth registration
  + Commentary (Lessard): *Trociuk* reduces parenthood to genetics, promotes heterosexual conjugal units
* Surrogate Mothers (*Rypkema*, 2003 BCSC):
  + Genetic mother should be listed as mother on birth certificate, not surrogate mother who carried the baby
* Lesbian and Gay Parenting
  + *AA v BB* (2007 ONCA) – lesbian non-bio mother applies to be declared “parent” of child
    - It is within *parens patriae* jurisdiction of court to declare A to be the child’s mother 🡪 3+ parents
  + *KGT v PD* (2005 BCSC) – court refuses to declare lesbian a parent or allow adoption w/o mom’s consent
    - Eventually awarded joint guardianship and access rights
  + *DWH v DJR* (2007 ABCA) – non-bio gay dad granted access because he had close parent/child relation
  + *Re SM* (2007 ONCJ) – lesbian mom allowed to adopt after bio-dad consents and agrees not to be parent
  + *C(MA) v K(M)* (2009 ONCJ) – Bio-dad w/active role cut off by lesbians, who try to adopt w/o consent
    - Adoption would deprive kid of loving parent who is more than mere sperm donor – best interests
  + *K(L) v L(C)* (2008 ONSC) – Lesbian ex doesn’t then does want custody, best interest to allow access

## Adoption, Race and Culture

Introduction

* *Adoption Act* (BC): S. 2: purpose is to provide new family ties while giving paramount consideration to child’s best interests
  + S. 3: factors to be considered under best interests of child
* Adoption: child becomes in law the adoptive parent’s child and ceases to be child of the birth parent 🡪 requires court order
* Adoptions in BC are regulated through the Ministry or licensed agencies
  + Direct placements are allowed, so birth parent can determine suitability of adoptive parents
  + All adoptions require a post-placement report
* Customary adoption: s. 46 of *Adoption Act* - courts *may* recognize customary adoption in Indian band/Aboriginal community
  + *Casimel v Insurance Corp of BC* (1993 BCCA) – status from aboriginal customary adoption will be recognized
    - *Indian Act* includes children adopted through Indian customer in definition of “child”

Blood Ties and the Rise of the Best Interest of the Child Test

* *King v Low* (1985 SCC):
  + Mother places infant with respondents for adoption then later asks for custody of the kid
  + Old rule: presumptive custody to birth mother unless she was shown to be unfit
  + New rule: Welfare of the child is the paramount consideration in custody consideration
  + Economic circumstances of the parties is not determinative 🡪 consider psychological, spiritual, emotional welfare
  + Must choose course best for healthy growth, development and education of child to prepare them for adulthood
  + Stability and permanency are important considerations 🡪 avoid disruption during development
  + Birth parents’ wishes are a consideration but cannot overrule child’s best interests
  + Here, child bonded with adoptive parents and had no bond with birth mother 🡪 adoptive parents get custody

BC Adoption Scheme

* *Adoption Act*, RSBC 1996
  + S. 37: child becomes adoptive parent’s, birth parents cease to have any rights (unless remaining as joint parent)
  + Private adoptions must follow same procedures as ministry adoptions 🡪 birth parents more informed of choices
  + Gives children greater say 🡪 requires consent from those 12+, must consider views of kids 7-11
  + Enhanced rights for birth fathers
  + Section 3 defines “best interests of child” 🡪 includes aboriginal cultural identity in s. 3(2)
  + Allows open model (agreements w/adoptive parents, reunion services) & disclosure vetoes/no-contact declarations

Who Can Apply to Adopt?

* Ss. 5 and 29: one adult or two adults jointly may apply to adopt if they are residents of BC, no marriage-like relationship req
* Courts can’t alter eligibility to adopt because it is a statutory creation
* Aboriginal kids: s. 7 - reasonable efforts required to discuss placement w/designated rep of relevant aboriginal community
  + Unlikely that an aboriginal community can adopt a kid 🡪 *S(SM) v A(JP)­*: a tribe is not a person
* Same sex couples can adopt in most provinces/territories (BC: *Adoption Act* ss. 5, 29) (except in Nunavut)
  + *Re K* (1995 ONCJ) – s. 15 challenge for lesbian partners to adopt birth child of their partner
    - Adoption only allowed for spouses, who were defined as being opposite sex
    - No indication that non-traditional family structures are detrimental to child’s development
    - Most important part of child’s healthy development is stable, consistent, warm, responsive relationships
    - No evidence that homosexual individuals are less able to provide supportive relationships for children
    - Remedy: definition of “spouse” changed to include same sex partners

Whose Consent is Required?

* See ss. 13-20 of *Adoption Act*
  + S. 13: need consent of kids over 12, birth mother, father (see s. 13 for definition), any person appointed as guardian
  + S. 10: birth father registry 🡪 how to give notice to father
  + S. 11: father’s consent can be dispensed with if in child’s best interests and if justified in the circumstances
  + S. 17: dispensing with mother’s consent for variety of reasons (see section)
  + S. 32: required consents or orders dispensing with consent must be filed with court before adoption
* Notice must be given to anyone with access rights to the child before adoption is granted
* *In the Matter of a Female Infant, BC Registration No. 99-00733* (2000, BCCA):
  + Mother puts baby up for adoption even though father offered to raise the kid himself, father applies for custody
  + Best interest: kid is in stable, risk-free environment with adoptive parents and transferring custody would be a risk as birth father had no care arrangement worked out to demonstrate he could provide a stable caregiving environment
  + If factors are equal, rule in favour of birth parents 🡪 but here, factors clearly weighed towards adoptive parents
  + Dissent: Birth father’s consent is required, must consider Charter values
* *Re BC Registration Number 06-014023* (2007 BCSC) 🡪 no notice to father required if mother doesn’t acknowledge paternity

Access Issues Related to Adoption

* *Re Alberta Birth Registration 78-08-022716* (1986 BCCA):
  + Adoption orders where this is an outstanding access order
  + Tie with parent with access should not bar child from being adopted
  + Child adopted by one birth parent’s new spouse should not be cut off from the other birth parent if it’s a useful tie
  + Anyone with a “sufficient tie” with the child should be heard from before an order is made under *Adoption Act*
  + Petitioner should give notice to people with access, parent who kid lives with, or people with substantial ties to child
  + Adoption orders have the effect of terminating a right of access
  + Adoptive parents have the same right to resist an access application as natural parents have
* See ss. 38, 59 and 60 of *Adoption Act*
* *BC Birth Reg No 023969* – biomom opposes adoption by bio-dad’s wife, court dispenses w/biomom’s consent, orders access
* *North v North* – access orders under *Divorce Act* not terminated by adoption because of federal paramountcy
* Grandparents:
  + CL: parents have considerable control over whether 3rd parties get access
  + *C(DH) v S(R)* (1990 ABQB): custody and access denied to grandmother of child who was adopted out

Race, Culture and Adoption

* *BC Practice Standards and Guidelines for Adoption* – not legally binding, expand on *Adoption Act*
  + Require that Aboriginal parents be informed about value of involving their community in adoption process
  + Exceptions Committee must approve adoptions of Aboriginal children to a non-Aboriginal family
    - Application should include cultural plan involving contact w/Aboriginal community
* *Racine et al v Woods* (1983 SCC):
  + Aboriginal mother leaves baby with Caucasian family, they try to adopt her, mother asks for custody when kid is 6
  + Best interests: Bond w/parents becomes more significant & cultural heritage becomes less important over time
* *Sawan v Tearoe* (1993 BCCA)– significance of cultural background and heritage as opposed to bonding abates over time
* *DH v HM* (1999 SCC):
  + Half-black half-Aboriginal kid🡪 mom’s white adoptive parents want custody, mom’s Aborignal bio-parents also do
  + Appeal sought on basis that First Nations community (child not a member) was not served with appeal notice
  + Cultural identity must be considered within child’s best interests for Aboriginal children
  + This isn’t a case of ripping kid from his roots 🡪 white grandparents were his adoptive grandparents, he knew them
  + Held: judge considered Aboriginal roots, other interests must be considered, kid stays with adoptive grandparents

# LEGAL REGULATION OF FAMILY LIFE

## Child Protection

Overview of Child, Family and Community Services Act

* *Child, Family and Community Service Act (BC)*, particularly ss. 1-12, 13-14
  + Non-interventionist legislation 🡪 must balance between freedom/respect for private families and public compassion
  + Goal: state only interferes in manner that least interferes w/family autonomy while appealing to humanitarian values
  + Gove Inquiry(1995) led to *CFCSA* having safety of the child as paramount among the guiding principles
  + S. 4 best interests: (a) child’s safety, (b) physical/emotional needs and development, (c) important of continuity in care, (d) quality of relationship child has with parent or other person and effect of maintaining that relationship, (e) cultural, racial, linguistic & religious heritage, (f) child’s views, (g) effect on kid if there is delay in making decision
    - 4(2): importance of preserving cultural identity must be considered for aboriginal children
  + S. 13: protection needed where child has been or is likely to be physically harmed, sexually abused or exploited, or harmed due to neglect, emotional harm or abandonment, or if child is being deprived of necessary health care
  + S. 14: anyone who has reason to believe a child needs protection must report it to Director or social worker
    - Director must assess the info then decide whether to offer support services, refer to community agency, or investigate child’s need for protection
    - If investigation required, Director must take course of action least disruptive for the child
  + S. 30: child may be removed from parent’s custody if their health or safety is in immediate danger
  + S. 31: parents must be promptly notified of removal and advised of the reasons for doing so
  + If child is removed, it can be returned to parents if (1) director makes agreement with parent that he considers adequate to protect the child, (2) circumstances have changed so kid doesn’t need protection, (3) a less disruptive means of protection becomes available
  + S. 33: notice of a presentation hearing must be given to those affected
  + S. 33.3: If child isn’t returned, director must attend court within 7 days of removal for presentation hearing
    - Two stages: (1) assesses if removal was justified (reasonable and probable grounds to believe child was in need of protection), (2) determine best way to care for the child in interim
  + S. 35: court must order kid to remain in Director’s custody or be returned to parents with or without supervision
  + S. 37: full protection hearing must occur within 45 days of presentation hearing 🡪 consider if child needs protection
    - *BC v Schneider*: can be longer than 45 days if adjournment is needed to achieve fair and proper hearing
  + S. 39: At protection hearing, parents of kid, Director, and rep of aboriginal community are entitled to attend
  + S. 40: purpose of protection hearing is to determine if a child requires protection
  + S. 41: if child needs protection, court can order child to remain under Director’s supervision for specified period
    - S. 43: Max 3 months for kids <5, 6 months for kid 5-12, or 12 months if kid is over 12
    - S. 45: total period of temporary custody shouldn’t exceed 12 months (<5), 18mos (5-12), 24mos (12+)
      * Can be extended if it is in child’s best interests to do so
  + S. 49: Director can apply for continuing custody order not sooner than 60 days before temp custody order expires
    - 49(5): kid can be placed in continuing custody if there is no significant likelihood that circumstances that led to child’s removal will improve within a reasonable time or that parent will be able to meet kid’s needs
    - 49(6): court must consider past conduct of parents toward kid, plan of care, child’s best interests
    - Result: Director becomes sole guardian of kid and can consent to child’s adoption (s. 50)
    - S. 53: continuing custody order terminates when kid turns 19, is adopted, marries, or court cancels it
    - S. 54: party to proceeding can apply for cancellation if circumstances causing order change significantly
    - S. 55: court can makes orders for access to child in interim
  + S. 66: proceedings should be informal as possible to allow full consideration of best interests
  + S. 81: parties can appeal to Supreme Court from provincial court, and to CA from SC (s. 82)
* *LJ et al v Director of Child, Family and Community Services* (2000 BCCA):
  + Paramount concern under a protection hearing is a concern for the safety and welfare of the children
  + Courts should strive to keep families together if it is a feasible option
  + Purpose of Act: provide solutions for unsatisfactory home situations, incl. supervisory orders or support services

Child Protection, Abuse in the Family, and Corporal Punishment

* Ministry for Children and Family Development is responsible for child protection in BC
* Bill 34, *Representative for Children and Youth Act*, SBC 2006
  + Role of rep: support, assist, inform and advise kids and their families, increase accountability of ministries/public bodies responsible for provision of services, and review, investigate, and report of deaths/injuries of children in care
  + Rep’s functions: consider needs/circumstances of youth, advocate for kids/families, promote establishment of advocacy services, monitor ministries and quality assurance activities, research to improve services
* Two main state responses to child abuse and neglect:
  1. State intervention through child protection proceedings under *CFCSA* (removal of child or supervision in home)
  2. *Criminal Code* 🡪 failure to provide necessaries of life (215), abandoning child <10yrs (218), (sexual) assault (265)
* Corporal punishment
  + CC provides a defence for parents where force is used to discipline a child under their care (s. 43)
    - Force must be for correction of behavior only and can’t exceed what is reasonable under the circumstances
    - Constitutionality unsuccessfully challenged: *Canadian Foundation for Children, Youth and Law v Canada*
      * S. 43 affects children’s security of person but does not offend a principle of fundamental justice

Child Protection – Familial Autonomy, Culture, and Religion

* *CFCSA*, ss. 1-4, 29, 39
* *SJB v BC*(2005 BCSC):
  + 14yo refuses blood transfusion on basis of JW faith, Director applies for CFCSA order so she has to get it
  + Held: freedom of religion isn’t absolute, she gets the transfusion
  + Legislation was tailored to group of “children facing life-threatening health conditions”, fit with Charter rights
* *VM v BC* (2008 BCSC): premature babies seized from JW parents and given blood, found that it didn’t violate parents’ rights

First Nations and Child Protection

* *CFCSA* ss. 1-4, 29, 39
* Aboriginal children are overrepresented in child welfare system 🡪 govt tries to place w/Aboriginal family if possible
* Memorandum of Understanding (2002) 🡪 aimed at transferring child welfare services to Aboriginal communities
* 2009: Protocol signed by BC, focuses on enhancing jurisdiction of First Nations to make Aboriginal child welfare decisions
* Kline article: “best interests” test makes it so taking kids from aboriginal families appears natural, necessary, legitimate
  + Makes kids decontextualized individuals, makes cultural identity irrelevant/unimportant, takes focus from heritage
* Bunting article: culture should be seen as part of child’s identity, particularly for Aboriginal children
  + Best interests of child should be connected w/best interests of community, connection should be preserved
  + Aboriginal communities should have say in child placement and should take over Aboriginal child welfare services

## Domestic Abuse and Family Law

* Parents are generally presumed to be equally entitled to claim custody of his or her children
* *Divorce Act*, s. 16(10): children of marriage should have as much contact with each spouse as in best interests of kid
  + Presumes that access with non-custodial parent is in child’s best interests
* Legislation states courts should not take past conduct into account unless it is relevant to parent’s ability to act as parent
* Canadian courts are increasingly recognizing effects of domestic violence under “best interests” test and *DA* s. 16(10)
  + Inconsistent handling due to lack of legislative guidance, effects on child are not given sufficient attention
* Criminal law: peace bond remedy or charged under a variety of offence provisions
* Civil law: restraining order, orders for interim custody for abused spouses (to avoid kidnapping charges), order for exclusive possession of residence, compensation for victim, civil law damages, limited access for abuser, etc
* *HH v HC* (2002 ABQB):
  + Wife opposes access by husband because of history of physical attacks by husband against the wife
  + *Abdo v Abdo* – children exposed to violence suffer long and short term effects, access with abusive parent may affect their psychological development and relationship with the custodial parent
  + *Lavery* – continuing relationship b/w abuser and child may cause upset on abused parent, which may affect the child
  + *Innes* – factors include abuser’s unwillingness to accept responsibility for abuse or to acknowledge seriousness of it
  + *Young* – test isn’t of harm to kids, it’s for best interests of child assessed from a child-centered perspective
    - But risk of harm may be a factor in considering what child’s best interests are – physical and emotional
  + Family law does not have a purpose of punishing abuser like criminal law 🡪 best interests only
  + Held: no harm to kids, no serious risk for future harm, not able to assess future emotional harm at that time but it can be revisited in the future, court should avoid denial of access of otherwise good father 🡪 limited supervised access
* *Family Relations Act* civil restraining orders:
  + S. 37: restrained from molesting, annoying, harassing or communicating w/applicant or child in custody of applicant
  + S. 38: restrained from interfering with or contacting a child, or removing child from specified geographic area
  + S. 67: restrained from disposing of a family asset or any other property at issue
  + S. 126: restrained from entering premises occupied by applicant or by child in custody of applicant
  + “Peace officer enforcement clause” 🡪 requires police to actively enforce above orders, can arrest if person breaches
  + Consequences of breach: breach of a civil order = contempt of court (versus criminal, where breach is an offence)

# FAMILY BREAKDOWN: DIVORCE, SEPARATION, & COROLLARY ISSUES

## Divorce and Separation Process and Bargaining

Legal Framework

* *Divorce Act* (1985) – definitions and ss. 3, 8-14
* S. 8: grounds for divorce (marriage breakdown) and ways to establish the breakdown:
  + Adultery: voluntary sexual *intercourse* between married person and another person of opposite sex (*Orford*; *Kahl*)
  + Cruelty: s. 8(2)(b)(ii) – must be grave and weight, going beyond incompatibility 🡪 issue isn’t intention, it is the subjective effect of the treatment on the other spouse (*Balasch*)
  + Living Separate and Apart: s. 8(3)(b)(ii) – 1 year period, not considered interrupted or terminated if spouses resume cohabitation to try to reconcile as long as the period(s) of cohabitation total less than 90 days (see s. 11(3))
    - *Oswell v Oswell* (1990) – what is separation?
      * There must be physical separation 🡪 occupying separate bedrooms (can remain in same house)
      * Must have withdrawal by a spouse from matrimonial obligation w/intent of destroying marriage
      * Absence of sexual relations is not conclusive but is a factor
      * Factors: communications between spouses, joint social activities, meal patterns, household tasks, buying gifts, shopping for self only, filing taxes, holidays
    - *Riha v Riha* (2001) – date of separation?
      * Ceasing of sexual relations and occupation of different bedrooms are factors but not determinative
      * Held: separation occurred when divorce documents served and server accepted marriage was over
* Bars to divorce: collusion (11(1)(a), 11(4)), maintenance arrangements for kids (11(1)(b)), connivance and condonation (relevant only to fault-based grounds, 11(1)(c)), religious barriers to remarriage (s. 21.1)
* S. 9: duties of legal advisors
* S. 3: if spouses start proceedings in different provinces
* Capacity to separate:
  + *Wolfman-Stotland v Stotland* (2011 BCCA):
    - Separate: minimum capacity required to form the intent to separate is the capacity to instruct counsel
    - Divorce: requires desire to remain separate and to be no longer married to one’s spouse
* Same sex divorce: *DA* amended in 2005 to define spouse as “two persons married to each other” so they can divorce
* Same sex adultery: *P(SE) v P(DD)* (2005 BCSC) – CL definition of adultery changed to include same-sex acts

Procedural Issues

* *JG v New Brunswick* – The Charter and Availability of Legal Aid in Family Law (1999)
  + State removal of child from parents constitutes a substantial interference with s. 7’s protection of security of person
    - Combination of stigma, distress, and intrusion into private and intimate sphere relate to Charter
  + Effective legal representation for parent is required to assure adherence to “best interest” principle
  + Obligation on state should be judicial discretion to order state-funded counsel (not straight entitlement)
    - 3 factors: seriousness of interests at stake, complexity of proceedings, capacities of the parent
  + LHD (concurring minority): must consider equality because single mothers are disproportionately affected
* *JG* is of limited application 🡪 only where actions of state threaten security of person and counsel is necessary for fairness
* *Miltenberger v Braateni – Charter* does not guarantee legal counsel for individuals in private civil litigation (custody dispute)
* *Mills v Hardy* – no legal custody for private litigants in custody trial
* *SAK v AC* – no counsel in appeal of custody and access denial at trial
* *New Brunswick v RW* – application for legal aid denied, legal aid is only if state is party interfering with parent’s custody
* New Supreme Court Family Rules in 2010 aim to reduce expenses by tailoring litigation to complexity, promoting mediation
* Collaborative Lawyering (Tesler article):
  + 2 clients and 1 lawyers work together with goal of reaching an efficient, fair, comprehensive settlement of all issues
  + If process fails, lawyers can’t represent clients in court
  + Commitment to voluntarily disclose relevant information, proceed respectfully in good faith, not threaten litigation
    - Criticism: power disparities and lack of financial resources for lawyer for women make it ineffective
* Mediation (Burdine article):
  + Criticism: can’t assist women in abusive relationships, can be influenced by intimidation and power imbalances
  + Currently there are no universal standards or regulation of mediators
* Judicial Case Conferences (see p. 25 for JCC rules):
  + Informal private session w/judge, parties, and counsel that must be held before any contested application is heard in a family case with goal to streamline costs and time by IDing and narrowing issues and encouraging settlement
  + If parties can’t agree, an efficient trial is organized and aimed at particular issues

Marriage Contracts

* *Hartshorne v Hartshorne* (2004 SCC):
  + Domestic k’s are explicitly permitted by BC’s matrimonial property regime
  + S. 65 of *Family Relations Act*: factors for division of property, court looks at these in considering fairness of k
  + Primary policy objective for dividing assets after marital breakdown in BC is fairness
  + Courts should respect private arrangements, particularly if negotiated with independent legal advice
  + Court may reapportion assets upon finding that dividing property as per the k or FRA would be “unfair”
    - Lower threshold for judicial intervention than in other provinces
  + Marriage agreements are given less deference than separation agreements because they’re anticipatory and may not fairly take in account financial means, needs or other circumstances of parties at time of marital breakdown
  + Courts shouldn’t interfere w/pre-existing agreement unless convinced it doesn’t substantially comply w/*DA*
  + Appropriate weight to be given to k involves balancing parties’ interest in determining own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular
  + 2 stage approach: (1) look at negotiations to see if 1 party took advantage and for substantial compliance with general objectives of *DA*, then (2) inquire if agreement still reflects original intentions and still complies with *DA*
  + Test for fairness on application for reapportionment: were the circumstances of the parties at time of separation within the reasonable contemplation of the parties at the time the agreement was formed, if so, whether at that time the parties made adequate arrangements in response to the anticipated circumstances
  + Fair distribution must take in account sacrifices may and their impact, situation of parties at time of distribution, their age, education and capacity to reintegrate into work force and achieve economic independence
    - Must be done in light of personal choices made and in consideration of property rights under k
  + Steps: apply agreement then consider factors in s. 65(1) of FRA to assess if contract operates unfairly
    - Consider personal and financial circumstances and if they were in contemplation at time k was made
* Criticism (Shaffer): *Hartshorne* is insensitive to power dynamics involved in family context, even with legal advice
  + Majority judgment places too much emphasis on importance of freedom to enter into contracts instead of fairness
* Unmarried Cohabitants:
  + S. 120.1 of *FRA* (REPEALED), Parts 5 and 6 of FRA applied to agreements between unmarried cohabitants
    - Gives discretion to judges to reapportion property if division under k would be unfair
  + *Wiest v Middlekamp* – s. 120.1 does not apply retroactively unless couples choose to opt in
  + *Johnstone v Wright* (BCCA):
    - Couple sign agreement, woman gets legal advice and is told not to sign but signs anyway
    - Must consider s. 65(1) of FRA & *Hartshorne* when determining fairness of cohab agreements under 120.1
    - *Hartshorne* means upholding private agreements, interfere only if things didn’t turn out as expected
    - Question: is the k unfair in the actual circumstances existing at the time of distribution?

## Child Custody, Best Interests, Decisions and Trends

* See *Divorce Act* ss. 16-17 and *Family Relations Act* Part 2, especially ss. 21, 21, 24, 34-38
* *Divorce Act*: “custody” is “care, upbringing and any other incident of custody”, “access” is “the right to visit”
* *FRA* s. 25: “guardian of the person of the child” and “guardian of the estate of the child”
* Custody traditionally defined as (1) almost all rights incidental to guardianship (e.g. decisions of health care, religion, and education) and (2) physical care and control of the child

Best Interest of Child

* Guiding principle in child custody and access disputes is the “best interests of the child”
  + Article 3(1) of UN *Convention on the Rights of the Child* states this as primary consideration
* Contact with both parents after breakdown has become more significant 🡪 s. 16(10) of *DA*
* *Young v Young* (1993 SCC):
  + Courts must balance age, physical/emotional aspects of child and parents with situation in which child will live
  + Best interests test allows courts to respond to spectrum of factors that can positively and negatively affect a child
  + Common concern: “best interests” is indeterminate and fails to provide direction and criteria for making decisions
  + Child’s needs and concerns must be accommodated and not obscured by abstract claims of parental rights
* *FRA* s. 24:
  + (1) paramount consideration is best interests of child, court must consider (a) health and emotional well-being including special care, (b) views of child if appropriate, (c) love/affection/ties between child and other people, (d) education and training, (e) capacity of people w/guardianship/access/custody to exercise duties/rights adequately
  + (1.1) must consider parents, grandparents, other relatives, and people who aren’t relatives under (1)(c) and (e)
  + (2) if guardianship of estate is at issue, court must also consider material well-being of child
  + (3) court can’t consider conduct of a person unless it impacts (1) or (2)
  + (4) if conduct is considered, it can only be considered to the extent it impacts (1) or (2)

Relevance of Conduct, Race and Sexuality

* *FRA* s. 24(3): court must not consider conduct of a party unless it substantially affects best interests of the child
* *DA* s. 16(9): court can’t take past conduct of any person into account unless relevant to ability of that person to be a parent
* *Van de Perre v Edwards* (2001 SCC – NBA player case) – race and conduct issues:
  + Principal determination in custody cases is the best interests of the child 🡪 focus on factors in legislation
  + Appellate courts can only intervene in trial decision if judge erred in law or made a material error
  + Conduct causing break-up is irrelevant but parties’ attitudes towards and views of each other are important
    - May impact emotional well-being of child and be considered under 24(1)(a) of FRA
    - Child should be with someone who will foster relationship with child and non-custodial parent
  + Judge must consider custody applicant in context of available support network (including step-parents)
    - However, it is still the specific applicant’s ability to parent that is considered under 24(1)(e)
  + Importance of race will depend greatly on factual considerations 🡪 which parent will be best able to contribute to healthy racial socialization and overall healthy development of the child in way that avoids conflict or discord?
  + Race can be best interests factor because it is connected to culture, identity and emotional well-being of the child
  + Race is not determinative 🡪 exposure to race can also be achieved through access to other parent
* Physical violence/abuse: not a listed “best interest” factor in FRA or DA, but adding it in has been proposed
* *Carlson v Carlson* (1991 BCCA) – judge awards custody to mother because of father’s history of physical/verbal abuse
* *TS v AVT* (2008 ABQB) – custody to alleged abuser father because mother would have prevented relationship with father and best interest of kid was to have one primary parent who did not alienate her from the other parent
* Sexual Preference: Lesbian Custody
  + *N v N* – discreet homosexuality does not interfere with best interests of the child
  + *JT v SCT* – Best interests focuses on maximum contact, court awards joint custody to non-biomom
  + *MMG v GWS* – wife’s decision to leave husband for a woman not in children’s best interest, alienated children
  + *S v S* – lesbian mother loses custody because she moves to different city, even though parenting was competent
  + *JSB v DLS* – Hetero parenting no better than lesbian parenting, same sex relationship just one best interests factor

Joint Custody

* No presumption of joint custody under DA or FRA but negotiations seem to use it as a starting point
* Joint custody: both parents have joint legal custody 🡪 decision-making authority over children, presumes equal access
  + Not the same as joint physical custody 🡪 kids still tend to have one primary caregiver
* *DA* s. 16(4): custody may be awarded to “one or more persons” 🡪 allows joint custody but no presumption
* *Stewart v Stewart* – joint custody should only be made rarely if parties are in agreement and can communicate meaningfully
* *Robinson v Filyk* – presumptions have no place in “best interests” test, joint custody not ok unless parties are in agreement
* *Javid v Kurytnik* – joint custody not in best interests because parents have real and continuing conflict
* *Narayan v Narayan* – joint guardianship rejected because df have assaulted pf and holds animosity and blame towards her
* *Kaplanis v Kaplanis* – joint custody shouldn’t be awarded if there is no evidence of historical cooperation or appropriate communication between parents 🡪 must have some evidence that parties can communicate effectively with each other

Primary Caregiver Presumption

* Primary caregiver presumption: parent who was primary during relationship is presumed to get custody unless “unfit”
  + Canada does not have this presumption but some judges have taken primary caregiving into account
* *K v K*: primary caregiving is a factor but must be second to children’s emotional, psychological, and intellectual needs
* *Windle v Windle* (2010 BCSC):
  + Joint custody is inappropriate because of parties’ inability to communicate 🡪 invites future conflict
  + Custody and access must be determined on basis of best interests
  + Significant value should be given to maintaining the current primary residence of the children
  + Status quo of primary residence should be preserved – includes relationships and contacts, not just location
  + Mother is primary caregiver and clearly provides the most emotionally stable home in this case

## The Access Parent

Role of Access Parent

* *Divorce Act*, ss. 16(5) and (10), 17(5), *FRA* ss. 42-55
* Access = “the right to visit” (French *DA*)
* S. 16(5) *DA*: unless court orders otherwise, access parent has right to get info about health, education, and welfare of child
* *Young v Young* (1993 SCC):
  + Dad is a religious nut and tries to force his JW beliefs on his unenthused children against mother’s wishes
  + “best interests” is the only test 🡪 parental preferences and “rights” play no role
  + “Best interests” is objective, broad and flexible, and must be applied to the evidence in the case
  + S. 16(10) of DA requires that child should have as much contact with each spouse as consistent with its best interests
  + Idea that custodial parent should have right to forbid types of conduct between access parent and child must fail
    - Custodial parent’s wishes are not the criterion for limitations on access 🡪 only best interests of child
    - However, risk of harm may be a factor to consider
  + Role of access parent is “that of a very interested observer, giving love and support in the background”
  + Right to access must be guided by best interests of child only 🡪 it’s a right of the child, not the parent

Maximum Contact and Violence

* *Johnson-Steeves v Lee* (1997 ABQB):
  + Mother asks father to help her conceive w/agreement he’d help financially and know the kid, he agrees, then she turns around and tries to get custody with an order denying father access to the kid but wants child support
  + It is better than children have a relationship with their father than no relationship (though not always determinative)
    - No relationship is only better when there is a bad or damaging or inadequate father
  + Child’s best interests are dominant over desires of the parent 🡪 can’t bargain your kid’s right to access away
* Access and Allegations of Violence:
  + Only clear evidence of probability of harm to the child will result in denial of access
  + *Fullerton v Fullerton* – terrified children who witnessed severe spousal abuse still have access with father
  + *Al*-*Maghazachi v Dueck* – access upheld despite allegations of sexual abuse and kids not wanting to see father
  + *EH v TG* – access terminated because psychological impact on daughter who alleged father abused her
    - “parental preference and so called parental rights should not influence our consideration of best interests”
  + *Baggs v Jesso –* father given short periods of access after sexual abuse allegations 🡪 long periods not in best interest
  + *H(K) v T(J) –* father convicted of assault denied access, was psychologically manipulative, didn’t take responsibility

Remedies

* Remedy for Frustrated or Denied Access:
  + *Frame v Smith* – no cause of action in tort of breach of fiduciary duty if access rights are interfered with
  + Two remedies available: contempt of court and termination of spousal support (also maybe change of custody)
  + *Ungerer v Ungerer* (1998 BCCA):
    - Spousal support terminated because wife refused to cooperate with ex-husband’s access
    - Wife was previously found in contempt of court and was imprisoned
    - S. 15(6) and 17(6) of DA: misconduct in relation to the marriage can’t be considered for spousal support
      * Not a bar because this misconduct occurred outside of marriage after its termination
    - Conduct can disentitle you to spousal support if it is “of such a morally repugnant nature as would cause right-thinking persons to say that the spouse is no longer entitled” or is “sufficiently egregious”
  + *B(L) v D(R) –* mother jailed after being found in contempt after frustrating access, even though it was unlikely to promote access because judge wanted to send a message that violating a court order has costs
  + *Cooper v Cooper* (2004 ONSC) – mother denies access to father:
    - Court orders mother to arrange counseling for the family or else submit to psych exam, she doesn’t
    - Court also ordered phone access for the father, he claims she frustrated that too
    - Held: mother must pay fine, arrange counseling and “be supportive”, and joint custody ordered
  + *JKL v NCS* – mom gets custody, turns son against dad, judge gives dad custody, orders “deprogramming” therapy
  + *TS v AVT* – mother loses custody because of negative attitude towards ex-husband
    - These cases underline destructive effect of turning kid against other parent, award custody to other parent
* Denial of Child Access:
  + It is more common than parents don’t exercise their access rights versus being frustrated in trying to do so

Non-Parental Access

* Grandparents’ Access:
  + S. 35 of *FRA* and s. 16(1) and (4) of *DA* permit order of access in favour of a third party
    - Onus on 3rd party to show that access is in the best interests of the child
  + *Bridgewater v Lee* – if access order would disrupt child’s nuclear family, courts must exercise extreme caution
  + *Chapman v Chapman* – not in child’s best interests to be forced to visit grandmother w/bad relationship regularly
  + *Parsons v Parsons* – mom becomes lesbian, her parents don’t approve, she terminates healthy relationship between her parents and her kid until they approve, court gives access to grandparents because in child’s best interests
* Non-Parental Access – *GES v DLC* (2005 SKCA):
  + Man applies for joint custody and access to kids to whom he isn’t related and against will of birth mother
  + Access rights can arise independently of being defined as a legal parent 🡪 Non-parent or non-bio relative can apply for custody or access (in SK at least) if there is some connection or “sufficient interest” in the child
  + Held: GES more than a babysitter but “much less than a parent in that… he limited his committed to the children”
    - Court also considered conflict between mom and GES, impairment on mom to make new relationships

Mobility Restrictions on Custodial Parents

* *Divorce Act* s. 16(7)
* Mobility problems arise when 1 parent wants to move and other parent opposes the move
* *Gordon v Goertz* (1996 SCC):
  + Two-part test for parent who wishes to vary a custody or access order in relation to a proposed move:
    1. Threshold requirement of demonstrating a material change in circumstances affecting the child
    2. Applicant must establish the move is in best interests of the child, given all relevant circumstances, child’s needs, and ability of the respective parents to satisfy them
  + Material change in circumstances requires (1) a change in the condition, means, needs or circumstances of the child or in the ability of the parents to meet the needs of the child, (2) which material affects the child, and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order
  + If met, judge has fresh inquiry into best interests of child relating to needs and parents’ abilities to satisfy them
    - Inquiry is based on findings of judge who made previous order and evidence of new circumstances
    - Inquiry does not begin with presumption in favour of custodial parent
  + Judge should consider the existing custody arrangement and relationship between the child and custodial parent, existing access arrangement and relationship, desirability of maximizing contact with both parents, views of child, reason for moving only if it is relevant to the parent’s ability to meet the needs of the child, disruption to the child of a change in custody, disruption due to removal from family/schools/community
  + Importance of child remaining with custodial parent must be weighed with continuance of full contact with access parent, extended family and community
  + Minority: custody under *DA* includes right to choose child’s place of residence
    - Existing custody order is in best interests as determined by trial judge
    - Non-custodial parent should have onus of showing the move will be detrimental to kid’s best interests and that their relationship with kid is so important to kid’s interests that prohibiting a change in residence would be less detrimental than an order to vary custody
    - Exception: if there is an explicit location order, onus will be on custodial parent
  + Note: *Goertz* has been applied to provincial cases too
  + Note (Bala & Harris study): factors include relationship between child and each parent, relationship of child to new partner, reasons for move (economic, social, psychological well-being), unilateral conduct by custodial parent versus a cooperative attitude, age of child (move more likely if <6), wishes of child, domestic violence/high conflict
* BC: some judges pay attention to past primary caregiving, particularly if mother was homemaker/only PT worker
  + *Chilton v Chilton* – mother moved to Hawaii from BC for employment, joint custody but kid lived with mother
* Courts generally tie reasons (including economic) for move into best interests, even if they’re not supposed to be relevant
* *Nunweiler v Nunweiler* (2000 BCCA):
  + Court can consider custodial parent’s wish to move as long as there is no improper motive
  + Willingness of parent to facilitate contact is important but subordinate to overall best interests consideration
  + *Goertz* principles are applicable to initial custody order as well as a variation applicant
* Most common reasons for allowing move: improved financial situation, custodial parent only parent capable of caring for child, move in parent’s best interests which are in line with child’s (particularly if mother was victim of spousal abuse)
* Most common reasons for denial: reduced access to access parent, inadequate planning by moving parent, disruption to community ties 🡪 note that distance of move does not have a large effect of likelihood of move
* *One v One* (2000 BCSC):
  + Move denied because of uncertainty and disruption to education and relationships w/extended family, friends
  + 12 factors to consider for best interests of child: parenting capabilities of and kid’s relationship with parents and new partners, employment security and prospects of parents and new partners if appropriate, access to and support of extended family, difficulty of exercising and quality of proposed access, effect on education, kid’s psychological and emotional well-being, disruption of kid’s existing social and community support and routines, desirability of proposed new family unit for kid, relative parenting capabilities of each parent and ability to discharge those responsibilities, separation of siblings, retraining or educational opportunities for the moving parent
    - Do not replace *Goertz* factors but act as a helpful guideline
* *Karpodinis v Kantas* (2006 BCCA):
  + Mother has to move to Houston or lose her job, prepares for move, applies for variation to bring kid with her
  + Distance between kid and access parent/extended family is significant, esp. when kid is too young to travel alone
  + A move for financial or family reasons can conduce to the best interests of the child
  + Children in tender years: age where bonding w/extended family and access parent is a prime consideration
  + Mother’s interest in moving was legitimate but deference to trial judge is important and he considered all factors
* *Falvai v Falvai* – mother successfully appeals condition requiring her to live in same community as father

Jurisdiction and Child Abduction

* *FRA*, s. 55
* *Hague Convention of the Civil Aspects of International Child Abduction*
  + Removal or retention of a child is wrongful if it breaches the rights of custody under the law of the jurisdiction in which the child was habitually resident immediately before the removal/retention, if the rights were being exercised
  + Article 3: court must order return of child unless an exception under Articles 12, 13 or 20 apply
    - Article 12: 1+ year has elapsed between removal/retention and application for return and child is settled
    - Article 13: person seeking return was not actually exercising custody rights, or consented or acquiesced in the removal/retention, or if there is grave risk child’s return would expose him to physical/psychological harm or otherwise place the child in an intolerable situation, or mature child objects to being returned
    - Article 20: to protect human rights and fundamental freedoms
  + *Thompson v Thompson* (1994 SCC):
    - Mom got interim custody in Scotland w/no removal clause, moved to Manitoba w/kid, applied for custody
    - Father granted custody in Scotland, applied in Manitoba for kid, judge ordered kid’s return to Scotland
    - Judge used Manitoba “best interests” law to give mom temp custody for time for custody app in Scotland
    - Held: Manitoba courts don’t have jurisdiction to impose transitory measures for return of kid
  + *Hoskins v Boyd* – what is in the best interests of the child is a matter of courts of the “home state”
* *Yassin v Loubani­* (2006 BCCA):
  + Held that lower court correctly took jurisdiction even though neither parties nor child lived in BC and kids weren’t physically present there on basis that the kids were Canadian citizens (as were the parents)
  + Best interests of children to make interim custody order in mother’s favour because danger that she would be deported from Saudi Arabia and separated indefinitely from her children was of overriding importance
    - Mother likely would have lost custody of young children under Saudi Arabia law

Efforts to Change Legislation

* Bill C-22 (died on table): would have removed *DA* language of “custody” and “access” and replaced it with “parenting orders” that regulate “exercise of parental responsibilities” (including parenting time and decision-making)
  + Aim: create new normative standard of cooperative parenting with focus on children’s needs
* *FRA* to be replaced with *Family Law Act* in BC

# ECONOMIC CONSEQUENCES OF FAMILY BREAKDOWN

* *FRA* Part 5, ss. 1
* Spouses’ earning capacity is the main asset of most families 🡪 must be taken into account upon separation
* 3 types of matrimonial property regimes:
  + Traditional community of property 🡪 all property is common property of both but is controlled by husband
  + Full and immediate community of property 🡪 property shared immediately on marriage but is in joint control
  + Deferred community property 🡪 property shared equally at separation but controlled separately during marriage
    - This is the format used in all Canadian provinces
* Provinces all recognize that contributions to family through homemaking and child care are worth of recognition
* Equal economic partnership model: most or all assets accumulated during marriage are a product of joint efforts/resources

## Matrimonial Property: Unmarried Cohabitants

* *Nova Scotia v Walsh* (2002 SCC):
  + Common law couple separate and appellant brings application under marriage act for equal division of assets
  + Held: Act is not discriminatory because distinction between married and common law corresponds to differences between those relationships and respects fundamental personal autonomy and dignity of the individual
  + Reliance on functional similarities ignores traits, history and circumstances different between the groups
  + Ignoring the differences assumes a commonality of intention that doesn’t exist 🡪 nullifies freedom to choose alternative family forms and have that be respected by the state
  + Marrying=consent to obligations and benefits, versus unmarried couples who are free to consent by marrying
  + Extending marital property Act to common law would intrude into most personal and intimate of life choices by imposing a system of obligations on people who never consented to such a system
  + While spousal support should be extended, property regime shouldn’t become it involves different principles
  + Dissent: Act fails to provide fundamental benefit based on a distinction of status instead of actual need
* *Pettkus v Becker* (1980 SCC):
  + Common law couple has beekeeping business, is together for 20 years, woman asks for ½ interest in land/business
  + Unjust enrichment lies at the heart of a constructive trust
  + 3 requirements for unjust enrichment: (1) enrichment, (2) corresponding deprivation, (3) absence of a juristic reason
  + Not enough that one spouse benefits at hands of the other 🡪 retention of the benefit must be unjust in circumstances
  + Factor: wife believed she had some interest in the farm and that expectation was reasonable in the circumstances
  + If one person in relationship prejudices herself in reasonable expectation of receiving an interest in property and other person in relationship freely accepts the benefits when he knew or ought to have known that there was that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it
  + Causal connection: must have a clear link between the contribution and the disputed assets
    - Includes enabling or assisting in enabling the other person to acquire the assets
    - To be unjust, must be some connection between acquisition of property and corresponding deprivation
  + Not every contribution will entitle spouse to ½ interest 🡪 must be proportionate to contribution (direct or indirect)
* *Sorochan v Sorochan* – constructive trust imposed because of preservation/maintenance/improvement of property even though spouse’s work did not contribute to the acquisition of the property
* *Peter v Beblow* – Constructive trust 🡪 household/childcare duties w/o compensation enhanced value of the property
* *Kerr v Baranow* (2011 SCC):
  + Common intention resulting trusts should not be used in domestic property and financial disputes
  + Unjust enrichment: restoring a benefit which justice does not permit one to retain
    - Pf must give something that df receives and retains without juristic reason
  + Absence of juristic reason: no reason in law/justice for retention of benefit, making retention unjust in circumstances
    - E.g. intention to make a gift, contract, statute prevents recovery
    - Provides consideration for autonomy of parties, including legitimate expectations of parties and right of parties to order their affairs by contract
    - 2 step analysis: (1) look at established categories of juristic reasons, (2) consideration reasonable expectations of the parties and public policy considerations to assess if recovery should be denied
  + Quantum meruit: monetary remedy is determined by proportionate contribution to the accumulated wealth
    - However, it is not a fee-for-services approach or an accounting exercise
  + Factors: mutual effort (pooling of effort/resources, teamwork, decision to have/raise kids, length of relationship, one spouse taking on all domestic labour), economic integration/interdependence (joint bank account, shared expenses, common savings), actual intent (not what reasonable parties *ought* to have intended, can be inferred if parties accepted relationship as equivalent to marriage, stability of relationship, title to property, distribution of property in will), priority of the family (detrimental reliance on relationship, financial sacrifices, career sacrifices)
  + Claimant must show (a) there was a joint family venture (q of fact), and (b) link between contributions and wealth
  + Mutual benefits: can be considered at juristic reason stage if relevant, if not, consider at defence and/or remedy stage

## Matrimonial Property: BC Scheme

Family Assets under *FRA* Part 5

* Family assets are defined in s. 58 and must be read in conjunction with s. 59
* Four ways to find a family asset:
  + (1) “ordinary use for a family purpose” (OUFP) [s. 58],
  + (2) rights under annuities or pensions, home ownership or retirement savings plan [58(3)(d)],
  + (3) venture to which the non-owning spouse has directly or indirectly contributed [58(3)(e)], and
  + (4) business asset towards which the non-owning spouse has made a direct or indirect contribution under s. 59
* S. 60: onus of proof is on spouse opposing “family asset” designation for OUFP assets, otherwise onus on applicant
* S. 56: Family assets are subject to prima facie equal division between spouses on occurrence of a triggering event
* S. 65: equal division may be adjusted by court to favour one spouse (reapportionment)
* Two stages to matrimonial property division: (1) characterization, (2) reapportionment
* Fact that asset was acquired prior to marriage is immaterial but this may be considered under reapportionment

🡪 Will change under *FLA*

* *Tratch v Tratch:* If property can be traced back to an original family asset, it can be classified as a family asset
* S. 66(2)(c): court can order compensation where a spouse has disposed of property

Ordinary Use for a Family Purpose

* *Fong v Fong* – car found to be personal, not family, because it was only rarely used by him to drive family around
* Broadening trend towards OUFP aided by s. 60 presumption
* *Graff v Graff* – savings accounts are generally family assets 🡪 intention of providing for family in future
* Characterization of gifts will depend on court’s determination of nature of donor’s intention
  + *Hauptman v Hauptman* – jewelry/furs are family assets because purpose was to impress colleagues
* *Lindholm; Hefti* – intended use of asset for future financial security is a question of fact 🡪 no presumption
* Inheritances/gifts to one spouse may be family assets if there was OUFP
  + *Hefti:* Inheritance is not OUFP if only proven use was as a “possible” source of retirement income
  + *Campbell*: inherited rental property other spouse helped with = plan for future of family = family asset
  + Inheritance/gift will come into play for reapportionment if found to be a family asset
* *Jiwa v Jiwa* (1991 BCSC):
  + Family asset? Voluntary group accident insurance policy and lump sum policy in case of death/disability
  + Pension: income replacement upon termination of employment 🡪 income replacement
  + Personal accident insurance does not specifically go against income loss 🡪 not a pension
  + Husband have rights under insurance contract 🡪 ownership rights 🡪 counts as an asset
  + “Ordinary use” includes future use, family use includes future security for family
  + Life insurance policies are therefore family assets 🡪 planned family security
  + Both the policies themselves and their proceeds are family assets (added by BCCA)
* *Martin v Martin* (1992 BCCA):
  + Couple wants separate finances during marriage, husband has a bunch of savings and wife has little
  + Whether something is a family asset depends on the facts of each case 🡪 no sweeping statements
  + Savings for retirement may be family assets, particularly in long marriages, but not always
  + Something more than a general intention that funds will be used for retirement is required for family assets
  + Distribution fairness: here, must return wife to position she was in before marriage
  + Fairness: must distribution family assets and burger of the marriage failure equitably between the spouses
* *Lye v McVeigh* (1991 BCCA):
  + Cheap guy who makes lots of money makes wife split every cost w/him even though she makes much less
  + Question: should pension which was largely accumulated before marriage be split with wife?
  + Demonstration of “lifelong commitment” or presence of children of marriage indicates family purpose of savings
  + Respondent’s savings were personal 🡪 only family bank account was the joint one for living expenses
  + Consider if both spouses have their own pensions and whether the pension existed before the marriage
* *Samuels v Samuels* (1981 BCSC):
  + Husband had interests in 2 inherited properties and has rental income from one that was used for family purposes
  + If use of spouse’s business income is family purpose, doesn’t mean the business itself is a family asset
  + Businesses must be considered individually under 58 and 59 to determine if they are family assets
* *Brainerd v Brainerd* (1989 BCCA):
  + Rich guy gets big trust, gets wife, buys various properties, pays for everything, wife tries to get assets on divorce
  + Husband concedes 2 properties as family assets but wants reapportionment, challenges 3rd property as non-family
  + Contested property is family asset – rental money went to joint account, family used it for lake access
  + Investment portfolio – drawn on for family purposes but husband wants it for son, argues wife made no contribution
  + Judge looks at excluded assets under 59 and determines portfolio depends on whether it was OUFP
    - It was encroached on regularly to provide for family living expenses, therefore it is OUFP
  + S. 65 reapportionment: 80% of portfolio to husband, most to husband because it was inherited, she didn’t contribute
  + Jewelry: wife entitled to keep wedding ring because it was intended as a gift
* *Evetts v Evetts* (1996 BCCA):
  + Is a capital asset a family asset if some or all of the income from it is used to meet household/family expenses?
  + Cases turn on whether it was “ordinary use” 🡪 rest on findings of fact
  + Occasional use does not render a capital asset as being ordinarily used for family purpose
  + Use of capital from the asset “from time to time, when required” may be an indication of OUFP
  + Use of asset to provide financial security and protect against erosion of income or other family misfortune in the future may constitute a present OUFP
  + Ordinary use for a family purpose is not inconsistent with ordinary use for another purpose

Hobbies

* *O’Bryan v O’Bryan* (1006, BCSC):
  + Husband has huge sports memorabilia collection and wife wants part of it on divorce
  + Hobbies may not always be carried on for family purpose 🡪 personal time and effort can be personal, not family
  + Burden of proof that it wasn’t used for a family purpose falls on the party claiming it wasn’t
  + Here, family asset because wife attended trade shows w/husband and they displayed it in their home (20% to wife)

Debts

* S. 65(1)(f) *FRA*: debts are to be taken into account and can be divided between spouses
* *Young v Young* – court can’t make spouse jointly liable to creditor for debt of other spouse, no matter for what purpose debt was incurred, or, in absence of some contractual foundation, make one spouse liable to indemnify the other, either whole or in part, for a liability of the latter 🡪 can’t be responsible for liability your spouse owes someone else
* *Mallen v Mallen* (1992 BCCA):
  + Family debt = liability of either or both of the spouses which has been incurred during marriage for family purpose
  + “Family purpose” depends on circumstances 🡪 generally includes acquisition/maintenance/improvement of family asset or a debt incurred for purpose of facilitating support, education or recreation of spouses or children
  + Liability incurred by a spouse is “maintaining” the family will generally qualify
  + Income tax debt of one spouse ought to be considered when assessing fairness of equal division of assets
  + Onus is on party seeking reapportionment under s. 65 to satisfy court it is required as a matter of fairness
    - Party responsible for a liability it claims is a family debt must show court other spouse should pay some
    - Vision of fairness must be confined to that in 65(a)-(f)
* *Stein v Stein* (2008 SCC):
  + Can the court divide a contingent liability that can’t be valued at time of trial?
  + *FRA* does not preclude an order dividing between spouses a contingent liability that can’t be valued at trial
  + Both benefited from tax shelters so fairness requires that the contingent debt be shared
  + Both assets and debts must be consider to ensure fairness on breakdown of marriage
  + Spouses can claim interests even where asset itself in contingent, immature, or not vested 🡪 applies to debts too
  + *FRA* doesn’t place time limits on division of assets 🡪 66(2)(c) allows court to adjust division of assets at any time
  + Liability that must be split is net of any profit received from ownership or sale of instruments 🡪 netting principle

Pensions

* *FRA*, Part 6, ss. 58, 59, 62, 65, 66
* Pension plans don’t require “family purpose” test 🡪 58(3)(d) defines them as family assets
* Severance payments or disability payments qualify as pensions
* *Clarke v Clarke* – pensions are analogous to savings, not business assets
* OLD LAW: *Rutherford* – order concerning pension can’t affect plan, so unless plan will assist, there are 2 ways to divide:
  + Require one spouse to pay portion of payments upon retirement to other spouse
  + Compensation payment of money or transfer of property (s. 66)
* OLD LAW: *Mailhot* – pension is to be valued at triggering event, including part earned before parriage
* NEW LAW: *FRA* Part 6 requires pension plan administrators to be involved in dividing pensions in different ways:
  + Matured pension: benefit split administered by plan (pays out part to other spouse)
  + Unmatured pension, defined contribution plan: share of pension transferred to separate account on divorce
  + Unmatured pension, defined benefit plan: can choose to do either of the above as “limited member” of the plan
* NOTE: Under Part 6, pension is confined to portion of pension that accrued *during* the marriage
* NOTE: pension does not have to be divided under Part 6 🡪 can agree to dividing it other way (s. 80)
  + Agreement cannot give non-owning spouse more than 50% of the pension
* Spouses can waive division of pension entitlement (s. 80(1)(b) and (c))
  + If included in a premarital agreement, court can change this if unfair under s. 65 factors
  + Waiving division of earnings under CPP is s. 62 🡪 must specify that CPP is being waived
* Extraprovincial plans are not subject to Part 6 rules

Ventures and Business Assets

* Venture: “undertaking attended with risk” 🡪 any investment with element of risk and potential for profit
  + Doesn’t include passive deposits/investments (e.g. bank deposits, bonds)
  + Does include professional practices, real property investments, stock portfolios
* *Robertshaw v Robertshaw* (1979 BCSC):
  + “Venture” must be interpreted so as to include any business 🡪 includes professional practices
  + Fact wife was paid for work towards venture is irrelevant 🡪 she contributed, Act doesn’t care she was employed
* Courts are fairly unconcerned with difference between a venture and a business
* Things found as business assets: patent rights (*Coulthard*), farm land/operations (*Laxton*), professional practices (*Wilson*)
* Professional qualifications (degrees, licenses) are intangible person assets 🡪 NOT property regardless of contributions by other spouse, and income stream from that asset is not considered to be property subject to division (*Caratun*)
  + Contributions to other spouse’s uni degree/pro designation can be considered under spousal support (*De Beeld*)
* *Seymour* - commercial fishing license is family asset as divisible property 🡪 generated income, no personal quality
* *Verschuur* – milk quota is family asset, was OUFP, had marketability potential, could be valued and apportioned
* Direct contributions: paid/unpaid work in business, contributing family assets or permitting use of family assets to acquire or maintain the business asset, assuming risks (e.g. mortgaging family asset or guaranteeing a loan)
* Indirect contributions: 59(2) specifies household management and child rearing but this is not a non-exhaustive list
  + *O’Keeffe* – contribution: wife goes to trade shows as hostess, answers phones, household management
    - Wife didn’t contribute to venture but was involved in acquisition of property, minimally contributed
    - *O’Bryan* – doing floral arrangements for family restaurant makes it a family asset
    - *Piercy* – home care, entertaining, help with family, companionship = indirect contribution
* *Balic vBalic* – dividing a business:
  + Orders to liquidate a business should be exceptional and requires knowledge of all consequences of order
  + It is valuation of the shares of a company, not the valuation of the business, which is the asset to be apportioned

Reapportionment and Dissipation of Assets (s. 65)

* *Narayan v Narayan* (2006 BCCA):
  + Husband starts disposing of RRSPs and uses proceeds for his own purposes, fails to pay child support
  + RRSPs are defined as family assets in *FRA* because they are security for the future
  + It would be unfair to saddle a spouse with tax consequences over which she had no control
  + Dissipation of assets and non-disclosure are relevant circumstances for making compensation orders under 66(2)(c)
  + Equal division supported because of duration of marriage, acquisition of RRSPs and home by joint efforts
  + Marital breakdown left wife is more economically poor situation where her need to become economically self-sufficient was greater and capacity to achieve economic stability was less

Interim Use of Property and Valuation Date

* S. 124 *FRA* can be used to grant one party exclusive temporary use of family residence and personal property
* *FRA* does not say anything about valuation of property but evidence of value is almost always needed
* *Gilpin v Gilpin* (1990 BCCA):
  + Valuation date should be date of trial unless there is reason to depart from that
  + Mere possession and control over family assets isn’t a reasonable basis for denying right to share in increased value

Compensation Orders – First Nations and Provincial Property Law

* S. 66 of *FRA* gives court authority to make any order necessary to give effect to reapportionment under s. 65 or Part 6
* *Derrickson v Derrickson*, *Paul v Paul*:
  + Federal government has exclusive jurisdiction over Indian land 🡪 can’t make division of property orders under *FRA*
  + However courts can award compensation to adjust the division of assets between spouses
  + *FRA* is inapplicable to Indians (and Indian land) by virtue of s. 88 of *Indian Act*
  + However, courts can award compensation to adjust the division of assets between spouses
  + *FRA* compensation not inconsistent w/property aspect of *IA*, particularly for division of family assets b/w spouses
  + Effect: courts can’t make order for occupation or possession under s. 124 (no fed legislation governs this either)
* *George v George* – Couple builds home on reserve, wife gets compensation on break-up even though property not registered
* Bill C-49 – allows First Nations to opt out of land management sections of *IA* and create their own regimes
* Other Bills have been proposed that deal with these issues for Indians but none have been passed (e.g. Bill C-47, C-8)

## Spousal Support: Introduction and Modern Models

* *FRA* Part 7; *DA* ss. 15.2, 15.3, 17

Rationales and Principles: Who is Responsible for Support and Why?

* *Messier v Delage*: sets stage for debate about clean break, removed termination date for wife’s spousal support
* Same sex spousal support - *M v H* (1999, SCC):
  + Lesbian challenges definition of “spouse” in Ontario act in application for spousal support
  + Purpose of spousal support is need/actual dependence, objective of shifting obligation from public to individuals
  + Act requires fair and equitable distribution of resources to alleviate economic consequences, regardless of gender
* Tests for Proving Conjugality:
  + *Gostlin v Kergin* (1986 BCCA):
    - Ask whether unmarried couple’s relationship was like that of a married couple in that they have voluntarily embraced the support obligations of s. 57 of *FRA* 🡪 would they consider themselves committed to life-long financial and moral support of that partner?
    - Objective indicators: referring to themselves as spouses or in way indicating long-term commitment, sharing legal rights to living accommodation, sharing property, finances or bank accounts, sharing vacations 🡪 in short, did they share their lives?
    - Most important: did one surrender financial independence and become economically dependent on other?
  + *Takacs v Gallo* – use objective *Gostlin* factors if intention for relationship is elusive
    - Subjective or conscious intentions may be overtaken by conduct
  + *Macmillan-Dekker* – emphasis should be on objective facts and intention, not subjective intention
  + *Molodowich v Penttinen* (1980) – questions as means of determining conjugaility/cohabitation (page 233):
    1. Shelter – live under same roof? Sleeping arrangements? Did others live with them?
    2. Sexual and personal behavior – Sex? Fidelity? Feelings? Communication? Meals? Gifts?
    3. Services – Domestic chores like cooking, laundry, shopping, maintenance, etc
    4. Social – Participation together in community activities? Behaviour towards each others’ families?
    5. Societal – Attitude and conduct of community towards them as a couple?
    6. Support (economic) – Arrangements towards (a) buying necessities of life, (b) acquisition and ownership of property, (c) special financial agreements that they agreed would be determinative of overall relationship
    7. Children – attitude and conduct of parties concerning children?
    - Note: Parts 4/5 may be less important for same sex couples because of social fears
  + *Austin v Goerz* – conjugal relationships can exist even if one party lacks capacity to marry (not single here)
    - Financial dependence not determinative 🡪 marriage now viewed as partnership between equals
  + *G(JJ) v A(KM)* (2009 BCSC):
    - Woman claims that her relationship with a man was platonic roommates
    - Man must establish he was in “marriage-like” relationship with woman for at least 2 years
    - Application for spousal support must be brought within 1 year of ceasing to live together in relationship
      * Cessation of marriage-like relationship starts the clock, not cessation of cohabitation
    - Financial dependence is not a necessity to find a marriage-like relationship 🡪 just one factor
    - Court must consider shared shelter, sexual and personal behaviour, services, social perceptions of couple
    - Common law relationships end when either party regards it as being over and demonstrates so w/conduct
      * Absence of sex, clear statement of intention to terminate by one party, physical separation (incl. different bedrooms), cessation of presentation to outside world that they are a couple

Three Conceptual Grounds for Spousal Support

* *DA* ss. 15.2, 17(1), 17(4.1), 17(7)
* 3 grounds for spousal support:
  + (1) contractual [*Miglin*] –parties entered marriage or separation agreement, or other k (see next section)
  + (2) compensatory [*Moge*] – spouse has forgone opportunities or endured hardships as a result of the marriage
  + (3) non-compensatory [*Bracklow*] – recipient spouse’s need exceeds the entitlement to be compensated
* S. 15.2: ability of courts to make spousal support orders 🡪 15.2(4) is the factors, 15.2(6) is the objectives
* S. 17(1): gives courts power to vary, rescind or suspend a spousal support order
* S. 17(4.1) *DA*: basic test for variation – “change in condition, means, needs or other circumstances of either former spouse”
* S. 17(7): factors to consider for varying a spousal support order

Old Models

* Self-Sufficiency: *Pelech* trio - test of “radical change in circumstances flowing from economic dependency from marriage”
* *Story* – moves away from *Pelech*, says *Pelech* only applies for variation to order meant to be final or 17)19) applies
  + Said “clean break” approach may be inappropriate in cases where it’s unrealistic to expect self-sufficiency

Compensatory Model

* *Moge v Moge* (1992 SCC):
  + Polish immigrant homemaker wife with no skills/education receives indefinite spousal support award
  + *Pelech* should only apply to contractual, consensual situations (deference to freedom to contract)
  + Spousal support objective: deal with economic consequences of marriage of its breakdown for the parties
    - Focus: effect of marriage in either impairing or improving each party’s economic prospects
  + Analysis applies equally to both spouses, depending on how division of labour was exercised in the marriage
  + Self-sufficiency is only one objective and should not be given priority, it is only a goal “in so far as practicable”
  + Consider if withdrawal from labour force during marriage affected that spouse’s ability to maintain herself
  + Spouses who provide household management and child care should be seen as freeing other to promote career
  + If former spouse continues to suffer economic disadvantages and other reaps advantages 🡪 compensatory support
  + Most significant economic consequence of marriage usually arises from birth of children
  + Standard of living-considered but not determinative 🡪 more important for longer marriages w/close economic union
  + Starting point: consider spouse’s actual situation before and after breakdown 🡪 connection in time
    - Argument spouse should be doing more must be considered in light of background, psych/physical abilities

Non-Compensatory Model (Basic Social Obligation)

* *Bracklow v Bracklow* (1999 SCC):
  + Wife in marriage has severe mental illness and had no means of support at time of separation, can’t work again
  + Trial and appeal: no spousal support b/c of no causal connection b/w breakdown and economic disadvantage
  + Law recognizes 3 grounds for spousal support: compensatory, contractual, and non-compensatory
  + Courts must exercise discretion in light of objectives in 15.2(6) and factors in 15.2(4) of *DA*
  + Spouses owe each other a mutual duty of support when married 🡪 interdependence
  + Basic social obligation model: responsibility to provide is on former spouse instead of government
  + Primary purpose of spousal support: replace lost income spouse used to enjoy in marriage
  + Clean break model in theoretical basis for compensatory support
    - Good for rehabilitation and self-maximization, appropriate for shorter marriages, successive relationships
  + Mutual obligation model: recognized tangled affairs, mutual support status, burden on spouse instead of state
  + If self-sufficiency is not possible, a support obligation may arise from the marriage itself
  + Statutes: “means and needs” in *DA*, s. 89(1)(d) and (e) of *FRA*, s. 15.2(6) objectives of *DA*
  + Quantum involves same factors that go to entitlement (need, length of marriage, ability to pay, etc)
  + No limitation or magic cut off dates for duration because it depends on discretion/circumstances

Spousal Misconduct and Economic Self-Sufficiency

* *Leskun v Leskun* (2006 SCC):
  + Attribution of fault to one spouse is irrelevant to spousal support (i.e. no-fault basis regime)
  + Self-sufficiency is a goal in s. 15.2(6) of *DA* “in so far as practicable… within a reasonable period of time”
  + S. 15.2(5) of *DA* states that court shall not take misconduct into consideration of spouse in relation to marriage
  + Distinction between emotional consequences of misconduct and the misconduct itself
  + S. 15.2(4) says court must take condition, means, needs and other circumstances of spouses into consideration
    - Includes capacity to become self-sufficient 🡪 also considered under 15.2(6)(d)
  + Self-sufficiency is a goal, not a duty, and failure to do so is just one factor in the analysis

## Spousal Support: Contracts and Guidelines

Separation Agreements and Variation of Support

* *Miglin v Miglin*
  + *Pelech* test is inappropriate in current statutory context 🡪 other grounds are available to override “final” agreement
    - *Pelech* has too much focus on self-sufficiency and “clean break” and ignores practical realities
  + Couple co-owns hotel, sign agreement that releases husband from spousal support and a consulting agreement where husband pays wife consulting fees, but then husband gets mad at wife and cuts off consulting agreement
  + Separation agreement should be accorded significant and determinative weight (no vulnerabilities during formation)
    - Both parties used counsel, negotiations were lengthy, substantial compliance with objectives of *DA*
  + Balancing: Parliament’s objective of equitable sharing with freedom of parties to arrange affairs
    - Court should be loathe to interfere with pre-existing agreement unless it lacks substantial compliance
      * Especially important if spousal support was part of a comprehensive settlement
  + S. 9(2) indicates Parliament’s intention to promote negotiated settlement 🡪 show deference unless truly unfair
  + Judges must consider agreements in light of entire *DA* objectives 🡪 certainty, autonomy, finality, 15.2(6)
  + Approach for 15.2 application for spousal support with pre-existing agreement: investigate circumstances surrounding creation of agreement (a) at formation [circumstances, substance] and (b) at time of application
  + Court should treat parties’ reasonable best efforts to meet Act’s objectives as presumptively conclusive of issue
  + Court should set aside wishes of parties in agreement only where applicant shows agreement fails to be in substantial compliance with overall objective of the Act (wide *DA* objectives and 15.2(6))
  + Circumstances of Execution: conditions of parties, circumstances of oppression, pressure, or other vulnerabilities, taking into account all circumstances (incl. 15.2(4)(a)(b)), conditions of negotiation (duration, presence of counsel)
    - Courts should not presume imbalance of power or vulnerability 🡪 must have evidence
    - If no vulnerabilities or they’ve been offset, take it as subjective intentions, be loathe to interfere
    - If negotiations impaired by power imbalance, agreement will receive little weight
  + Substance: look at agreement in totality to see if it substantially complies with *DA* objectives
  + Time of Application: extent agreement still reflects original intentions and still complies with *DA* objectives
    - Change doesn’t have to be “radically foreseen” nor causally connected to marriage, but they must clearly show that, in light of new circumstances, terms of agreement no longer reflect intentions at time of execution or objectives of Act (i.e. circumstances were not reasonably contemplated by the parties)
* *Hartshorne* – applies *Miglin* in context of marriage agreements
* *Rick v Brandsema* (2009 SCC):
  + Validity of a separation agreement with attention to mental health of one of the spouses
  + Assets must be distributed through a process that is free from informational and psychological exploitation
  + Duty on separating spouses to provide full/honest disclosure of all relevant financial info
  + Agreements negotiated with full/honest disclosure and without exploitative tactics will likely survive scrutiny

Spousal Support Guidelines

* *Spousal Support Advisory Guidelines* – not legally binding but intended as informal guidelines on advisory basis
* Two basic formulas: without child and with child
* Income sharing method that produces a range of amounts and durations for support 🡪 allows for judicial discretion
* Without child formula:
  + Two factors: gross income difference between parties and length of marriage
  + Amount of support: 1.5-2% of differences in incomes for each year of marriage to maximum of 50%
    - Factors: strong compensatory claim, recipient’s needs, property divisions, ability to pay, self-sufficiency
  + Duration of support: 0.5-1 year of support for each year of marriage, indefinite if 20+ years or total age/years > 65
  + Allows for restructuring so duration and amount can be traded off with each other
* With child formula:
  + Priority of child support over spousal support
  + Differences from Without: uses net income to calculate, upper/lower limits don’t change b/c of length of marriage
  + Duration: initially indefinite but subject to outer limits – if 10+ years then duration limited to length of marriage, if shorter than 10 it lasts until youngest child finishes high school
* *W v W* (2005 BCSC):
  + Compensatory support is the main focus of spousal support in BC 🡪 recognizes economic disadvantage+advantage
  + Non-compensatory cases are not just confined to economic necessity but also involve marital standard of living
  + Advisory Guidelines are consistent with the law in BC and bring uniformity and rationalization
  + Guidelines can be challenged in their accuracy when appropriate
* *Redpath v Redpath* – if an award substantially deviates from Guidelines with no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention

Intersection of Matrimonial Property and Spousal Support

* Interpretation of 65(e) of *FRA* was affected by *Moge* 🡪 said support awards should play a role in compensating a spouse
* *Lodge v Lodge* – *Moge* principles used to reapportion a rental property under s. 65(e) by having “regard to needs of each spouse to become or remain economically independent and self-sufficient”
* Trend towards reapportionment in favour of wives who were child caregivers and had capital loss of earning capacity
* Concern about “double compensation” from support AND division of property using compensation principle (*Kennedy)*
* *Boston v Boston* (2001 SCC) – case comment
  + To avoid double recovery with pensions (first considered as property then later as income), only the portion of the pension earned after separation can form basis of continuing spousal support
  + Case comment: this doesn’t take into account women’s position, minority judgment was better because it viewed it as an issue of variation to an order with focus on wife’s situation and husband’s ability to pay
* *Meiklejohn v Meiklejohn* (2001 ONCA):
  + On separation, wife gets house and RRSPs and husband gets pension, husband agrees to pay set amount of spousal support, but pension later reduced because of new early retirement program
  + To avoid double recovery, court should, where practicable, focus on assets not part of division of matrimonial assets
    - Criticism: this assumes wife can generate income from assets received at separation but this may be unreasonable with assets like matrimonial home
    - Support payments should also try to provide enough for similar standard of living as during marriage
      * Allowing spouse to stay in matrimonial home contributes to this
  + If spousal support order is based mainly on need, not compensation, double recovery may be permitted
    - Considerations: payor’s ability to pay, if payee spouse has made reasonable efforts to use equalized assets in an income-producing way

## Child Support

* *FRA* ss. 88, 93, 93.1, 93.2, 94, 95, 96
* *DA* ss. 15.1, 15.3, 17(1), (4), (6.1), (6.3) and (6.4), 25.1, 26.1, *Federal Child Support Guidelines*

Defining the Parent-Child Relationship

* S. 1 *FRA*: “parent” includes (a) guardians, or (b) stepparent if (i) contributed to support or maintenance of child for at least 1 year, and (ii) proceeding under Act is commenced within 1 year of when stepparent last contributed to support/maintenance
* Term “stands in place of parent” (*Chartier*) for child support applications must be read to meet *FRA* s. 1 criteria
* *Chartier v Chartier* (1998 SCC) – can a person standing in place of a parent unilaterally give up that status?
  + Married couple have own child and woman brought kid from past relationship, man acted as father to that child, never officially adopted the kid, now wants to sever ties with child upon divorce
  + *DA* s. 2(2): “child of marriage” includes (b) any child of whom 1 is parent and the other stands in place of parent
  + *DA* focuses on best interests of children of marriage, not on biological parenthood or legal status of children
  + If someone makes permanent/indefinite unconditional commitment to stand in place of a parent, courts can award spousal support under *DA* regardless of whether that parent later disavows the kid or not
  + Once a person is found to stand in place of a parent, that relationship can’t be unilaterally withdrawn
  + Divorce is supposed to affect children as little as possible 🡪 spouses not entitled to divorce the children
    - Children must be able to count on parent relationships following the divorce
  + Parental relationship must be determined as of the time the family functioned as a unit
  + Opinion of child of child regarding relationship with step-parent is important but is just one factor
  + Attention must be given to representations made by step-parent, independent of child’s response
  + Objective analysis is required, taking into account all relevant factors to determine nature of relationship
  + Intention is a factor to be considered but note that expressed intentions may change or be expressed through actions
  + Factors: if kid participates in family as bio kid, financial provision for kid, if parent disciplined kid, representations to child/family/world that parent is responsible for kid, nature/existence of kid’s relationship w/bioparent
  + Step-parent can incur obligations and rights (e.g. custody, access) under s. 16(1) of *DA*
* *Russenberger; Dumais; Elliott*: courts can take lack of involvement with child following separation into account
* *Doe v Alberta* – people can’t contract out of “stand in place of parent” obligations 🡪 intention is only one factor
* *JMS v FJM* – Crown ward children are children in law but do not count as children of the marriage

Federal Child Support Guidelines

* Parents’ obligations are calculated using tables, on the bases of annual income and number of children
  + Income of spouse who order is made against but claiming spouse’s income is irrelevant
  + Income is total income from tax return but court has some discretion in the circumstances
* *Child Support Guidelines Regulation* makes the federal *Guidelines* applicable in BC
* Note: *Guidelines* are in Appendix 2 of 2nd coursepack
* Extraordinary Expenses, s. 7 Guidelines:
  + Child care expenses because of custodial parent’s employment/illness/disability/education, medical and dental insurance premiums, health-related expenses beyond insurance, extraordinary primary or secondary education expenses, expenses for post-secondary education, extraordinary extracurricular expenses
  + Court may consider necessity and reasonableness of the expense, with regards to means of spouses, best interests of child, and family’s spending pattern prior to separation
* Agreement & consent orders: court may award different amount if parties have made “reasonable arrangements” for support
  + Separation agreements or minutes of settlement from s. 15.1 of *DA*
* If guidelines would be inequitable due to special provisions already being made for child, court can award different amount
  + Spouses can argue that support arrangements made before Guidelines are appropriate to be continued
* Age of child (3(2)): required to support kids over age of majority if unable to withdraw from charge for approved reasons
* Relation to child (s. 5): “stand in place” parents may not have to pay Guideline amount because of real parent’s duty to pay
* Size of income (s. 4): Guidelines don’t apply to spouses under certain amount ($6700) of incoem
  + Income over $150K calculated on base amount of $150K plus appropriate amount determined by considering child’s circumstances and financial ability of each spouse to contribute to support
* Custody arrangements (ss. 8, 9): may affect amount of support 🡪 “where each spouse has custody of one or more children, amount of child support is difference between amount each spouse would otherwise pay if a child support order were sought against each of the spouses”
  + For shared custody, consider table amounts, increased costs of shared custody arrangements, and conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought
    - Implies that extraordinary expenses are not to be considered
    - Applicable when each spouse (access or custody) has kid at least 40% of the time
* Undue hardship (s. 16): court may deviate if Guidelines would cause undue hardship to child or spouse order made against
  + S. 10(2): circumstances leading to undue hardship include unusual levels of debt reasonably incurred to support spouses and kids prior to separation, unusually high costs to exercise access, spouse has legal duty to support any person, spouse has legal duty to support another child, spouse has legal duty to support a disabled or ill person
  + Circumstances must be unusual enough that they weren’t already accommodated in calculation of table amounts
  + Before finding undue hardship, court must compare standard of living at each household

Application of Child Support Principle

* *DA* ss. 14(c), 15.1, 17(4); *CSG* ss. 1, 4, 7, 10, 25(1)
* *McCrea v McCrea* (1999 BCSC):
  + Mother applies for support under 15.1 of *DA* (had separation agreement) after father has remarried woman w/3 kids
  + Child support orders under *DA* or *FRA* may be varied where there is “a change in circumstances”
  + If previous order exists and application is for variation, *Guidelines* are sufficient change to invoke s. 17(4) variation
  + If there is a separation agreement it isn’t necessary to establish a “change in circumstances” to apply under 15.1
  + Reasonableness of pre-existing arrangement when measured against *Guidelines* is an important factor
    - Previous arrangements must be unreasonable in comparison for court to vary a previous order
  + Asset division does not count as a “special provision” for a child
  + S. 4(b) income over $150K: does not always require analysis to determine if Guideline amount is inappropriate
  + S. 10 undue hardship: obligation to natural daughter can’t suffer because he has taken on additional responsibilities
  + S. 7 extraordinary expenses: compare to what is usual, consider combined income of parties and nature/amount of the expense, natural and number of activities, any special needs or talents of children, overall cost of activities
    - If found to be extraordinary, then consider necessity and reasonableness with regard to income of parents and family’s spending habits prior to separation
    - Divide these expenses based on proportional income
    - Extraordinary: orthodontics, counselling, testing and tutoring
    - Not extraordinary: typical medical/dental premiums, dance/piano/catechism classes

Shared Custody – s. 9 of *Child Support Guidelines*

* S. 9: Where spouses exercises access or has physical custody of kid for not less than 40% of time over course of a year, amount of child support must be determined by taking into account (a) table amounts, (b) increased costs of shared custody arrangements, and (c) conditions, means, needs and other circumstances of each spouse and child for whom support is sought
* *Green v Green* (2000 BCCA):
  + Parties have joint custody and guardianship of children, dad wants to pay less because he has kids 40% of time
  + S. 9 intent: provide financial relief to parents exercising extensive access by permitting deviation from *Guidelines*
  + Consideration: extra money spent by access parent may not mean less money spent by custody parent
    - Many costs are fixed: housing, transportation 🡪 savings only occur for food and entertainment
  + If access parent’s income is significantly higher, decreases in support may affect standard of living for custodial parent 🡪 concern that reduction in child support is not in best interests of child
  + If access parent has lower income, it will more commonly be in best interests of kid to provide some relief
  + S. 9 has built-in discretion to accommodate range of facts and circumstances, especially 9(b) and (c)
  + Parties must lead evidence relating to 9(b)(c) 🡪 increased costs and circumstances of spouse
* *Contino v Leonelli-Contino* (2005 SCC):
  + How is child support to be determined for shared custody?
  + S. 9 of *Guidelines* expressly provides for a particular regime for shared custody
    - Flexibility and fairness to ensure economic reality and circumstances are accounted for
  + S.9: weight given to factors will depend on each case
  + No presumption that s. 3 guidelines will apply nor that there will be a decrease in the s. 3 amount
  + Three stage analysis for s. 9 claims:

1. S. 9(a) – consider table amounts to find simple set-off amount by finding what each parent would owe
   * Must examine ability to recipient parent to meet needs of child in light of fixed costs
2. S. 9(b) – shared custody may cause increased costs 🡪 examine budgets and actual expenditures, determine if shared custody caused total increase in costs, then apportion costs according to income
3. S. 9(c) – broad discretion to analyze resources and needs of both parents and children
   * + - Must be done in line with objectives of Guidelines and must be fair
       - Look at standard of living of child in each house and ability of parent to pay
       - Requires financial statements and/or child expense budgets

Income over $150,000 – s. 4 of *CSG*

* S. 4: if income of payor is over $150K, support determined by either (a) s. 3 table or (b) if table amount is inappropriate then court can order total amount of (i) table amount for first $150K, (ii) appropriate amount for balance of income with consideration to condition, means, needs and other circumstances of children and financial ability of each spouse to contribute to support, and (iii) any amount determined under s. 7 extraordinary expenses
* *Francis v Baker* (1999 SCC):
  + Super rich lawyer gets angry about paying large child support to high school teacher wife
  + Meaning of “inappropriate” under s. 4 is “unsuitable” and just “inadequate”
  + S. 4 requires objectives of predictability, consistency and efficiency be balanced with fairness, flexibility, and recognition of the actual “condition, means, needs and other circumstances of the children”
  + Parliament intended a presumption in favour of table amounts 🡪 presumption must be rebutted as “inappropriate”
  + Unique economic situation of high earners must be acknowledged, courts shouldn’t be too quick to deem amounts of child support awarded in these cases to be unreasonable
* *Metzner v Metzner* (2000 BCCA) – summary of principles in *Francis v Baker*:
  + Parliament intended presumption in favour of Table amounts
  + Guidelines can only be altered if presumption of appropriateness of table amount is rebutted
  + There must be clear and compelling evidence to depart from guidelines
  + S. 4(b)(ii) lists the factors to be considered when determining appropriateness, must consider all circumstances
    - Also emphasizes centrality of actual situation of the children
  + Must balance predictability, consistency, and efficiency with fairness, flexibility and recognition of actual situation
  + Goal of child support is maintenance of children, not household equalization or spousal support
  + Court must have all necessary information to determine appropriateness, including expense budgets
  + Test for reasonableness of expenses will be a demonstration by payor that the budgeted expense is so high “as to exceed generous ambit within which reasonable disagreement is possible”
* *Greene v Greene* (2010 BCCA) – contracting out of Guidelines:
  + Husband’s income increases to over $150K, wants reduced support because of increased access costs due to move
    - Previous agreement that he would pay only ½ of Guideline amount because of wife’s move, access costs
  + *DA* does not have an express provision addressing access costs in relation to child support
  + Guidelines refer to access in s. 10 “undue hardship” provision 🡪 “unusually high expenses in relation to… access”
    - 10(3): Variation from guidelines because of undue hardship claim must be denied if payor would have higher standard of living than payee after paying child support
  + Guidelines don’t intend to take access costs into account unless s. 10 requirements of undue hardship are made out
  + Child support is child’s right and parents can’t waive or bargain it away
  + Parents can reach own agreements as long as they don’t short-change children with respect to support
  + Sharing of access costs should not be at expense of child support but may be justified on another basis
  + Held: father must pay support as laid out in the guidelines because he makes more money than mother

Post-Secondary Education Costs

* *DA* s. 15.1(1), *CSG* s. 3(2)
* *DA s. 15.1(1)* – court may make order requiring spouse to pay support for “any and all children of the marriage” which is deinfed in s. 2(1) as including children over age of majority who can’t withdraw from parents charge
* *S*. 3(2) of *CSG*: two ways to determine amount of child support for adult child:
  + 3(2)(a) – use tables as if child was under age of majority (*Neufeld*: this is used for post-secondary), or
  + 3(2)(b) – if tables are inappropriate, determine appropriate amount considering “condition, means, needs, and other circumstances of child and financial ability of each spouse to contribute to support of child”
* S. 7: specifies post-secondary education as an extraordinary expenses under 7(1)(e)
* *Farden v Farden* (1993 BCCA):
  + Factors to determine whether child remains a “child of the marriage” in post-secondary education:
    - Enrolment in FT or PT studies, whether child has student loans or other financial assistance, career plans of child, ability of child to contribute to their own support through PT employment, age of child, child’s past academic performance, plans made by parents for child’s education (especially if made during marriage), and whether child has unilaterally terminated a relationship with parent being asked for support
* *WPN v BJN (Neufeld)* (2005 BCCA)
  + Agreement that child support would stop when kid turned 19 unless he remained a “child of marriage” under *DA*
  + It is not necessary to exhaust every source of funding before looking to parents for support
  + No general principle that child seeking second degree did not qualify for support
  + Amount of support for child in post-secondary should be determined by table amounts
    - Does not preclude specific awards under s. 7 🡪 child support plus 50% of education costs awarded
* *Haley v Haley* – entitlement to child support can be revived following a hiatus in studies

Retroactive Child Support

* *DBS v SRG* (2006 SCC):
  + “Retroactive child support”: where payor’s income has increased, compensation for something legally owed
    - Parents obligated to support children commensurate with income 🡪 exists independently of court order
    - Obligation is not filled if parent fails to increase support payments upon increase of income
  + Court must look at all relevant circumstances, including reasonable excuse for delay, conduct of payor, circumstances of child, and hardship that a retroactive award may cause
  + Award is generally retroactive to when notice was given to payor parent
    - Exception: if payor had blameworth conduct, will be retroactive to date of change of circumstances
  + Recipient parent must act promptly and responsibly in monitoring amount of support paid
  + Onus is on recipient parent to give “effective notice” to payor parent to trigger date of retroactive award
  + Quantum will be determined with attention Guidelines but court has some discretion
* *Greene v Greene* (2010 BCCA) – *DBS* applied to spousal support:
  + Recipient spouse should recognize change in income by circumstances (e.g. property purchase, promotion at job)
  + Payor doesn’t have automatic burden of adjusting payments but he won’t satisfy obligation by doing nothing
  + Payor parent can’t decide form of child support (i.e. can’t decide to pay extra by paying for hockey)
  + Hardship: onus is on payor to establish hardship from retroactive award on evidence
  + Court can balance payor’s failure to pay more with recipient’s failure to give notice of increase in payments
  + If there is evidence children suffered from lack of increase, retroactive payments can be made for longer period

Arrears and Variation of Child Support

* *Ghislieri v Ghislieri* (2007 BCCA):
  + Father who was unemployed for two years gathers large arrears of child support
  + Parents’ responsibility for child support is based on capacity to earn, not actual earnings
    - Judges can impute income to people who don’t work or work part-time on what they could be earning
  + Parents who don’t earn enough money to pay child support must clearly show why they have failed to do so
* *Earle v Earle* (1999 BCSC):
  + Payment of maintenance is based on ability to pay 🡪 legal obligation to earn what you can so you can pay support
  + To vary a maintenance order, must show material change in circumstances since original order was made
    - Change must be significant and long-lasting, previous order must now be unreasonable versus Guidelines
  + Heavy onus on person asking for reduction or cancellation of arrears to show that there has been a significant and long lasting change in circumstances 🡪 must be grossly unfair to not cancel or reduce them
  + Court can postpone payment for a reasonable period or make reasonable terms for payment
    - Must seem appropriate in all circumstances of case, including present financial circumstances of payor
  + “Can’t pay now” 🡪 can only be cancelled in they can’t pay now and won’t be able to in future
  + “My financial circumstances changed” 🡪 heavy onus that (i) change was significant and long lasting, (ii) change was real and not one of choice, and (iii) every effort was made to earn money but was not successful
    - Requires reliable, accurate and complete information, not hearsay evidence
  + “Couldn’t pay because of new obligations” 🡪 priority, which came first, new family isn’t a reason to not pay
  + “Recipient delayed in trying to enforce payment” 🡪 not a relevant factor unless it prejudiced payor materially
    - Requires you to show you can’t pay now and can’t pay in future
  + “Spouse will get windfall” 🡪 not valid, fairness requires payment so recipient doesn’t bear disproportionate costs
  + “Kids didn’t suffer because others paid” 🡪 fails to recognize financial obligation of payor
  + “Kid doesn’t need the money now” 🡪 invalid, if qualify of child’s life has been diminished you must compensate
  + “Recipient said I didn’t have to pay” 🡪 invalid, it is child’s right and neither parent can waive it
  + “Recipient prevented my access” 🡪 not a proper factor to consider for child support
  + “I spent money on kids in other ways” 🡪 invalid, it is up to recipient to decide how to spend in best interests of kids
  + “I didn’t have legal advice” 🡪 not a reason to reduce or cancel arrears
  + 26.1(2) of *DA*: guidelines are based on principle that spouses have joint financial obligation to maintain the children

Enforcement of Child Support

* Support orders can be enforced under *DA, FRA, Family Maintenance Enforcement Act, Family Orders and Agreements Enforcement Assistance Act, Rules of Court* and Supreme Court’s equitable or inherent jurisdiction
* BC’s *Interjurisidictional Support Orders Act* sets out reciprocating jurisdictions, allows international enforcement
* *Family Maintenance Enforcement Act*: gives significant enforcement powers to Director of Maintenance Enforcement
* *Family Orders and Agreements Enforcement Assistance Act*: arrangement between federal and provincial governments
* *Dickie v Dickie* (2007 SCC):
  + Civil enforcement mechanisms in family law
  + Court can refuse to hear an appeal of someone who didn’t comply with family law court order
  + Affirms use of creative and severe enforcement mechanisms for people who could pay but choose not to
* *McIvor v Direction of Maintenance Enforcement* (1998 BCCA):
  + Director seeks order determining arrears and enforcing support order, respondent tries to cancel arrears
  + Court must take common sense approach in an effort to craft an order that is practical and functional
  + Delay in enforcing child’s right to support is not generally relevant because child cannot waive his right to support nor can the custodial parent waive those rights on child’s behalf
  + Child is entitled to adequate maintenance, even with access problems
  + Interspousal disputes about access or attitudes of children themselves do not affect obligation to support children