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Family Law

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1. Introduction: Families, Relationships, and Laws

1.1 *What is a family?*

Canadian law **does not** have an official definition of "the family". Some definitions from select readings:

> **Robert Leckey:** "For lawyers, the family is the aggregation of the relationships, rights and obligations connecting those individuals who are otherwise seen as forming a family. Relations between married spouses and between parents and children have been family law's traditional preoccupations. But the boundaries can shift, and recognition of family relationships by contemporary laws exceeds these categories."
>
> **Vanier Institute:** "Rather than focusing on what families *look like*, the Institute created a definition based on what families *do*, regardless of the family's structure or who performs roles within. A family is any combination of two or more persons who are bound together over time by ties of mutual consent, birth and/or adoption or placement, and who together assume responsibilities for variant combinations of some of the following: physical maintenance and care of group members; addition of new members through procreation, adoption or placement; socialization of children; social control of members; production, consumption, distribution of goods and services; and affective nurturance (i.e. love)."

Families are dynamic. They constantly perform the same functions but adapt how they do so in response to changing social, economic and cultural contexts (Vanier Institute).

There's a constant negotiation and renegotiation between family and culture. Families are shaped by and react to social, economic, and cultural factors, but they have an impact on these same forces as well (via micro-level decisions about family aspirations, labour market participation or lack thereof, and the consumption of goods and services that collectively create change at the macro level over time, as institutions and organizations react to these patterns of behaviour). Families are agents of change, but at the same time they are compliant to the norms of culture to some extent (Vanier Institute).

1.2 History and Context

Modern Context (Statistics Canada)

Family law (cite Robert Bauman CJ):

- **The rates of self-representation in family law matters are especially high**. In the BCCA, 57% of family law matters in 2015 involved a self-represented litigant (compared to 27% in civil matters overall). In the BC Provincial Court, the rate of self-representation in family matters for fiscal year 2014/15 was 41%. Across Canada, legal aid programs cover only a small portion of the legal problems families face, and even then legal aid is available only to those individuals and families of extremely modest income levels.

Household type (cite Statistics Canada):

- **One-person households became the most common type of household** for the first time in 2016 (28.2%); compare this to 7.4% in 1951.
- From 2001 to 2016, **multigenerational households rose the fastest (+37.5%) of all household types**, above the increase of 21.7% for all households. In 2016, 6.3% of those living in private households lived in multigenerational households.
- **Dual-earner couples are now the majority** (of all couples with children under 16) (36% in 1976 ⇒ 69% in 2014).
- **Stepfamilies** comprised 12.6% of all couples with children in 2011.

- **Lone-parent families** comprised 16.3% of all couples with children in 2015.

Children (cite Statistics Canada):

- **There is a decrease in couples with children** (31.5% of all households in 2001 ⇒ 26.5% in 2016). The number of couples without children (+7.2%) is growing faster than those with children (+2.3%).

Marriage (cite Statistics Canada):

- **The percentage share of married couples (of all couples in Canada) decreased** (93% of all couples in 1981 ⇒ 79% in 2016).
- **Common-law unions are becoming more frequent in every province and territory.** In 2016, over one-fifth of all couples (21.3%) were living common law, more than three times the share in 1981 (6.3%).
- **Aboriginal women are less likely to live as part of a couple.** In 2011, 47% of women reporting an Aboriginal identity lived as part of a couple, compared with 57% among non-Aboriginal women.

Overview: History of Family Law

- **Twelve Tables:** one of the first iterations of codified legal principles, used in Rome c. 450 BC. Consisted of 12 tables w diff principles. Some scholars are convinced that FL started with this.
  - One table dealt with paternal power; said that children are things over which the father has ultimate power, that wives can be repudiated unilaterally; etc.
  - **Prof Tremblay:** while some say this is the origin of family law, it takes quite a narrow view of FL; power/ property law focus rather than what she hopes to engage with as FL
- **William Blackstone, Commentaries on the Laws of England, 1765-1769**
  - most famous in FL for the *coverture* concept: a mechanism by which "the very being or legal existence of the [married] woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband".
  - the married woman had a duty to obey her husband and, in turn, the husband offered her protection
  - In BC, it was not explicitly made until 1985 that women and men and marriage had distinct legal personalities when it comes to ownership etc.
  - In Civil Code, married women were of a lesser category than drunkards and feeble-minded people - they were completely incapacitated.

Federal legislation:

- **1968: An Act respecting Divorce, SC 1968-69, c 24**
  - S.3 of the DA 1968 included grounds for divorce, which were: adultery; being guilty of sodomy, bestiality, rape (with a third party), or homosexual acts; going through a form of marriage with another person; or has treated the applicant with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses
  - S.4 of the DA 1968 enabled applicant to seek divorce on misc. grounds (e.g. respondent has been imprisoned of at least 3 years; respondent "grossly addicted" to alcohol or narcotics).
  - Under these schemes, corollary relief of divorce also stuck in a corollary of fault. Focus on amount of spousal divorce you could get
- **1969: Civil Marriage Act**
  - Clear attempt to make difference between religious and civil marriage
- **1982: Charter**
  - Section 15 (equality): a lot of challenges bought in family law to expand understanding of what relationships qualified as family law and deserved recognition.

- Following enactment, challenges brought re: what sort of relationships deserve recognition, both symbolically and instrumentally

- **1985: "Divorce Act" (An Act respecting divorce and corollary relief, RSC 1985, c 3 (2nd Supp))**
  - Most current Divorce Act; current Bill C-78 trying to amend the DA
  - Previously, a spouse needed to be at fault for divorce. With this Act, grounds for marital breakdown no longer based on conduct of parties, but mostly related to living apart for a period of at least one year
  - Still possible to ask for divorce if your spouse committed adultery. However, it will be slightly more complicated. Given time required to go to court, it is often easier to go the no-fault path
  - This DA had effect of limiting logic of finalization both in terms of access to divorce and effects of divorce (e.g. even if you cheated, you still get the same amount of spousal support)
- **1990: Marriage (Prohibited Degrees) Act, SC 1990, c 46**
  - This Act is not very interesting - it is about who you can(not) marry. Codified many common-law impediments to marriage.
- **2001: Federal Law—Civil Law Harmonization Act, No. 1, SC 2001, c 4**
  - Impact on province of Quebec only. This law came to clarify the age of consent to marriage in the province of QC. Before that, QC used to define through Civil Code. Fed gov't not pleased - encroachment of powers.
  - Age was fixed at 16 years old for QC. In BC, age of consent was dealt with through old English law and ecclesial courts. Age of consent was not uniform in Canada til 2015.
- **2005: Civil Marriage Act, SC 2005, c 33 (modified in 2013 and 2015)**
  - Same-sex marriage act; result of many s. 15 challenges in the country.
  - Marriage as "the lawful union of two persons to the exclusion of all others".
  - Modified in 2013 to precise conditions of validity of marriage ~ i.e. age of consent, free consent, etc.

Provincial legislation (BC):

- **1963: Statute Law Amendment Act, SBC 1963, c 42**
  - removed the word "illegitimate children" and replace it with "born of wedlock" ⟶ stigma attached to illegitimacy somewhat lessened
- **1978: Enactment of the Family Relations Act, Law and Equity Act (1985);**
  - narrow understanding of family; e.g. parent-child relationships were only dealt with in terms of child support
- **1985: Legitimacy Act repealed by the Charter of Rights Amendments Act, SBC 1985, c 68 and s 60 and 61 are added to the Law and Equity Act.**
  - province repealed the *Legitimacy Act* to clarify status of children and the status of spouses. The Amendments Act added two sections:
    - s. 61, re: child status, which explicitly said that children equal regardless of not whether they were natural or previously illegitimate or adopted (now repealed)
    - s.60, re: spousal capacity and property, which came to clarify that a married man has a legal personality independent, separate, and distinct from that of his wife, and vice versa (still part of Law and Equity Act)
- **2010: White Paper on Family Law**
  - result of negotiations that began in 2006 in response to discussions on changes to Law and Equity Act
- **2013: Family Law Act**
  - current; provides for detailed parent-child relationships, promotes dispute resolution, includes family violence, assisted reproduction for same-sex couples, children born of surrogacy arrangements, etc.

Provincial legislation (QC):

- **1964: Married women granted legal capacity**
- **1866-1994*: Civil Code of Lower Canada**
  - Inspired by French civil law; no book on family law to follow.
  - QB started process of revamping Code — first book came into force in 1980 and was entitled "The Family". The book included a provision that asserted equality of all children (no legitimacy distinction or distinctions between "natural" and assisted births), dealt with adoption, equality of spouses re: decision-making power, formal conjugal relationships
- **1994-present: Civil Code of Québec**
- **2002: An Act instituting civil unions and establishing new rules of filiation**

1.3 *Critical Analysis: Functions and Tensions in Family Law*

Leckey, "Families in the Eyes of the Law", Tensions in Family Law

Tensions acknowledge difference between law's understanding of family and lived experiences. These oppositions are an inescapable feature of family regulation.

- **Private law vs public law:** Private is law amongst citizens rather than law amongst the state. K is private law, criminal law is public. The private-law model consists of the use of instruments such as Ks and wills. Most effective at formalizing expectations that are conscious and articulable.
- **Instrumental vs symbolic:** instrumental is something that carries out a specific function; it produces a result. Symbolic is for perception and it doesn't actually affect or do anything
- **Formal vs functional:** formal is a defined structure. Functional is about what people do and the very function of the relationship
- **Formal equality vs substantive equality:** formal equality is identical treatment of individuals who are similarly situated. Substantive equality is securing respect for diff individuals that takes their differences into account.

Functions in Family Law

Functions are important because they engage the question of why family law rules exist and what they achieve. They allow us to improve understanding of the regulation of families and helps us to better understand what the word of the law is in familial settings.

John Eekeelar, Family Law and Social Policy

1. **Protective function:** to protect individuals from the harm within the family
2. **Adjustive function:** to provide a machinery for adjusting affairs between individuals when the family unit ends (i.e. family law provides people with rules, courts, principles to adjust affairs between individuals within the family unit)
3. **Support function:** "direct social support to families which are in being" (both public and private support)

Carl Schneider, "The Channelling Function in Family Law"

1. **Protective function:** "one of the law's most basic duties". The protective function is similar to Eekelaar's conception of the protective function. Can materialize in different ways, i.e. protection from economic harm, psychological harm, physical harm, etc. done to citizens by other citizens
2. **Facilitative function:** helps people organize their lives and affairs in the way they prefer (i.e. family law has a facilitative function bc it provides citizens with specific rules already there, for example, with contracts - provides mechanisms to organize lives and affairs within family settings)

3. **Arbitral function: r**efers to the idea that family law should help people resolve their disputes. Puts forward rules and mechanisms that aim at providing certainty in resolving disputes about family matters
4. **Expressive function:** two aspects: passive and active. The expressive function is about law's power to import ideas through words and symbols. Active: provides people with a voice (via ideas, concepts) to talk about their family arrangements. Passive: for sets of identified behaviours that one adopts because they are expressions of mainstream family living.
5. Of family law's functions, the most important, under-analyzed function is the "**channeling function**"
    - "in the channelling function the law creates or (more often) supports social institutions which are thought to serve desirable ends."
    - Schneider argues it is neutral - can include any set of rules or institutions that would channel people's actions in a particular way.
    - Neutrality is complicated; the channeling function is itself neutral, but the social institutions chosen through the function are NOT "normatively neutral".
    - "Social institution" is intended broadly: "In its formal sociological definition, an institution is a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative." Social institutions control human behaviours.
    - Under this function, the task of family law is to create institutions, select institutions, and channel people into them
    - **How does family law channel people into institutions?**
        1. By recognizing certain institutions and endorsing them (e.g. marriage)
        2. Reward participation in certain institutions
        3. Disfavour other competing institutions
        4. Penalization of the non-use of certain institutions over others (e.g. unmarried cohabitation, 60 years ago - no rights; children born under these schemes would've had lesser status)
    - Schneider says this is the hidden function of family law and has been for a long tim**e.** The ultimate goal of the channeling function is that people propagate it out of habit rather than consciously
    - The very idea of social institutions alludes to idea of continuity between past, present, future

Mark Henaghan, "The Normal Order of Family Law"

- Reaction to Dewar article in late 1970s about "normal chaos" of family law that Basically posited that family law was inconsistent, reactionary ~ bunch of developments made in inconsistent way
- Describes Eekelaar's theory of what family should be (or rather personal law)
    - Contrary to Carl Schneider, Eekelaar does not think that the law is about telling people what to do or that institutions should influence decisions about family structure/living.
    - Under Eekelaar's scheme, what is important is that **power should be constrained.** The wrongful exercise of power by the state or family members unto other family members should be constrained, so that we leave space for people to make individual decisions about how to live their intimate lives.
    - The function of family law comes from within; from **identification of values important to individuals.** Law's role is to make sure that it is possible to facilitate individual decision-making.
    - Law's role *should* be to constrain wrongful exercises if power and to leave room for individuals to make free choices about intimate lives. Individual decision-making—or the reality of relationships themselves—should be more important to law than propagating normative ideals about family and life. The individual aspect is so important that he actually proposes to call family law "personal law".
    - However, law isn't there yet (In contrast, Schneider says the channeling function is the hidden function of family law and has been for a long time).

1.3 *Legal Framework and Jurisdiction*

Legal Framework

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- **CA S.91(26): Marriage and Divorce**
  - **essential validity:** essence of marriage, divorce, and some of its effects (spousal support, custody and access, child support)
- **Civil law: Substantive conditions of marriage:** physiological, psychological, sociological conditions
- **Federal legislation:**
  - *Zero Tolerance for Barbaric Cultural Practices Act*
  - *Marriage (Prohibited Degrees) Act*
  - *Civil Marriage Act*
  - *Divorce Act*
  - *Marriage (Prohibited Degrees) Act*
  - *Assisted Human Reproduction Act*

</td><td>

- **CA S.92(12):** The Solemnization of Marriage in the Province
  - **formal validity:** solemnization (ceremonial and procedural requirements) associated with marriage
- **CA S.92(13):** Property and Civil Rights in the Province
- **CA S.92(14):** Generally all Matters of a merely local or private Nature in the Province.
- **Civil law: Formal conditions of marriage:** publication, prenup medical exam, parental consent, solemnization

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- Family Law Act
- Vital Statistics Act
- Adoption Act
- Child, Family and Community Service Act
- Marriage Act

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- Family Law Act
- Matrimonial Property Act
- Adult Interdependent Relationships Act
- Child, Youth and Family Enhancement Act
- Vital Statistics Act
- Marriage Act

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- Children's Law Reform Act
- Family Law Act
- Family Services Act
- Vital Statistics Act
- Marriage Act

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Book 1 — Persons
- Title 1: Enjoyment and Exercise of Civil Rights
- Title 2: Certain Personality Rights
- Title 3: Certain Particulars Relating to the Status of Persons
- Title 4: Capacity of Persons
- Title 5: Legal Persons

Book 2 — The Family
- Title 1: Marriage
- Title 1.1: Civil Union
- Title 2: Filiation
- Title 3: Obligation of Support
- Title 4: Parental Authority

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Jurisdiction in British Columbia

	Supreme Court	Provincial Court
Divorce	Yes	
Care of children	Yes	Yes
Time with children	Yes	Yes
Child support	Yes	Yes
Children's property	Yes	
Spousal support	Yes	Yes
Family property and family debt	Yes	
Protection orders	Yes	Yes
Financial restraining orders	Yes	

Empowered by	Supreme Court of BC "BCSC")	Provincial (Family) Court of BC ("BCPC")
Other matters of note	• Inherent jurisdiction, including *parens patriae* jurisdiction and jurisdiction in equity • Statutory jurisdiction • Governed by Supreme Court Family Rules • refers to parties as **claimant** and **respondent**	• Statutory jurisdiction only • Governed by Provincial Court (Family Rules) • refers to parties as **applicant** and **respondent**
Family Law Act	**Domestic orders:** • Determination of parentage • Guardianship of children • Parenting arrangements • Contact with a child • Relocation of guardians and children • **Child support** • **Spousal support** • Protection orders • Conduct orders and case management orders • Variation and enforcement of orders • Setting aside and enforcement of agreements • Family property, family debt and excluded property • Ownership and division of foreign property • Care of children's property	**Domestic orders:** • Determination of parentage, if necessary to resolve claim within court's jurisdiction • Guardianship of children • Parenting arrangements • Contact with a child • Relocation of guardians and children • **Child support** • **Spousal support** • Protection orders • Conduct orders and case management orders • Variation and enforcement of orders • Setting aside and enforcement of agreements • Enforcement of Supreme Court orders for parental responsibilities, parenting time, and contact with a child
	Foreign and extra-provincial orders: • Enforcement and superseding of foreign orders for guardianship, parenting arrangements and contact	**Foreign and extra-provincial orders:** • Enforcement and superseding of foreign orders for guardianship, parenting arrangements and contact
Divorce Act	**Domestic orders:** • **Divorce** • Custody of children • Access to children • **Child support** • **Spousal support** • Variation and enforcement of orders	*None*
	Foreign and extra-provincial orders: • Validity of foreign divorce orders • Provisional variation of extra provincial support orders	

192.BC Supreme Court jurisdiction

(1) Subject to the Divorce Act (Canada), the Supreme Court has jurisdiction in all matters under this Act.

(2) Subject to the Divorce Act (Canada), the Supreme Court continues to have jurisdiction in all matters respecting marriage and divorce.

(3) Nothing in this Act limits or restricts the inherent jurisdiction of the Supreme Court to act in a *parens patriae* capacity.

193.Provincial Court jurisdiction

(1) Subject to the Divorce Act (Canada) and subsection (2) of this section, the Provincial Court has jurisdiction in all matters under this Act.

(2) The Provincial Court does not have jurisdiction to make an order under (a) Part 3 [Parentage], except as necessary to determine another family law dispute over which the Provincial Court has jurisdiction, or (b) Part 5 [Property Division], 6 [Pension Division] or 8 [Children's Property].

(3) Nothing in ss. (2) (b) of this section prevents the Provincial Court from making an order under Part 9 [Protection from Family Violence] restricting access to a residence for the purpose of protecting the safety of a family member occupying the residence

194.Overlapping court jurisdiction

(1) If a proceeding respecting a family law dispute may be started in either the Supreme Court or the Provincial Court, the starting of a proceeding in one court does not prevent the starting of a second proceeding in the other court, unless the relief applied for in the second proceeding has already been granted or refused in the first proceeding.

(2) If proceedings are started in both courts and each court may make an order for the same relief, the making of an order by one court does not prevent an application for an order in the other court unless the relief that is the subject of the application to the other court has already been granted or refused by the first court.

(3) If proceedings are started in both courts, a court, on application and to the extent that the matter is within the court's jurisdiction under section 192 [Supreme Court jurisdiction] or 193 [Provincial Court jurisdiction], as applicable, may do one or more of the following: (a) decline to hear a matter; (b) decline to hear a matter until another matter under this Act, or under any other law of British Columbia or Canada, has been heard in the other court; (c) consolidate proceedings started in the other court with proceedings started in the court; (d) hear a matter.

(4) Despite subsection (2), the Supreme Court may change, suspend or terminate, under section 215 [changing, suspending or terminating orders generally], an order of the Provincial Court if (a) the Supreme Court is making an order that affects an order of the Provincial Court, and (b) the parties would have to go back to the Provincial Court to have the Provincial Court's order changed, suspended or terminated as a result.

(5) If the Supreme Court acts under subsection (4), the Supreme Court's order is deemed to be an order of the Provincial Court for all purposes.

(6) Nothing in this section authorizes the Supreme Court to change, suspend or terminate an order of the Provincial Court if the Provincial Court has refused to change, suspend or terminate the order, except as provided under section 233 [appeals from Provincial Court orders].

2. Parent-Child Relationships

2.1 Introduction

Parental status regards the **legal recognition** of one's status in relation to their child. A person with parental status could theoretically have limited parental responsibilities.

Parental responsibilities are associated with status, but one can have responsibilities even if they are not recognized as a formal parent. Owing support to a child does not make one a parent, in law, of that child.

Two forms of parental status are **filiation** (civil law) and **parentage** (common law). These are legal constructs and are **NOT interchangeable terms.** For example, parentage encompasses **1 or more parents. Filiation** encompasses **1 or 2 parents.**

Parent-child relationships often involve **division of powers** and are telling of **assumptions about who is or who is not a fit parent.**

History: BC Legislation

In British Columbia, part 3 of the **Family Law Act** provides a comprehensive scheme for determining who a child's parents are, whether the child is born through natural or AR. This part establishes legal parentage for all purposes of the law in BC. A person who is defined as a parent under this part is a parent under all laws of BC.

The former law was inadequate; unlike other Canadian provinces, BC did not have comprehensive legislation governing the rules for determining a child's parentage, especially for children born through AR. The **Law and Equity Act** only states that, subject to the **Adoption Act** and the **Family Relations Act**, "a person is the child of his or her natural parents"—three sections were related to parentage, which were related to support rather than the establishment of parent-child relationships.

In 2013, part 3 of the FLA replaced the parentage provision in the Law and Equity Act.

The **Family Relations Act** deals with determining parentage only when it is disputed in a child support case. There is no general authority in the Family Relations Act for judges to make declarations of legal parentage.

History: Paradigm Shifts

- **Pre-1980s: Legitimacy** — the idea that parent-child relationships recognized in law stemmed from **marriage.**
  - Legitimate children were born within wedlock and illegitimate/bastardized children were born out of wedlock. Children born to an unmarried woman were considered *filias nillius* (a child of no one), and were not recognized in law.
  - The husband was presumed to be the father of the child born to his wife. This presumption of paternity was the strongest proof of filiation. In civil law it was irrefutable.
- **1980s to mid-1990s: Naturalness** — equality provisions regarding birth inside and outside marriage; replacement of notion of legitimacy by "natural children" (children related by biogenetic connection)
  - **1980:** act passed in QC required equal treatment of children regardless of the conjugality of their parents.
- **Mid-1990s and onwards:** Multifactorial — paradigm of naturalness was quickly foiled because of advances in how people reproduce and growing societal importance of other models for family life. Now, filiation and parentage are understood as being informed by multiple factors.

Throughout these paradigmatic shifts, the equality of children and the notion that they should not be penalized for the actions of their parents or circumstances of their birth have been the driving forces for legal reform. However, although *prima facie* these reforms were about making children equal, they were also about balancing broadening variety of groups and parents engaging in the legal system.

What makes a parent in law? (includes Abraham, Boyd, Campbell, Cossman)

FRAESS V. AB (AG) (2005, ABQB)

Facts — Married same-sex female couple having a child via AR. Fraess gave birth to child. S. 13 of the AB FLA conferred parental status on a male partner where a child was conceived through AR without his sperm if he consented in advance of conception to being a parent. Fraess learned that for her female partner to have parental status, they would have to conclude a step-parent adoption. **Fraess applied for a declaration that s. 13 violated s.15(1) equality rights of the Charter and to read into s. 13 the words necessary to make int conform with the Charter.**

Held — **Allowed application *and* laid out some elements that the law should look to when trying to identify child's parents: (a) strictly biological connection to child; (b) intent of candidate parent to create a P-C relationship; (c) a combination of the two; (d) candidate parent's relationship to someone with a biological connection to child.**

Haim Abraham's 5 approaches to parental status allocation

1. **Marital presumption**
   - a child born in wedlock will be assumed the husband's child unless contradictory evidence exists
   - importance placed on the romantic relationships of the parents
2. **Psychological**
   - emphasis lies on the perception of the adults and children, and whether they see themselves as a family and identify as parents and children
   - perception of the public in identifying the relationship as parent-child is also important
3. **Functional**
   - the courts should recognize an individual as a parent if she acted as one in a regular way
   - overlap with intention-based approach — a person must act intentionally as a parent for a significant period of time in order to be recognized as a parent; the more responsibilities taken the more likely it is that the court will give a legal consequence to these actions
4. **Genetic-biological approach**
   - the genetic approach focuses on the genetic contribution to the child's DNA.
   - the biological approach adds another layer, and considers not just DNA but also general biological contribution to the child's birth.
   - in this sense, the genetic parents can also be described as the biological parents, but the reverse is not necessarily true.
   - the main contribution of the biological approach is in its use in AR, where there is a need to distinguish between the genetic parents and the gestational parent. Even when the latter has no genetic relation to the child, s/he could be considered as a biological parent.
   - gendered — different application to male and female parents (see Boyd, Cossman)
5. **Intention-Based**
   - parental status is determined according to the individual's intention to assume such a role

Susan Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility"

- Article suggests a feminist approach to determination of legal parenthood drawing on literature about gendered nature of parents in the law, father's rights and the fragmentation of parenthood.
- Family law has become largely gender neutral because of increased recognition of same-sex relationships and influence of father's rights lobby
  - Father's rights movement stresses bio-genetic ties and say its irrelevant that parents' rights are constrained by relationship with child's mother

- Pro-contact modern family law demonizes mothers who don't nurture contact between kids and fathers
- **Bio-genetic model:**
  - Mainly an approach that favours paternal rights
  - Does not take into account the best interests of the child
  - Neglects alternative family forms (homosexual couples, single mother etc.)
  - It is increasingly irrelevant to the determination of legal parentage whether a man has a relationship with the mother of the child
  - A mother's biological connection with a child tends to impose an automatic social relationship (this may not be the case with a biological father)
  - Biology is interpreted differently for women and men;
  - The "genetic tie could be seen as 'a bond among others, that forms the basis of a more important relationship developed in love and caring"
- **Feminist approach to P-C relationships:** Boyd acknowledges that there is a tension bwn gendered analysis and inclusion of same-sex families, but argues that focusing on gender is necessary. "Status of fathers has been strengthened, whereas the caregiving labour and responsibility of mothers is often, and possibly increasingly, undervalued or rendered invisible"
- **Fatherhood and motherhood are becoming increasingly fragmented**
  - Increasing openness to idea that it is in BIC to have more than one man having fatherhood recognition
  - Motherhood is also experiencing fragmentation – no longer just defined by gestation and birth.
  - However, fragmentation of motherhood/fatherhood is occurring in different ways and not gender neutral manner
  - Biological fathers can choose to develop social tie with children (i.e. genetic testing) but biological mother's connection imposes automatic social relationship
  - Maternal legal status still connected to caregiving role so given only if woman fulfills biological and behavioural requirements (i.e. giving birth to the child)
  - Hence lesbian mothers who didn't give birth to their children struggle to be legally recognized
  - Reproduction technologies (i.e. genetic testing, surrogacy) place "asymmetry of filiation law in sharp relief"
  - Determinations of parenthood have reinforced hierarchies based on race and racism, class and patriarchy.
  - Western family law privileged male seed over female growing of children – i.e. "child of no one" when unmarried woman even though had genetic link to mother
  - Legal system seems ambivalent about genetics role in relation to legal parenthood responsibilities (i.e. genetic emphasis = fathers responsible for child support regardless of intended actual social relationships between them — but so can social fathers)

TROCIUK V. BC (AG) (2003, SCC)

Facts — Mother and father were an estranged married couple who became parents to triplets. When filling out the birth registrations, mother indicated that the father was "unacknowledged by the mother" and that they were not together at the time. Consequently, she put her surname as the kid's surnames. Father wishes to amend records to include his particulars.

Held — **Unanimous decision ruled in favour of the father.** Father's intention + his biogenetic tie won out over the birth mother's biogenetic tie and intention (that is, to have her partner be the parent of her child). Emphasizes the the formal rather than functional aspects of parental status – the biological connection and blood lines of kinship over connection and care for children. Illustrates that the power that mothers accrue is by no means determinative for establishing parentage even when they are responsible for care and well-being.

- **Intentionality**
  - Boyd advocates for a "thick understanding" of intention. In her opinion, intention is contextual (social, political and gendered contexts).
  - Needs to be stripped of its "liberal individualism" that would strip intention of its social, political, and gendered contexts
  - Focus on who is actually doing the work and labour that goes into parenting
  - Gives more weight to social ties (but does not completely supplant biogenetics)
  - Sexuality and procreation is increasingly uncoupled technologically and socially
  - **Concerns:** whose intent is prioritized? How? When? What about when there are competing intentions? Does intent have to be reciprocal, mutual? At what point in time should these intentions be formed, before conception, before birth, after birth?
  - Intent is hard to determine and is interpreted differently for women and men.

Angela Campbell, "Conceiving Parents through Law"

- Article considers the way law attributes parental status in assisted reproduction circumstances and advocates for child-centric understanding of parent-child relationships
- Filiation and parentage "is always a constructed or attributed status (as opposed to one based solely on biology of genetics), which results from prescriptive choices and normative imaginings about family life". Western legal traditions acknowledge that parent-child relationship can exist absent a "natural" connection – i.e. adoption
- Law doesn't engage with actual relationships that are lived and experienced by children *or* "nature"; often it is more representative of the societal values (i.e. social and cultural imperatives) it is employed to protect.
- At the same time, it would be a mistake to assume that genetic realities have no bearing upon parental status. The rules of filiation are set up with a view to mimicking 'natural' filial relationships even where, in reality, a biological link between adult and child might not exist.
- **Goal**: to author normative framework for rethinking parenthood in context of reproduction
  - Illuminate frailty to dichotomy in Canadian common law and QB civil law between "natural" and "attributed/adopted" filiation
  - Understand that parenthood by law always constructed or attributed statute – not just biology/genetics – from prescriptive choices and normative imaginings of family life
- **Three part framework in her analysis of determining parentage:**
  1. **Biological Connection**
     - Example: sperm donor in same-sex partner of birth mother is more recognized as parent than partner of same sex partner
     - Locating parenthood should be more than tracing a child's genetic heritage nevertheless blood based connections and genetic factors continue to be a part of judicial analysis
  2. **Contractual Intentions regarding parenthood**
     - The courts attempt to locate parental status in complicated situations or cases such as assisted procreation situations and pay attention to the intention of the parties when they are locating status of parenthood
     - As a result intention of parenthood plays a big role in complex situations
     - Example of K bwn surrogate mother and genetic parent and court's statement of it: all parties intended that the genetic parents would be the child's parents and that they would raise them as their child, the surrogate who gave birth to the child consents to the genetic mother being recognized and registered as legal mother of the child

- In Quebec, in the context of AR, the language of the Civil Code provisions makes you look at intentions of parties and agreements prior to birth of child. **Article 538:** a person needs to consent before conception and decide to take on parenting role in order to be a considered a parent in the context of assisted reproduction. If there is a 3rd party that does not want to be in a parenting role – they will not be seen as a 3rd parent
  - This form of looking at intention was, in 2007, mainly done in Quebec and the Quebec's Civil Code. Be careful as it is not the case today

3. **Rule of Social Relationships**
   - A person's volition or desire to be a parent is dynamic, changes and varies over time. Intentions through time can change. For e.g. you can state that you do not want a child but you can over time want that child
   - A child's best interest does not always correlate with how the law labels and determines parentage
   - When courts make decisions about parenthood they examine social relationships that may be crucial to a child, the impacts of such relationships will be especially looked at when they are determining their final analysis and the courts weigh what is in the best interests of their child

- Campbell's standpoint: **the way things are now in our legal system, we do not always achieve coherence and equitable outcomes for the child**

Brenda Cossman, "Parenting Beyond the Nuclear Family: Doe v Alberta"

DOE V. ALBERTA (2007, ABCA)

Facts — Jane and John in an unmarried relationship. Jane wants a child and John doesn't. They agree to continue the relationship as Jane has a child via AR using sperm from anonymous donor, drafting a written agreement that John would not have any obligations towards the child. **Is a private contract to opt out of parental obligations for non-biological child effective in law?**

Held — **Contract of no effect.** The concept of parental standing is made at a relationship's dissolution and cannot be determined, while child support obligations are viewed as the right of the child — it cannot be bargained away. The freedom to make decisions about family choices is subject to the rights of the child.

- ***Doe v. Alberta*** raises questions about the legal recognition of alternative families.
  - Reminiscent of the constitutional challenges by queer couples (but arguably, the flip side of the coin). Queer couples challenged the assumption in law that those not in a nuclear heterosexual couple could not be parents. Here, it is a challenge to the idea that those in a nuclear family must be parents
  - Case unsuccessfully challenged a key assumption of the nuclear, heteronormative familial model: that "a partner of the mother = the father of the child"; that there needs to be two parents (specifically a mother and father).
  - The ABCA's reasoning, when out of the context of the nuclear family (e.g. if she were living with her brother, the same assumptions would not be made in law), it doesn't work anymore.
- Cossman argues that the ABCA did not respect the intention, autonomy, or liberty of the parents.
  - By focusing on **intention** of an individual to be a parent, their liberty and autonomy are better respected
    - At the same time, social parenting is enough without intention, particularly b/c individuals can be social parents under s. 48 of AB FLA regardless of their express intentions
  - The decision denigrates the real caring that comes with being a **social parent** and dilutes it to simply to the intimate relationships of the mother of the child.
    - In the context of alternative family forms, social parentage is an integral part of relationships between adults and children.

- **Possible s. 7 challenge argument** – infringing upon John and Jane's Charter rights by enforcing obligation upon him to have parental status; right to life and liberty should allow them to define their relationship to the child and to each other
  - The scope of parental liberty rights is uncertain in Canadian law, but the SCC held – in a different context – that parental rights were 'included within ambit of security of the person in s. 7 of the Charter'

Comparison of author's views

- All authors either prefer intention or at least treat it as equally important to genetics
  - But how to measure intention is problematic. If your intention differs too much from the heteronormative nuclear family model, then it may not be recognized
- All authors warn us of legal imagination's limits in the context of P-C relationships and of the importance of questioning intuitive or mainstream assumptions.
- But the different articles recognize different definitions of what is sufficient to be a father
  - **Cossman**: says that courts assume being in a sexual relationship with the mother of a child = being a father, even if another man's sperm created child. That being said, it is important for us to keep in mind that John Doe in ***Doe v. Alberta*** was not declared a father by the ABCA. What the court said is that in the future, John Doe could meet the requirements of a social parent in s. 48 FLA and that it is impossible to 'contract out' of such a status.
  - **Boyd**: says courts assume that if two women have a child with a sperm donor, the person who carried the child is the mother and the sperm donor is the father. The other woman being in a sexual relationship with the mother doesn't also make her a mother
- While they recognize different definitions, they would agree that the threshold for "father" in law is low compared to what is expected of women. The mother's biological relationship with the child imposes a P-C relationship. However, this is not the case for men.
- **All 3 authors would agree with that:**
  - Bio-genetics and intention are important factors
  - Most view intention as equal to if not carrying more weight than biology
  - Gendered assumptions are made in determinations of P-C relationships in law
- **Differences:**
  - **Perspectives**: Boyd takes feminist approach, Campbell takes child-centric approach, Cossman alludes to queer theory and gender-neutral norms (in putting emphasis on adult choices, gender-neutral norms and on social parenting).
  - Boyd and Cossman look at intentions of parents; Campbell looks at intentions of child and argues that intention can manifest through actual social relationships.
  - Boyd tends to view women as in a vulnerable and less powerful position – especially some women with intersectional vulnerabilities (race, sexual orientation, matrimonial status (or absence thereof)), whereas Cossman seems to view men and women as in equal positions

Parens Patriae Jurisdiction

The special ***parens patriae* jurisdiction** empowers the court to "act in the stead of a parent for the protection of a child" or bridge a gap in the legislation. For the gap to be filled, the gap must not be something that was created deliberately by the legislature.

See ***AA v BB***, in which the SCC held that the court had *parens patriae* jurisdiction to fill a legislative gap and recognize a third parent for the child.

In British Columbia, s. 192 of the FLA grants the **BCSC** (not BCPC) inherent jurisdiction to act in a *parens patriae* capacity.

2.2 *Parentage and Filiation – Typology and General Rules*

General Principles: Common Law vs. Civil Law

Common Law	Civil Law
Parentage refers to parent-child relationships	**Filiation** refers to parent-child relationships
Parentage is unitary (i.e. an individual recognized as a parent in the BC FLA is a parent for all purposes of the law in the province) — made clear and explicit from statutes	Filiation is unitary (i.e. an individual recognized as a parent in the QCC is a parent for all purposes of the law in the province) — given the formal nature of "parental status" in civil law, no need for an explicit statement of unitary nature
Allows for more than one parent	Only allows for two parents
Law generally proceeds using **induction**: looking at specific facts and then trying to find principles that apply to situation	Law generally proceeds using **deduction**: looking at general legal principles and trying to apply them to specific situations
Common-law provinces will generally work under the *Vital Statistics Act* + *Family Law Act* (or *Child Law Reform Act* for ON) scheme.	**Art 522 CCQ** is explicit about the equality of children regardless of the type of filiation. **Art 523-537** CCQ refers to filiation by blood. **Art 538-542** CCQ refers to children born of assisted procreation. **Art 543** CCQ refers to adoption. There is no VSA in Quebec, and the idea of 'registration' does not transfer very well. The law of persons deals with the act of birth and the step required to obtain one. The act of birth is also the primary proof of filiation.

Types of situations

	BC	ON	Civil Law
No assisted reproduction	20, 26, BC FLA	1, 6, 7, ON FLA	Filiation by blood (523-537 CCQ)
Assisted reproduction (general)	20, 24, 27, BC FLA	1, 5, 8, ON FLA	Filiation of children born of assisted *procreation* (538-542 CCQ)
Assisted reproduction (surrogacy)	20, 28, BC FLA	10, 11, ON FLA	N/A (see 541 CCQ)
Assisted reproduction (multiple parentage aka other arrangement)	20, 30, BC FLA	9, ON FLA	N/A (see 532 para 2 CCQ)
Adoption	25, *Adoption Act*	4(2), *Child and Family Services Act*	Adoption (543 and *ff*)
Other options?	31	13	N/A

General Parentage Rules in British Columbia

The parentage scheme in BC operates under two different statutes:

- The **Vital Statistics Act ("BC VSA")** deals with registration and issuance of birth certificates
- The **Family Law Act ("BC FLA")** is concerned with parentage rules

BC VSA

- The VSA provides for structures and administrative boards in which vital elements (e.g. birth) are recorded and kept track for state purposes
- Allows for setting of birth records that will facilitate many administrative functions (e.g. passports, health)
  - Birth records also have a symbolic and instrumental impact; sends message about who can/cannot be a parent in law
- Who can register as a parent in law is much more sophisticated than it used to be. There are 3 steps that must be taken for registration:
  1. **Notification (s. 2):** The notice of birth, whereby a third party will report that a child is born to the state. It must do so within a certain time limit (48 hours).
  2. **Registration/reporting (s. 3):** must be done, generally within 30 days, by the parents. How it is accomplished depends on the situation of the parties; e.g. different forms for assisted vs. unassisted reproduction.
     - It is possible to accomplish late registration, but requirements will be slightly different.
     - Note that commemorative birth certificates, while decorative, are not official documents.
  3. **Birth certification:** creates record of birth in province. Copies are issued to certain people by registrar general; only persons listed under 36.1 VSA can ask for birth certificates.
     - They must contain certain information are found in 36.2 VSA: Name of person; Date of birth; Place of birth; Sex of person; Date of registration; Serial number.
     - It is extremely important that nothing appears which indicates that children were born out of assisted reproduction or adoption – wouldn't want people to discriminate based on how a child was conceived.

BC FLA

- Parentage is dealt with in Part 3.
- General rules are different for assisted births and unassisted births (assumed in the common law to be **produced via intercourse)**
- **S.20 defines "assisted reproduction"** ("reproduction not produced via intercourse"). But definitions differ from province-to-province; look to relevant statute to find correct definition and don't make assumptions about what it means.
- **S. 23** of the FLA refers to the unitary idea of parentage.
- Parentage in situations of adoption are not dealt with under the FLA – its absence is specified under s.25 of the FLA, and adoption is dealt with via *Adoption Act* instead.
- **S. 26** of the FLA deals with parentage if there is no assisted reproduction; contains a set of assumptions regarding who a child's biological father is (i.e. will assume the following people to be biological fathers):
  - S.26(2)(a): if he was married to the child's birth mother on the day of the child's birth
  - S.26(2)(b): if he was married to the child's birth mother and, within 300 days before the child's birth, the marriage was ended by his death, judgment of divorce, or marriage was rendered void and voidable.
  - S. 26(2)(c): if he married birth mother after child's birth + child acknowledges he is the father

- S. 26(2)(d): if he was living with the child's birth mother in a marriage-like relationship within 300 days before, or on the day of, the child's birth;
- S. 26(2)(e): signing a statement under s.3 of VSA
- S. 26(2)(f): refers to old law about child paternity support. If in the past, he paid child support, still presumed to be father of child today. Realistically, considering age of children this would apply to, likely that you would never apply this.

- If more than one presumption applies to more than one persons, you cannot use any of the presumptions. If you cannot use any of the presumptions, it means that there is a dispute or uncertainty as to who the child's father is. Given uncertainty, go to s. 31 – go to court and have declaration of parentage.
- Note that there are no presumptions whatsoever when it comes to who the birth mother is.

General Parentage Rules in Quebec ("Filiation")

There is no VSA in Quebec, and the idea of 'registration' does not transfer very well. The law of persons deals with the act of birth and the step required to obtain one. The act of birth is also the primary proof of filiation.

Parent-child relationships are referred to as "**filiation**", of which there are 3 types:

- Blood (functional equivalent of **unassisted reproduction)**
  - divided into two sections: div 1 process, div 2 actions
- Assisted procreation
- Adoption

Filiation is found under Book II, Title II: Filiation. General provision 522 says all children whose filiation is established have the same rights and obligations regardless of circumstances of their birth.

Book 2: Family; Title 2: Filiation; Chapter 1: Filiation By Blood
Division 1: Proofs

- **Art 523:** Paternal filiation and maternal filiation are proved by the **act of birth,** regardless of the circumstances of the child's birth. In the absence of an act of birth, uninterrupted possession of status is sufficient.
- **Art 524: Uninterrupted possession of status** alludes to continuity and must start at birth of child (i.e. actions taken prior to birth kind of irrelevant for filiation by blood). Consists of 16-24 months of uninterrupted caring for the child. Allowing this means permanent parental status, even if later it is found out that the parent does not have a biological connection to the child
- **Art 525:** Presumption of paternity. Narrower in scope—will only apply to formal *de jury* spouses (married/civil union; does not apply to *de facto* MLR/conjugal relationships).
- **Arts 526-529:** voluntary acknowledgement of parentage. Impact of acknowledgment is very limited (only binding on the volunteer, not the other parent). Does not apply to maternal filiation in practice. Realistically, never used.

Book 2: Family; Title 2: Filiation; Chapter 1: Filiation By Blood
Division 2: Actions (Claiming or Contesting a Status)

- **Art 530:** No one can contest filiation if there has been title and uninterrupted possession of status.
  - This reinforces bi-parental model because it is not possible to add another relationship; must first contest relationship already existing before adding another relationship.

- **Art 531:** Who can contest filiation, if act of birth and uninterrupted possession are not consistent — only certain people can have standing, and action can only be taken in the first year by the presumed mother or father
- **Art 535.1:** Can use DNA to contest filiation

Birth Certification

To obtain birth certification, procedures are similar to BC:

- **Attestation of Birth = Notification. (Book 1, Title 3, Ch 4, Div 3, Art. 111)** Attestation of birth is done by the person who helped deliver the baby (*accoucheur*). Filed by 3rd person, sent to state, parents given a copy. Attestation identifies child and mother (no particulars as to who second parent is).
- **Declaration = Reporting. (Book 1, Title 3, Ch 4, Div 3, Art. 113, 115)**
  - Must be done within 30 days of birth of child.
  - The law is clear as to who can declare a child: **the father or mother** (QC does not use the term "parents"). However, there is an exception for married spouses (if you are in a married or civilian relationship), where one of the spouses may declare the filiation of the child with regard to the other. This cannot be done if you are in civil union that is functional but not formal.
  - The weight of birth certificate is more significant. Not only registration of document, it is also primary proof of filiation. Filiation of child is locked if uncontested after a few months.
  - Art 115 specifies what needs to be in the declaration: name, sex, place of birth, date of birth, mother and father's names, etc.
- **Act of birth = Birth certification.**

General Parentage Rules in Alberta

General parentage rules in Alberta are very similar to their BC counterparts — both use a VSA/FLA model.

However, there are differences in the AB VSA. While in BC, parents have 30 days to register the child for the purposes of birth certification, in AB the mother must complete a registration form before she leaves the hospital (s. 3, AB VSA).

According to Prof. Tremblay, the AB scheme is less coherent; rather than coming up with rules, came up with scenarios → risky because it is difficult to foresee all possible situations.

The first part of the FLA contains rules to establish parentage:

- **S. 1**: provides definitions (note there is no definition of "assisted reproduction here)
- **S. 3:** concurrent jurisdiction within different AB courts. Outlines exclusions for certain types of actions that are listed for s. 3 (including parentage when it comes to surrogacy)
- **S 5.1:** definitions for this Part on establishing parentage.
- **S 7:** general rules of parentage
  - **(1):** similar to BC → alludes to unitary concept of filiation
  - **(2):** states that parents are birth mother and biological father
    - **(b):** will be parents if AR parentage rules apply
    - **(c):** adoption dealt with under *Child, Youth and Family Enhancement Act*
  - **(3):** defines what a donor is; excludes them from parentage (BC FLA s. 24 equivalent)
  - **(6):** equality of children regardless of circumstances of birth
- **S 8:** presumptions of parentage
  - Only applies to general rules; similar to BC/ON (e.g. if married to birth mother when child was born → presumed to be biological father)

- **S 9:** declarations regarding parentage (affirming or denouncing)
- **S 10:** deals with new evidence on the basis of which a court may confirm, set aside, or replace a declaration of parentage.
- **S 11:** notice of application requirements for declarations of parentage
- **S 14:** evidence that is not admissible regarding determinations of parentage
- **S 15:** blood tests, DNA tests. Similar to BC — cannot force someone to take a blood test but can draw a negative inference upon a refusal to comply with a test

Children's Law Reform Act (Ontario)

- Operates under under same assumptions as BC FLA and conducting P-C relationships in similar ways
- Adoption is dealt with in the CFSA (Child and Family Services Act)
- ON uses a "birth parent + parent" model.
  - This alludes to different gender identities and different biological capabilities. Also sends a more neutral message about who has status in law (e.g. mother status vs parent status)
- **s 4(1):** a person is a child of his or her parents
- **s 4(2)(a):** parent is a parent under the CLRA 4(2)(d) but can also be a parent under the CFSA (adoption)
- **s 4(4):** for all the purposes of the law in ON a child is a child for their parents
- **s 6(1):** the birth parent of a child is, and shall be recognized in law to be, a parent of the child. The exception is for surrogates.
- **s 7:** deals with parentage
  - **S. 7(1):** non-assisted paradigm: if sperm is used, other bio parent is the parent from whom the sperm originates.
  - **S 7(2):** presumptions of parentage
  - **s 7(3):** conflicting presumptions. If circumstances exist that give rise to a presumption by more than 1 person under (2), no presumption shall be made under that subsection
  - **s 7(4):** This section is deemed not to apply to a person whose sperm is used to conceive a child through sexual intercourse if, before the child is conceived, the person and the intended birth parent agree in writing that the person does not intend to be a parent of the child.
    - **s 7(5):** a sperm donor is not a parent aka person who meets (4) is not a parent

2.3 Assisted Reproduction

Assisted reproduction ("AR") is defined in **s. 20 of the BC FLA** as a "method of conceiving a child other than by sexual intercourse". Similar definitions are found in Alberta and Ontario. There is no federal definition.

AR alludes to various practices, including in vitro fertilization ("IVF"), gamete (egg and sperm) donations, donor insemination, and surrogacy. It can happen medically (i.e. at a doctor's office) or broadly (i.e. sexual orientation).

AR in the Assisted Human Reproduction Act

The Assisted Human Reproduction Act ("AHRA") is a federal act applicable throughout Canada. It attempts to regulate AR largely by setting forward certain principles to be respected regarding AR practices and prohibiting certain activities. Prof. Tremblay thinks it is riddled with holes and regulates AR poorly, reflecting a void of actual direction or regulation regarding AR practices.

History

- **1989**: Baird Commission established to stud AR — resultant report expressed concern about certain practices in the field and pressed for legislation
- **1993-1995:** Federal government consulted provinces, territories, independent groups on AR
- **2004:** AHRA enacted — uses criminal law power to regulate AR practices
- **2008:** AG of QC submitted a question asking if AHRA was *ultra vires* and encroaching on provincial powers.
- **2009-2010:** ***Reference Re Reproduction Act:*** 4 judges decided that the impugned provisions were valid. 4 said invalid. 1 said some valid, some invalid.

Sections of Note

2. **Declaration — sets out certain principles should be respected in AR practices**: health and well-being of children born through AR; impact of AR on women; free and informed consent; anti-discrimination against those who use AR; preservation of human individuality, diversity and the integrity of the human genome
3. **Definitions** — no definition of AR is included.
5. **Prohibited procedures** — no cloning, sex selection, creation of hybrids and chimeras, etc.
7. **Purchase of gametes/embryos/other reproductive material** — no person can purchase, offer to purchase, or advertise the sale of gametes/embryos/other reproductive material from a donor or their agent
8. **Use of reproductive material/in vitro embryo without consent** — *One of the only sections that actually have regulations that are in force*. General use of reproductive material/in vitro embryo will need written consent in accordance with the regulations, including posthumous use of a dead donor's materials.
9. **Gametes obtained from a minor** — cannot obtain/use the gametes of a donor under 18 years of age unless for preservation or creating a human life that the person reasonably believes will be raised by the donor.

AR in British Columbia (BC FLA)

What is AR?

20. **(1) Definitions:**

"assisted reproduction" means a method of conceiving a child other than by sexual intercourse;

Who are the parties involved?

"birth mother" means the person who gives birth to, or is delivered of, a child, regardless of whether her human reproductive material was used in the child's conception;

"donor" means a person who, for the purposes of assisted reproduction other than for the person's own reproductive use, provides their own human reproductive material or an embryo

"embryo" means a human organism during the first 56 days of its development following fertilization or creation, excluding any time during which its development has been suspended, and includes any cell derived from such an organism that is used for the purpose of creating a human being;

"human reproductive material" means a sperm, an ovum or another human cell or human gene, and includes a part of any of them;

"intended parent" or **"intended parents"** means a person who intends, or 2 persons who are married or in a MLR who intend, to be a parent of a child and, for that purpose, makes an agreement with another person before the child is conceived that

(a) the other person will be the birth mother of a child conceived through AR, and

(b) the person(s) will be the child's parent or parents on the child's birth, regardless of whether that/those person(s) human reproductive material was used in the child's conception.

(2) A child born as a result of assisted reproduction is deemed to have been conceived on the day the human reproductive material or embryo was implanted in the birth mother.

Parentage

24. Donor not automatically parent — Where there is AR used to conceive a child, donors of any genetic material are NOT presumed to be the child's parents.

Parentage if AR where all parties are alive

27. (2) The child's birth mother is a parent, even if the birth mother is not genetically related to the child.

(3) In addition, the person married or in a MLR with the child's birth mother (i.e. her spouse) is a parent unless there is proof that (a) the person did not consent or (b) withdrew consent to parentage.

- Note that the form of consent is not specified.

Parentage if AR after death

28. (1) Applies if

(a) a child is conceived through AR,

(b) the donor (i) provided the reproductive material for their own use (i.e. no sperm donors) and (ii) died before the child's conception, and

(c) there is proof that the donor **(i)** gave written consent to the posthumous use of their reproductive material or embryo by their survivor spouse, **(ii)** gave written consent to be the parent of the child conceived, and **(iii)** did not withdraw the consent before death.

- higher consent for s 28 than s 27. Need to have proof that there was a written form of consent to use the reproductive material AND consent to be the parent of the child.
- divorce would vitiate the consent

(2) On the birth of a child born of AR and in the circumstances described in (1), the child's parents are (a) the deceased donor, and (b) the spouse of the donor at the time of their death, regardless of whether they provided reproductive material as well

Disputes regarding parentage

31. If there is a "dispute" or any "uncertainty" as to whether a person is or is not a parent, a person can make an application to the court seeking an order declaring whether the person is a child's parent.

AR in Quebec Civil Law

Art. 538: Assisted reproduction is "a parental project involving assisted procreation". It "exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project."

- **Very different.** The emphasis is not put on sexual intercourse occurring, but on using genetic material on a 3rd party who is not a part of the parental unit. If Mr. A and Mrs. B go through IVF using their own reproductive material using child, it is NOT AR (no one contributes material).
- The consent of all parties to the "parental project" is required (whether alone or spouses)
- AR is open to single mothers and couples. Moreover, neither sexual orientation nor "spouses" are mentioned, so AR is open to *most* same-sex and heterosexual couples, as well as *de jure* and *de facto* couples.
  - However, in practice the process would not encompass single fathers or same-sex male couples seeking AR — one would need woman's eggs, and QC has strong concerns with that

Art 538.1: Establishment of filiation: "As in the case of filiation by blood, the filiation of a child born of assisted procreation is established by the act of birth. In the absence of an act of birth, **uninterrupted possession** of status is sufficient; the latter is established by an adequate combination of facts which indicate the relationship of filiation between **the child, the woman who gave birth to the child and, where applicable, the other party to the parental project**. **This filiation creates the same rights and obligations as filiation by blood**."

Art. 538.2: The contribution of genetic material is **not a basis for a bond of filiation** between the contributor and the child subsequently born. **However**, if the 3rd party genetic material is contributed **via sexual intercourse**, the contributor has 1 year to change his mind and request parental status.

Art 538.3: Presumptions of filiation (for *de jure* couples only): If a child is born of AR between married or civil union spouses during the marriage/civil union or within 300 days after its dissolution/annulment, the spouse of the woman who gave birth to the child is presumed to be the child's other parent. Presumption can be rebutted if the child is born (a) more than 300 days after the judgment ordering separation or (b) within 300 days of the termination of the marriage or civil union, but after a subsequent marriage or civil union of the woman who gave birth to the child.

Art. 539: No one may contest the filiation of a child solely on the grounds of the child being born of a parental project involving AR. However, t**he married or civil union spouse of the woman who gave birth to the child may contest the filiation and disavow the child if there was no mutual parental project** or if it is established that the child was not born of AR.

Art. 540: Liability (*de facto* spouses only): A person who, after consenting to a parental project outside marriage or a civil union, fails to declare a bond of filiation with the child born of that project in the register of civil status is liable towards the child and the child's mother.

AR in Alberta (AB FLA)

What is AR?

8.1. **(1)** a reference to the provision of [human reproductive material | an embryo] by a person means the provision of [the person's own human reproductive material | an embryo created using the person's own human reproductive material] to be used for his or her own reproductive purposes;

Parentage

(2) If a child is born as a result of an AR with the use of human reproductive material or an embryo provided by **a male person only**,

- (a) Unless (b) or (c) applies, the parents of the child are the birth mother and the male person;
- (b) If the birth mother is a surrogate and declared not to be a parent, and the male person is declared to be a parent, then the parents are the male person and (i) the person he was married to or in a conjugal relationship with at the time of conception and (ii) consented to be the parent, without withdrawing consent
- (c) If the birth mother is a surrogate but does not consent to declare away parentage, then the parent is the birth mother only.

(3) If a child is born as a result of an AR with the use of human reproductive material or an embryo provided by **a female person only**,

- (a) Unless (b) or (c) applies, the parents of the child are the birth mother and (i) the person she was married to or in a conjugal relationship with at the time of conception and (ii) consented to be the parent, without withdrawing consent
- (b) If the birth mother is a surrogate and declared not to be a parent, and the female person is declared to be a parent, then the parents are the female person and (i) the person she was married to or in a conjugal relationship with at the time of conception and (ii) consented to be the parent, without withdrawing consent
- (c) If the birth mother is a surrogate but does not consent to declare away parentage, then the parent is the birth mother only.

(4) If a child is born as a result of an AR with the use of human reproductive material or an embryo provided by **both a male person and a female person**,

(a) Unless (b) or (c) applies, the parents of the child are the birth mother and the male person;

(b) If the birth mother is a surrogate and declared not to be a parent, and the male person and female person are each declared to be a parent, then the parents are the male person and the female person

(c) If the birth mother is a surrogate but does not consent to declare away parentage, then the parent is the birth mother only.

(5) If a child is born as a result of AR without the use of human reproductive material or an embryo provided by a person referred to in subsection (1), the parents of the child are the birth mother and a person she was married to or in a conjugal relationship with at the time of conception and consented to be a parent without withdrawing that consent.

- **Note: applies to sperm donors**

Presumed consent of spouses

(6) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born of AR if the person was married to or in a conjugal relationship with,

(a) in the case of a child born in the circumstances referred to in subsection (2), the male person,

(b) in the case of a child born in the circumstances referred to in subsection (3), the female person

(c) in the case of a child born in the circumstances referred to in subsection (5), the birth mother.

AR in Children's Law Reform Act (Ontario)

What is AR?

1. **(1) Definitions:**

"assisted reproduction" means a method of conceiving other than by sexual intercourse;

"insemination by a sperm donor" means an attempt to conceive a child through sexual intercourse in the circumstances described in subsection 7 (4);

Who are the parties involved?

"birth parent" means, in relation to a child, the person who gives birth to the child;

"spouse" means the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage;

"surrogate" means a person who agrees to carry a child conceived through assisted reproduction if, at the time of conception, the person intends to relinquish entitlement to parentage of the child, once born, to one or more persons.

When does conception occur in AR?

(3) A child conceived through AR is deemed to have been conceived on the day the reproductive material or embryo used is implanted in the birth parent.

Parentage

5. **Provision of reproductive material, embryo not determinative of parentage** — A person who provides reproductive material/embryo for child conception use through AR is not recognized in law as the parent of child unless they are parent of child under this Part.

6. (1) **The birth parent of a child is, and shall be recognized in law to be, a parent of the child.**

(2) Subsection (1) is **subject to the relinquishment of an entitlement to parentage by a surrogate** under section 10, or to a declaration by a court to that effect.

7. (1) The person whose sperm resulted in the conception of a child conceived through sexual intercourse is, and shall be recognized in law to be, a parent of the child. ...

(4) Non-application, insemination by a sperm donor — This section is deemed not to apply to a person whose sperm is used to conceive a child through sexual intercourse if, before the child is conceived, the person and the intended birth parent agree in writing that the person does not intend to be a parent.

(5) A person to whom subsection (4) applies is not, and shall not be recognized in law to be, a parent of a child conceived in the circumstances set out in that subsection.

8. **(1)** If the birth parent of a child conceived through AR or **(2)** insemination by a sperm donor had a spouse at the time of the child's conception, **the spouse is, and shall be recognized in law to be, a parent of the child.**

(3) This section does not apply if, before the child's conception, (a) the spouse did not consent to be a parent of the child; or (b) the spouse consented to be a parent of the child but withdrew the consent.

Parentage if AR after death

(4) This section does not apply **if the birth parent is a surrogate** or if the child is **conceived after the death** of a person declared under section 12 to be his or her parent.

Case Law and Other Issues

- **A biological connection is not needed** to establish a parent-child relationship: ***Low***
- Compare ***Low*** (where father was granted a declaration of parentage) and ***Greaves*** (where mother was denied a declaration of parentage).
- **Registration** (i.e. in the birth registry) is more than simply an administrative function — it can be used as a basis for a presumption for parentage; has symbolic value; and it facilitates your interaction with 3rd parties (ie getting your child a passport). **Declarations** of parentage do not share these functions: ***MDR (Rutherford)***
- **Donor anonymity is protected** — the right to know one's past is not of fundamental importance that it is entitled to free-standing constitutional recognition: ***Pratten***

PRATTEN V. BC (AG) (2012, SCC)

Facts — Pratten was conceived using anonymous sperm donor agreed to by his parents. Doctor destroyed records in accordance with rules. P commenced action seeking declaratory relief.

Held — **In favour of BC. The right to know one's past is not of fundamental importance that it is entitled to free-standing constitutional recognition.**

LOW V. LOW (1994, SCC)

Facts — Mr. Low had a low sperm count and was unable to conceive. He and his wife decided on artificial insemination by a sperm donor. P attentive and involved throughout AR process — intended to be parent, put name as father on birth certificate, etc. He and Mrs. Low break up shortly after the child's birth, then divorced. Mr. Low was allowed sporadic access on consent for roughly one year. **Mr. Low seeking judgment for joint custody and for child to be recognized as child of marriage, and a declaration that he is the child's father, regardless of an absence of biological connection to the child, under the former CLRA. Mrs. Low seeks a declaration that he is not the father.**

Held — **In favour of Mr. Low — got declaration that he was child's father; not granted custody, but granted access.**

P-C relationship did not need to be related to a biological connection. Under the former CLRA, judge said that "natural father" (s. 4(1)) did not necessarily mean "biological father" and the "the relationship of father and child" (s.5) does not require a biological or genetic character.Where a presumption of parentage does not arise under s. 8 of the former CLRA, a person may apply under s. 5(1) for a declaration that a person is his "child". This is permitted when the relationship of father and child has been established (s. 5(3)) — in this case, it was.

BUIST V. GREAVES (1997, ONCJ)

Facts — Buist and Greaves were in a same-sex female relationship. Greaves conceived and gave birth to a child (both planned the birth) with special needs. Although Buist greatly shared in the child's care, Greaves was the primary care giver. Buist had two affairs; against Greaves's wishes, the two broke up. Greaves offered a job in Vancouver and wishes to move there with child. **Buist is seeking a declaration that she is the child's mother.**

Held — **Buist's declaration of parentage was denied because the court found that the mother-child relationship was not established. Factors considered:** child considers and calls Greaves mama and Buist "gaga" (short for Peggy). Child has Greaves's last name. Accepted Greaves's evidence that Buist only started referring to son as her child after separation. When with Buist and away from Greaves, child is distraught. Buist lived with Greaves in a relationship that was "not committed" — she began her second affair of the relationship when child was less than 2 years old. Court considered child's perspective that Buist is not his mother.

Note — **Tremblay does not agree with this decision.** The facts put forward by the court in determining whether a mother-child relationship exists for Buist are not relevant. Buist is perhaps not morally great; but her behaviour is not related to her ability to parent nor to the P-C relationship.

MDR (RUTHERFORD) V. ONTARIO (2006, ONSC)

Facts — Lesbian parents seeking to register both women on the Statement of Live Birth of their children born through AR for inclusion in the birth registry under VSA. VSA s.9(2) said "mother and father" provide statement of birth. **Plaintiffs argued s. 15 Charter breach.** Ontario issued declarations of parentage to some co-mothers during an emergency case conference and now **argues that a declaration of parentage is an appropriate means for co-mothers to get legal parent status rather than inclusion in the birth registry.**

Held — **Violates s. 15 of the Charter — VSA provision deemed of no force or effect.**

Registration vs. Declaration: Declarations of parentage do not grant the benefit of the presumption of parentage flowing from being registered as a parent on the Statement of Live Birth. Moreover, applying for a declaration of parentage under the CLRA was time-consuming, expensive, and required the disclosure of private information.

Moreover, the co-mothers were not merely seeking accommodation through a separate system of recognition—they were **challenging the social institution of parentage and wished to alter it** so that it reflected their own needs and experiences. The failure to register the co-mothers **as of right** symbolized a societal failure to recognize their family units as legitimate and normal.

This case stands for one of the reasons why we have an explicit legislative presumption in the FLA now. (1) registration can be used as a presumption for parentage; 2) the fact that you can register your child has symbolic value; 3) it facilitates your interaction with 3rd parties (ie getting your child a passport).

2.4 *Surrogacy*

Surrogacy is a situation in which a woman carries a child for the "benefit" of the intended parents. Categories of surrogacy can be distinguished in several ways:

- **Whose egg is used:**
  - In **traditional surrogacy**, the surrogate will contribute her own genetic material. This can be done without medical intervention.
  - In g**estational surrogacy**, the surrogate will use the intended mother's egg or a donor's egg.
- **Motivations for acting as a surrogate:** commercial (paid a fee) vs. Altruistic (done for free)
- **Surrogate's relationship to the intended parent(s):** Intra-family (the surrogate is a family member) or not (the surrogate is a friend or stranger)
- **Nationality and residence of parties:** e.g. international surrogacy between Canadians citizens and surrogates abroad; inter-provincial surrogacy between an Ontario citizen and a BC surrogate

Surrogacy in the Assisted Human Reproduction Act

2. **Declaration — sets out certain principles should be respected in AR practices:** health and well-being of children born through AR; impact of AR on women; free and informed consent; anti-discrimination against those who use AR; preservation of human individuality, diversity and the integrity of the human genome

3. **Definitions — *surrogate mother*** means a female person who — with the intention of surrendering the child at birth to a donor or another person — carries an embryo or foetus that was conceived by means of an AR procedure and derived from the genes of donor(s).

6. **(1) No payment for surrogacy:** No person shall pay, offer, advertise payment a female person to be a surrogate mother

   (2) No acting as intermediaries: No person shall accept, offer, or advertise payment for arranging the services of a surrogate mother

   (3) No payment to intermediaries: No person shall pay, offer, or advertise payment to another person for arranging the services of a surrogate mother

   (4) Surrogate mother — minimum age: No person shall counsel or induce a female person to become a **surrogate mother**, or perform any medical procedure to assist a female person to become a surrogate mother, while knowing or having reason to believe that the female person is under 21 years of age

   (5) This section does not affect validity under provincial law of any agreement under which a person agrees to be a surrogate mother

12. **(1) Reimbursement —** No person shall, except in accordance with the regulations … **(c)** reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy.

   (2) Reimbursements for expenditures requires receipts.

   (3) No person shall reimburse a surrogate mother for a loss of work-related income incurred during pregnancy unless (a) a medical practitioner certifies, in writing, that continuing to work may pose a risk to her or the embryo/foetus's health and (b) the reimbursement is made in accordance with regulations.

   - Section not in force (refers to regulations that don't exist yet) — so no guidance over what can and cannot be reimbursed
   - But surrogates are *currently* reimbursed for certain expenses (e.g. food, clothing, medical appointments)

Surrogacy in British Columbia (BC Family Law Act)

Definitions

29. (1) "surrogate" means a birth mother who is a party to an agreement described in subsection (2).

Requirements for agreements between surrogate and intended parents

(2) This section applies if,

(a) before a child is conceived through AR, a written agreement is made between a potential surrogate and an intended parent or the intended parents, and

(b) the agreement provides that the potential surrogate will be the birth mother of a child conceived through AR and that, on the child's birth,

(i) the surrogate will not be a parent of the child,

(ii) the surrogate will surrender the child to the intended parent or intended parents, and

(iii) the intended parent or intended parents will be the child's parent or parents.

Parentage requirements for intended parents

(3) On the birth of a child born as a result of AR in the circumstances described in (2), **a person who is an intended parent under the agreement is the child's parent if all of the following conditions are met**:

(a) Before the child is conceived, no party to the agreement withdraws from the agreement;
(b) After the child's birth, (i) the surrogate gives written consent to surrender the child to the intended parent/s, and (ii) the intended parent/s take the child into his/her/their care.

Consent requirements

(4) For the purposes of the consent of the surrogate required under (3)(b)(i), **the Supreme Court may waive the consent** if the surrogate (a) s deceased or incapable of giving consent, or (b) cannot be located after reasonable efforts to locate her have been made.

In event of death of the intended parent/s

(5) If the intended parent/s die after the child is conceived, the deceased intended parent/s are the child's parent/s if the surrogate gives written consent to surrender the child to the personal rep or other person acting in the place of the deceased intended parent/s.

Consent before conception =/= consent after birth

(6) An agreement to act as a surrogate or to surrender a child before the child is conceived is not consent to surrender the child after birth, but may be used as evidence of the parties' intentions with respect to the child's parentage if a dispute arises after the child's birth.

- **Note: This is to make sure that the surrogate did not change their mind. If there is a dispute, s. 31 empowers courts to make orders declaring parentage: see *Re Family Law Act***

Parentage if AR after death

(7) Despite (2)(a), the child's parents are the deceased person and the intended parent if
(1) The circumstances set out in s. 28(1) (parentage if AR after death) apply,
(2) Before a child is conceived through AR, a written agreement is made between a potential surrogate and a person who was a spouse to the deceased person, and
(3) ss. (2)(b) and (3)(a) and (b) apply.

RE FAMILY LAW ACT (2016, BCSC)

Facts — A and B were married, intended parents of a child conceived by a surrogate C, artificially inseminated with A's sperm and B's own egg. The parties made a verbal surrogacy agreement with C where she renounced any parental rights and agreed that A and B were to be recognized as parents. Upon birth of the child, doctor registered birth under VSA with C as the birth mother but A and B's surname. **A and B seek declaration that they are child's parents, that C is not, and an amendment to the birth certificate.**

Held — **Declarations of parentage and amendment granted. S. 29** of the FLA did not apply as there was no written agreement. Court relied on s. 31(1)—"the uncertainty provision"—to make a declaration of parentage to name B as the mother, because the parties' intentions to be parents are important and clear; the only problem was that they didn't make a written agreement. If in writing, the terms of the Surrogacy Agreement between the A, B, and Cwould have been sufficient to satisfy the requirements of the FLA, s. 29(2)(b).

Who could the law recognize as parents?

- B (who provided the egg) is the "birth mother" under the definition under s.20 because she provided her own human reproductive material for the child's conception. Per s.27(2), the birth mother is the child's parent.
- A (who provided the sperm) is not a donor under s. 20 because he provided own human reproductive material for "his own reproductive use". Thus he was not excluded from parentage under s. 20.
- The surrogate C's husband cannot be the child's parent because he is not a party to the surrogacy agreement and did not consent to be the child's parent.

Surrogacy in Other Provinces

Alberta: Family Law Act

- Creating a family through surrogacy always requires declarations of parentage: **s. 8.2(1).** In ON and BC, this process is automatic if you follow rules, but here in AB you must apply.
- Resulting family must have some sort of genetic connection with the child: **s. 8.2(1)(b) — not so in BC**
- No mention of any agreements for surrogacy — but the surrogate must provide consent in specific form. This is often tricky because specifications are not found under the FLA surrogacy section, but rather in s. 2(2) and s. 2(3) of the Family Law Act General Regulation.
  - S.2(2) enumerates a list of statements that the consent must contain.
  - Per s.2(3), the consent of the surrogate must be (a) in writing, (b) dated, (c) signed and witnessed by a person other than the person who is to become a parent of the child.

Ontario: Children's Law Reform Act

Birth parent

6. **(1)** The birth parent of a child is, and shall be recognized in law to be, a parent of the child.

   (2) Subsection (1) is **subject to the relinquishment of an entitlement to parentage by a surrogate** under section 10, or to a declaration by a court to that effect under section 10 or 11.

Requirements for surrogacy agreement

10. **(1)** A surrogacy agreement must be entered into before the conception of the child where the surrogate agrees to not be a parent of the child (relinquishment), and each of the intended parents agree to be a parent of the child) (intention)

    (2) Subsection (1) only applies if 1. the surrogate and intended parent(s) enter into the agreement before the child is conceived; **2. each party to the agreement received independent legal advice before entering into the agreement; 3. of the parties to the agreement, there are no more than four intended parents;** 4. the child is conceived through AR
    - **In the case of 4+ intended parents**: If the conditions set out in ss. 10(2) are met other than the condition set out in para 3 of that ss., any party may apply to the court for a declaration of parentage under **s. 11.** This declaration must be made after the child is born (in most cases, after the child is a year old).

Recognition of parentage

(3) Subject to (4), on the surrogate providing to the intended parent or parents consent in writing relinquishing the surrogate's entitlement to parentage of the child, (a) each intended parent becomes a parent of the child and (b) the surrogate ceases to be a parent of the child.

Applications or declarations of parentage can only be done after the child's birth.

(4) The consent referred to in (3) **must not be provided before the child is 7 days old**.

(5) Unless the surrogacy agreement provides otherwise, the surrogate and the intended parent or parents share the rights and responsibilities of a parent in respect of the child from the time of the child's birth until the child is seven days old, but any provision of the surrogacy agreement respecting parental rights and responsibilities after that period is of no effect.

Applications for parentage declaration if surrogate cannot/does not give consent

(6) Any party to a surrogacy agreement may apply to the court for a declaration of parentage with respect to the child if the consent referred to in subsection (3) is not provided by the surrogate because (a) the

surrogate is deceased or otherwise incapable of providing consent; (b) the surrogate cannot be located after reasonable efforts have been made to find him; or (c) the surrogate refuses to provide the consent.

(7) On application re: ss. 6, the court may, (a) grant the declaration that is sought; or (b) make any other declaration respecting the parentage of a child born to the surrogate as the court sees fit.

(8) The paramount consideration by the court in making a declaration under subsection (7) shall be the best interests of the child.

(9) **A surrogacy agreement is unenforceable in law, but may be used as evidence of** (a) an intended parent's intention to be a parent of a child contemplated by the agreement; and (b) a surrogate's intention to not be a parent of a child contemplated by the agreement.

Quebec: Civil Code

- **Art 541 CCQ:** any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null

ADOPTION 1445 (2014, QCCA)

Facts — A and B, a heterosexual couple, entered into a gestational surrogacy agreement with surrogate C. C is a friend of the family and was paid to act as a surrogate. Act of Birth of child listed A and C as the father and mother; A's filiation as father is unchallenged because it was filiation by blood. **Parties are attempting to have filiation of B recognized by substituting C for B using consent for adoption (i.e. C consents to have child's father (A)'s spouse adopt the child). At trial, judge ruled that C's payment vitiated her consent, so unable to get adoption order for the child. A, B, C appealing.**

Held — **B granted filiation and C left with no filiation status, as were the parties' intentions.** Art. 541 says agreement is null, AHRA says renumeration is not OK — so court provided for framework to allow special consent for adoption of the child by a parent's spouse.

However, this adoption solution requires that the adoptee spouse be in a relationship with a parent **with a biological connection to the child**. **The framework does not contemplate a situation in which same-sex female couples will try to use a surrogate**, in which case filiation by blood would not be available to any of the intended parents (remember that filiation by blood for women requires attestation of birth and declaration of birth to match; i.e. that the woman herself give birth to the baby).

2.5 *Multiple Parenting and Non-Conjugal Parentage*

Multiple parenting alludes to the idea that more than one or two persons are going to be involved in birth of child (e.g. step-parents, foster parents, other forms of caregivers — but mostly refers to the pre-conception intention (i.e. before birth) to parent a child with more than one other person. *AA v. BB* was the first case in which an applicant requested parental status in addition to two other parents.

AA V. BB (AND CC) (2001, ONCA)

Facts — AA and CC were a lesbian couple; BB was their friend and sperm donor. The child was born with BB and CC as the bio parents. All agreed it would be in BIC to have BB involved in the child's life while the child lived with AA and CC, the primary caregivers. **Parties seek a declaration of parentage for AA to be the second mother; but under the CLRA, this was not possible.** Adoption was not an option because either BB or CC would lose parental rights.

Held — **Court can exercise jurisdiction through *parens patriae's* gap-filling powers and give AA parentage declaration.** In this case, gap was not intentional — was not the intent of the CLRA to discriminate against children with multiple parents, as is the case here; actually, the opposite. Although the CLRA was "a product of its time" and failed to foresee a child as having more than two parents, its intent was still to recognize the equal legitimacy of each child's status regardless of the circumstances of their birth.

Multiple Parenting in the BC FLA: S. 30 and its limits

30. (1) This section applies if there is a **written agreement** that

(a) is made **before** a child is conceived through AR,

(b) is made between

(i) the intended parent(s) and a potential birth mother who agrees to be a parent together with the intended parent(s), or

(ii) the potential birth mother, a spouse of the potential birth mother, and a donor who agrees to be a parent together with the potential birth mother and her spouse, and

(c) provides that (i) the potential birth mother will be the birth mother of a child conceived through AR, and (ii) on the child's birth, the parties to **the agreement will be the parents of the child**.

(2) On the birth of a child born as a result of AR in the circumstances described in ss. (1), the child's parents are the parties to the agreement.

(3) If an agreement described in ss. (1) is made but, before a child is conceived, **a party withdraws from the agreement or dies**, the agreement is deemed to be revoked.

In BC, s. 30 of the FLA contains multiple parenting provisions. If the provisions apply, there is no need for a declaration — one only needs to fill out a form to be recognized as a multiple parent family.

Per Fiona Kelly, while s. 30 disrupts the two-parent nuclear family model, there are 6 significant limits:

1. Only available to couples who conceive using AR
2. Can only be utilized where the additional parent has a biological link to the child
   - doesn't look at potential: e.g. lesbian mothers with gay couple arrangement — want both men to be dads but law doesn't allow for 4 parents/2 who have no biological link to the child
3. Only available to to those in a conjugal union (marriage/MLR)
4. Limits number of parents a child can have to 3 — note that ON CLRA allows for more than this (s.9)
5. Imposes all-or-nothing parental obligations — the third individual involved must be a legal parent, leaving no legal space for an "involved known donor"
6. Provides very little guidance to parties when conflict arises, including about the enforceability of these relationships post-separation or dissolution.

Kelly argues that while ss. 24, 27, and 29 of the BC FLA serve to clarify that pre-conception intention is a key factor in determining parentage and will, in most instances, trump biological or genetic ties, s. 30 envisages a situation in which a gamete donor or surrogate is *actively involved* in the child's life and a legal parent.

Multiple Parenting in Other Jurisdictions

Not allowed in Quebec

- **Art. 532:** a child whose filiation is not established by act of birth or possession of status can claim filiation before court. The father/mother can claim paternity/maternity of child whose filiation not established by act of birth or possession of status.

  If the child already has another filiation established by an act of birth, by the possession of status, or by the effect of a presumption of paternity, an action to claim status may not be brought unless it is joined to an action contesting the status thus established.

  The action for disavowal or for contestation of status is directed against the child and against the mother or the presumed father, as the case may be.

Ontario Children's Law Reform Act

9. (1) In this section, "pre-conception parentage agreement" means a written agreement between two or more parties in which they agree to be, together, the parents of a child yet to be conceived.

Application

(2) This section applies with respect to a pre-conception parentage agreement only if,

(a) there are **no more than four parties** to the agreement;

(b) the **intended birth parent is not a surrogate**, and is a party to the agreement;

(c) if the child is to be conceived through sexual intercourse but not through insemination by a sperm donor, the person whose sperm is to be used for the purpose of conception is a party to the agreement; and

(d) if the child is to be conceived through AR or through insemination by a sperm donor, the spouse, if any, of the person who intends to be the birth parent is a party to the agreement, subject to ss. (3).

If spouse intends to not be a parent

(3) Clause (2) (d) does not apply if, before the child is conceived, the birth parent's spouse provides written confirmation that he or she does not consent to be a parent of the child and does not withdraw the confirmation.

Recognition of parentage

(4) On the birth of a child contemplated by a pre-conception parentage agreement, together with every party to a pre-conception parentage agreement who is a parent of the child under section 6 (birth parent), 7 (other biological parent) or 8 (birth parent's spouse), the other parties to the agreement are, and shall be recognized in law to be, parents of the child.

Surrogacy, up to four intended parents

Definitions

10. (1) In this section and in section 11, **"intended parent"** means a party to a surrogacy agreement, other than the surrogate; **"surrogacy agreement"** means a written agreement between a surrogate and one or more persons respecting a child to be carried by the surrogate, in which, (a) the surrogate agrees to not be a parent of the child, and (b) each of the other parties to the agreement agrees to be a parent of the child.

Application

(2) This section applies only if the following conditions are met:

1. The surrogate and one or more persons enter into a surrogacy agreement before conception.

2. The surrogate and the intended parent(s) each received independent legal advice before entering into the agreement.

3. Of the parties to the agreement, there are **no more than four** intended parents.

4. The child is conceived through AR.

Recognition of parentage

(1) Subject to subsection (4), on the surrogate providing to the intended parent(s) consent in writing relinquishing the surrogate's entitlement to parentage of the child,

(a) the child becomes the child of each intended parent and each intended parent becomes, and shall be recognized in law to be, a parent of the child; and

(b) the child ceases to be the child of the surrogate and the surrogate ceases to be a parent of the child.

Limitation

(4) The consent referred to in subsection (3) must not be provided before the child is seven days old.

Parental rights and responsibilities

(5) Unless the surrogacy agreement provides otherwise, the surrogate and the intended parent or parents share the rights and responsibilities of a parent in respect of the child from the time of the child's birth until the child is seven days old, but any provision of the surrogacy agreement respecting parental rights and responsibilities after that period is of no effect.

Failure to give consent

(6) Any party to a surrogacy agreement may apply to the court for a declaration of parentage with respect to the child if the consent referred to in subsection (3) is not provided by the surrogate because,

(a) the surrogate is deceased or otherwise incapable of providing the consent;

(b) the surrogate cannot be located after reasonable efforts have been made to do so; or

(c) the surrogate refuses to provide the consent.

Declaration

(7) If an application is made under subsection (6), the court may, (a) grant the declaration sought; or (b) make any other declaration respecting the parentage of a child born to the surrogate as the court sees fit.

Child's best interests

(8) The paramount consideration by the court in making a declaration under subsection (7) shall be the best interests of the child.

Effect of surrogacy agreement

(9) A surrogacy agreement is unenforceable in law, but may be used as evidence of, (a) an intended parent's intention to be a parent of a child contemplated by the agreement; and (b) a surrogate's intention to not be a parent of a child contemplated by the agreement.

Surrogacy, more than four intended parents

11. (1) If the conditions set out in subsection 10 (2) are met other than the condition set out in paragraph 3 of that subsection, any party to the surrogacy agreement may apply to the court for a declaration of parentage respecting a child contemplated by the agreement.

Time limit

(2) An application under subsection (1) may not be made, (a) until the child is born; and (b) unless the court orders otherwise, after the first anniversary of the child's birth.

Bakht and Collins, "Parentage in a Nonconjugal Family"

- Bakht was the birth mother. Collins, her good friend, helped Bakht raise the child. The parties wanted to secure Lynda's status as a parent.
- Collins did not have preconception intentions, the parties were not in a conjugal relationship, and the process was initiated when the child was 6 years old.
- Adoption was not possible for two reasons:
  - Since there is no conjugal relationship between the parties, second-parent adoption (the adoption by your spouse or another listed relative) was impossible
  - A regular adoption would erase parentage relationship between child and Bakht
- Parties could have gone for s. 15 challenge, but decided to use the Declaration of Parentage as found in pre-2017 CLRA, so that Collins would be recognized as a parent in addition to Bakht. Parties asked court to use *parens patriae* jurisdiction based on 3 arguments, and were ultimately successful:

- Would be in child's BIC, especially because the child had complex disabilities
- Legislative gap in CLRA allows them to add declaration
- **Non-conjugality should not be a barrier to parentage**
  - The CLRA permits non-biological/social parents where the parent-child relationship is established (see ***Low v. Low***, where non-biological father was recognized as a parent in law even though marriage to child's mother ended). Bakht and Collins' position is analogous to ex-spouses co-parenting child — the fact that they are not in a conjugal relationship is immaterial to child's best interest. There is no logical reason to privilege sexual connection for parenting ability.

- However, the new CLRA (modified under the *All Families are Equal Act*, which received royal assent in 2016) may foreclose court's *parens patriae* jurisdiction to recognize non-normative families.
  - For example, the declaration granted to Bakht and Collins would not be possible under the new Act because, *inter alia*, the necessity for a declaration of parentage must have a pre-conception intention (in the form of a written agreement) and must be declared within a year of the child's birth — even where such a declaration may be in the child's best interests.

2.6 *Adoption in British Columbia*

History and Definitions

Adoption was historically largely a child protection mechanism — the state needed to intervene and protect children born to unmarried women. Adoption was a way to prevent children from being raised in households deemed of lesser moral value.

In BC, the history of adoption is even more sensitive and problematic given the context of Indigenous children's experiences, especially the Sixties Scoop: events that have largely been described as cultural genocide. Currently, we see an overrepresentation of Aboriginal children in foster care (approximately 50%) — the numbers give the impression that history might be repeating itself.

Adoption has the same name in each province, but rules and concepts vary from province-to-province.

Some categories of adoption include:

- **International adoption:** adoption of a child who is a national of a different country.
- **Local infant adoption:** expectant parents make an adoption plan and place their child with a family living in the same province. The birth parents often get to select the adoptive family.
- **Direct placement adoption:** the birth parents choose to place their child with someone they already know well, but who is not a relative.
- **Ministry of Children and Family Development ("MCFD") adoption/Adopt BC Kids program:** adoption of BC children living in foster care to local families. For a child to be eglible for adoption, courts or the birth parents must first grant a **continuing custody order** — the effect is loss of all guardianship rights by the parents. This is a serious order that must be made by the judge in light of BIC.

Legislative Framework and Jurisdiction

In BC, the legislative framework is divided between:

- **Adoption Act, RSBC 1996, c 5:** provides substantive rules on adoption
- 3 regulations:
  - **Adoption Agency Regulation, BC Reg 292/96:** regulates adoption agencies

- **Adoption Fees Regulation, BC Reg 293/96:** regulates fees related to adoption
- **Adoption Regulation, BC Reg 291/96:** provides forms and applications for certain rules of the *Adoption Act* and clarifies certain concepts in the *Adoption Act*

The **BCSC** has jurisdiction over adoption matters — this is so because of the definition of "court" in s. 1 of the *Adoption Act* (not so in QB, where provincial courts are responsible for adoption).

Orders form a court are always required for adoption — it is not an automatic process and necessitates formalization.

Adoption Act, RSBC 1996, c 5

Definitions

1. "**birth mother**" means the person who gives birth to, or is delivered of, a child, regardless of whether her human reproductive material was used in the child's conception, unless the person is a surrogate within the meaning of section 29 of the Family Law Act;

   "**child**" means an unmarried person under 19 years of age;

   "**relative**" means a person related to another by birth or adoption;

Purpose

2. The purpose of this Act is to provide for new and permanent family ties through adoption, giving **paramount consideration in every respect to the child's best interests**.

Best Interests of the Child

3. (1) All relevant factors must be considered in determining the child's best interests, including for example:
   (a) the child's safety;
   (b) the child's physical and emotional needs and level of development;
   (c) the importance of continuity in the child's care;
   (d) the importance to the child's development of having a positive relationship with a parent and a secure place as a member of a family;
   (e) the quality of the relationship the child has with a parent or other individual and the effect of maintaining that relationship;
   (f) the child's cultural, racial, linguistic and religious heritage;
   (g) the child's views;
   (h) the effect on the child if there is delay in making a decision.

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

   - *How to weigh cultural Aboriginal heritage in determining BIC? See* **Racine** *and* **MM v. TB**

Residency requirements for applicants

29. (3) Each applicant must be a **resident of British Columbia.**

- ***S. 2(3) of the Adoption Regulation explains who a resident of BC is:*** *a person has continuously resided in BC for at least 6 months immediately preceding the application to the court to adopt a child* or *a person moved to BC to cohabit with another person who has continuously resided in BC for more than 6 months and seek to adopt a child with that other person. Applicant must also be an adult (i.e over 19 years old). Marital status does not matter.*

Principles applicable to all adoptions

35. (1) The court may make an adoption order if it is satisfied that

   (a) The child has **resided with the applicant for at least 6 months** immediately before the date of the adoption hearing, and

(b) It is **in the child's best interests** to be adopted by the applicant. ...

(3) The **court may alter or dispense** with the residency requirement after considering any recommendation made by a director or an adoption agency

Placement of a Child for Adoption

Types of Placement

Non-placement adoption: placement for adoption is not a prerequisite to adoption in BC. Applicants who are the guardians of an "unplaced" child are not subject to the requirements for placement adoptions (i.e. (pre-placement assessment or home study report and a post-placement assessment). Per **para. 83 of *MM v. TB*,** any adult resident of BC (including the child's guardian) may apply to adopt a child if they meet the following requirements:

1. establish that the child has resided with them for at least 6 months immediately before the adoption hearing;
2. provide a views-of-the-child report on the proposed adoption if the child is 7 to 11 years old; and
3. establish that the proposed adoption is in the best interests of the child.

Placement adoption: not defined in statute, but in the common law, refers to the physical placement of a child with prospective adoptive parents for the clear and intentional purpose of adoption (***MM v. TB***). **There are 4 methods for a placement:**

1. **Placement by a director of adoption:** Parents may use the services of the "Adoptions" division of the Ministry of Children and Family Development. The practice of the director does not usually involve independent social workers for either the biological or the adoptive parents; however, the director may send the adoptive parents to independent legal counsel for legal advise, and in some cases insist that counsel prepare and file the petition to obtain an adoption order.
   - s. 7 requires the Director or adoption agency to consult with an Aboriginal child's band before placing the child for adoption
   - s. 6(2) requires the Director or adoption agency that places a child for adoption to obtain a home study report on the prospective adoptive parents
2. **Placement by an adoption agency:** s. 4(1)(b) and s.82(1) of the Adoption Act grant exclusive authority for adoption planning and placement to licensed agencies, their employees, and contract workers. Currently four agencies are licensed in BC.
   - See notes above
3. **Direct placement:** "the action of a parent or other guardian of a child placing a child for adoption with 1 or 2 adults, none of whom is a relative of the child"
   - ss. 8-9 set out requirements for a direct placement of a child by a parent/guardian, including:
     - s. 8(1): notification by the parent/guardian to the Director/adoption agency
     - s. 8(2): the director or the agency must then obtain and provide certain information about the child (e.g. about its biological family, medical, social history) to the prospective adoptive parents
     - s. 8(3): the director/agency must then conduct a pre-placement assessment of the prospective adoptive parents
   - s. 12(1) requires written notice of placement by the prospective adoptive parents to a director/adoption agency within 14 days after receiving a child in their home for the purposes of adoption
4. **Relative adoption:** adoptions of children by relatives or stepparents
   - s. 12(2) states that the requirement of s. 12(1) does not apply if a prospective adoptive parent is a relative of the child.

Who Can Receive a Child for Adoption

Section 5(1) states that a child may be adopted by **one adult or 2 adults jointly** (alludes to conjugal status). This provision, by inference, includes an adult who is already the guardian of a child.

Who Can Place a Child for Adoption

Section 4(1) of the *Adoption Act* lists four parties who may place a child for adoption (this language is permissive, not mandatory):

4. (1) (a) A **director** who (i) has care and custody of the child under s. 23, or (ii) is the guardian of the child under s. 24.

(b) **An adoption agency**;

(c) A **parent or other guardian** of the child, by direct placement;

(d) A **parent or other guardian related to the child**, if the child is placed with a relative of the child (relative adoption).

(2) In addition to the authority under subsection (1) (a), a director may, at the request of a director of child protection, place a child for adoption with the person or persons selected by the director of child protection, if

(a) the child is in the continuing custody of the director of child protection, or

(b) the director of child protection is the child's personal guardian under s. 51 of the *Infants Act*.

Consent to Adoption, Revocation and Dispensing

Who must consent to adoption

Adoption Act

13. (1) The consent of each of the following is required for a child's adoption:

(a) the child, **if 12 years of age or over**;

- *If child is 0-7 years old, no formal requirement for consent or an evaluation of the child's views*
- *If the child is between 7-11 years old, no formal requirement to have their consent but must give consideration to the child's view (s. 30) – the child must meet privately with a person authorized by the regulations so the person can make a written report indicating whether the child understands what adoption means, has any views on the proposed adoption and any proposed change of the child's name*

(b) the child's parents;

(c) the child's guardians.

(2) Despite subsection (1) (b), the consent of a biological father who is not presumed to be the child's biological father under s. 26 of the Family Law Act *("parentage if no assisted reproduction")* is not required unless the biological father

(a) acknowledges that he is the child's father, and

(b) is named by the child's birth mother as the child's father.

(3) If the child is in the continuing custody of a director of child protection, or a director of child protection is the child's personal guardian under s. 51 of the Infants Act, the only consents required are

(a) the director of child protection's consent, and

(b) the child's consent, if the child is 12 years of age or over.

- *(i.e. no consent of the child's parents are needed)*

(4) If a child who has been adopted is to be adopted again, the consent of the adoptive parents (i.e. a person who became a parent at the time of the previous adoption) is required.

(5) If a child has been placed for adoption by an **extraprovincial agency** and the law of the jurisdiction in which the agency is located is that only the consent of the agency is required for the child's adoption, that consent and any consent required of the child under subsection (1) are the only consents required.

14. A child must be at least 10 days old before the birth mother can consent to the child's adoption. Otherwise, the consent is considered invalid.

15. A person under 19 years of age may give a legally valid consent to the adoption of a child.

How to consent to adoption

Adoption Act

16. (1) A consent to the adoption of a child in BC by a person resident in BC must be in the **prescribed form** and must be supported by the prescribed documents. **(2)** When a consent to the adoption of a child in BC is required from a person resident outside BC, the consent is sufficient if it is in a form that meets the requirements for adoption consents in the jurisdiction in which the person is resident.

Adoption Regulation

9. **(1)** For the purpose of s. 16 (1) of the Act, the affidavit of consent to adoption of a child in British Columbia by a person resident in British Columbia must be made **using the following forms**:

(a) the Consent to Adoption by Parent or Guardian, in Form 2 of Schedule 3;

(b) the Consent to Adoption by Child Twelve or Over, in Form 3 of Schedule 3;

(c) the Consent to Adoption by Director of Child Protection, in Form 3.1 of Schedule 3.

(2) *(Consent must be expressed in specific form and different document support – e.g. social worker's notes)* The affidavit of consent referred to in subsection (1) must be fully explained to the person giving the consent by

(a) a social worker, or

(b) a lawyer who is registered to practise law in the jurisdiction where the consent is taken.

(3) Subsection (2) does not apply if

(a) the consent is given by a director of child protection, and

(b) the child is in the continuing custody of the director of child protection or the director of child protection is the child's personal guardian under section 51 of the Infants Act.

(4) The person who takes the affidavit must ensure that the person who gives the consent **(a)** appears to have signed the consent to adoption freely and voluntarily, and **(b)** was informed about and appears to understand the effect and meaning of the consent.

Dispensing with consent

Dispensing with consent means that consent is no longer required. The test to dispense consent is a **strict one:** either the best interests of the child or the circumstances found under s. 17(1) of the *Adoption Act*, below.

17. (1) On application, the court may **dispense with a consent** required under this Part if the court is satisfied that it is **in the child's best interests** to do so or that

(a) the person whose consent is to be dispensed with is **not capable** of giving an informed consent,

(b) the person whose consent is to be dispensed with **cannot be located** after reasonable efforts to do so;

(c) the person whose consent is to be dispensed with

(i) has **abandoned** or deserted the child,

(ii) has not made reasonable efforts to meet their **parental obligations** to the child, or

(iii)is **not capable** of caring for the child, or

(d) **other circumstances** justify dispensing with the consent.

(2) Despite subsection (1), **the court may dispense with the consent of a child *only* if the child is not capable** of giving an informed consent.

(3) Before making an order under this section, the court may consider any recommendation in a report filed by a director or by an adoption agency.

(4) An application under this section may be made **without notice** to any other person and may be joined with any other application that may be made under this Act.

Revocation of consent

Revocation of consent means that consent was required and provided, but the person providing the consent has changed their mind and wishes to "take back" consent.

Who can revoke consent: a person who consented to the child's adoption (s. 18), the birth mother (s. 19), the child (s. 20), the court (s. 22).

How to revoke consent: unless the person revoking is the child, in writing and within a specified time period

Revocation of consent of a person before placement

18. (1) Before a director or an adoption agency places a child for adoption, a person who consented to the child's adoption may revoke the consent, but only if the revocation **(a) is in writing and (b) is received by a director/adoption agency before the child is placed with prospective adoptive parents.**

(2) After receiving written revocation, the director/adoption agency responsible for the child must make reasonable efforts to give notice of revocation to anyone else who consented to the adoption ASAP

(3) If person revoking consent had care and custody of the child immediately before giving consent, the child must be returned to that person ASAP after the director/adoption agency responsible for the child receives written revocation

Revocation of birth mother's consent within 30 days of birth

19. (1) A birth mother may revoke her consent to adoption within 30 days of the child's birth, even though the child has been placed for adoption during that period, but only if the revocation **(a) is in writing and (b) is received by a director/adoption agency before the end of the 30 days.**

- *Note that if the birth mother exceeds the 30 days, she can still apply to revoke consent under s. 18*

(2) After receiving written revocation, the director/adoption agency responsible for the child must make reasonable efforts to give notice of revocation to the prospective adoptive parents and anyone else who consented to the adoption ASAP

(3) The child must be returned to the birth mother ASAP after the director/adoption agency responsible for the child receives written revocation

Revocation of child's consent

20. A child may revoke consent to adoption at any time before the adoption order is made.

- *Note that no written requirement is imposed. The form required will probably vary with the age of the child. Remember that formal consent is only required for children ages 12 and over.*

Revocation of consents given outside BC

21. (1) Consent given under the law of another jurisdiction to teh adoption of a BC child may be revoked in accordance with that other jurisdiction's laws.

(2) Subsection (1) does not limit a child's right under section 20 to revoke consent at any time before an adoption order is made.

Court revocation of consents after placement

21. (1) After a child is placed for adoption, a consent to the child's adoption may only be revoked by the court or in accordance with section 19 (birth mother), 20 (child) or 21 (consents given outside BC).

(2) An application to court to revoke a consent may only be made **before an adoption order is granted**.

(3) Notice of the court application to revoke a consent to adoption must be served on everyone who consented to the adoption.

(4) On application, the court may revoke the consent if it is satisfied that it would be **in the child's best interests to do so.**

(5) Failure to comply with an openness agreement is not grounds for the court to revoke a consent to adoption.

Adoption Orders

The **issuance of an adoption order** is when adoption materializes. They are always issued by a court, if the court is satisfied of certain conditions. Adoption orders **apply to both placement and non-placement adoptions**.

35. (1) After considering the post-placement report and other evidence filed under section 32, 33 or 34, the court may make an adoption order if it is satisfied that

(a) the child has resided with the applicant for at least 6 months immediately before the date of the adoption hearing, and

(b) it is in the child's best interests to be adopted by the applicant.

(2) If the post-placement report was completed more than 3 months before the date of hearing the application, no adoption order may be made until the applicant files with the court a written certificate of a director or the adoption agency confirming or modifying the report.

(3) The court may alter or dispense with the residency requirement after considering any recommendation made by a director or an adoption agency.

Effects of Adoption

37. (1) When an adoption order is made,

(a) the child becomes the child of the adoptive parent,

(b) the adoptive parent becomes the parent of the child, and

(c) the parents cease to have any parental rights or obligations with respect to the child, except a parent who remains under subsection (2) a parent jointly with the adoptive parent.

(2) *(Simply adding another parent, not severing ties)* If the application for the adoption order was made by an adult to become a parent jointly with another parent of the child, then, for all purposes when the adoption order is made,

(a) the adult joins the parent as parent of the child, and

(b) any other parent ceases to have any parental rights or obligations with respect to the child. ...

(6) An adoption order does not affect an interest in property or a right of the adopted child that vested in the child before the date of the adoption order.

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

38. (1) Subject to (2), orders/agreements for contact/access re: child terminates when an adoption order is made.

(2) The court may, in the child's best interests (a) order that contact with the child or access to the child does not terminate, and (b) vary the order or agreement respecting contact with the child or access to the child.

- **What survives adoption:** parental rights and obligation exceptions under s. 37(2), child's property interests (s. 37(6)), child's aboriginal rights (s. 37(7)), arrears on child support
- **What doesn't survive adoption:** parental rights and obligations under s.37(c), child support obligations (s. 37), inheritances (s. 37, ***Clayton v Markolefas (2002, BCCA)***)
- **What may survive adoption:** contact and access under s. 38(2)

Aboriginal Adoptees and Customary Adoptions

Customary Adoptions

46. (1) On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.

(2) Subsection (1) does not affect any aboriginal rights a person has.

It is possible for the courts, through a court order, to recognize the adoption of a child through customary adoption by an aboriginal community. However, implementation is uncertain.

Aboriginal Adoptees

Per s. 3(2) of the *Adoption Act*, **if the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests**. The courts in ***Racine*** and ***MM v. TB***, however, seem to suggest that Aboriginal heritage and identity is merely one of several other factors that must be considered in determining whether an adoption order is in the BIC.

RACINE V. WOODS (1983, SCC)

Facts — Child was born to Woods, an Aboriginal woman. Woods was a serious alcoholic and was unable to care for the child. Through Children's Aid Society, child was placed with Racine family and lived with them until the wardship order expired, at which point arrangements were made to return child to Woods. Woods was in a volatile situation with her husband and emotionally unstable, so Racine took child back with Woods's consent. Racine thought Woods had surrendered child to her on a permanent basis and got in touch with CAS about adoption. Later in the year, Woods returned, saying she wanted her sister to have the child. Racine refused to give the child up. 4 years later, Woods launches application for *habeas corpus*. Racine applies for a *de facto* adoption order (MB exclusive form of adoption — stems from idea that child has been abandoned and taken care of for 3 consecutive years by other parents). At this point, child was 5 years old, happy, and attached to Racine. **Did BIC lie with adoptive parents or birth mom?**

Held — **With adoptive parents; adoption order sustained.**

The child's Aboriginal heritage and cultural identity must be considered by the trial judge, but it is just one of several other factors listed in s. 3(1) that must also be considered in determining the paramount consideration under s. 2 of whether an adoption order is in the best interests of the child "in every respect".

↑ Time spent with adoptive parents in different cultural environment = ↓ Importance of cultural heritage. The longer the child spends time in a different cultural environment and develops stronger bonds with the prospective adoptive parents, the more the strength of cultural heritage can be diluted.

MM V. TB (2017, BCCA)

Facts — A is birth mother of a 10-year-old Aboriginal child legally adopted by Rs. Child has lived with Rs full time and continuously since he was 20 months old. Rs obtained legal custody and guardianship of the child, thereafter applied to adopt him. A objected, but TJ granted adoption order, finding it in BIC. **A appeals adoption on the basis that TJ erred in law by failing to properly weigh s.3(2) of *Adoption Act*, which requires consideration of the importance of preserving the child's Aboriginal heritage and cultural identity as a factor contributing to his best interests.**

Held — **TJ did not err—appeal dismissed.**

In determining whether an adoption order should be made, a child's Aboriginal heritage and cultural identity does not attract a "super-weight" over the other factors. Per *Racine*, "just one of several other factors."

The TJ's decision was not based on *Racine's* correlation between time and cultural heritage, but rather on consideration of other factors. In this case, the child had a strong emotional bond with the Rs, including his two siblings, would likely suffer emotional/traumatic harm if removed from their family, and wanted to stay with the Rs with whom he identified as his mother and father, "forever".

2.7 *Other Relationships to Children*

Stepparents under the Divorce Act

> **2.** (2) For the purposes of the definition of "child of the marriage", a child of 2 spouses or former spouses includes **(a)** any child for whom they both stand in the place of parents; and **(b)** any child of whom one is the parent and for whom the other stands in the place of a parent.

Step-parenthood often engages issues of child support. The idea is that because the stepparent "stands in place of a parent" for a "child of the marriage" (as defined under s. 2(2) DA), the stepparent has an obligation to support that child.

Thus, whether a stepparent owes a child the obligation of child support depends on whether or not the stepparent is established as "standing in place of a parent", which is to be construed broadly and liberally.

Per ***Chartier v. Chartier (1991, SCC),*** the test to determine if a person stands in the place of a parent is objective and looks at the **nature and the quality of the relationship between stepparent and child at the time that the family was functioning as a unit (i.e. not after separation).** Relevant factors include, but are not limited to:

1. Intention, both those expressed formally and inferred from conduct;
2. Whether the child participates in the family as would a biological child;
3. Whether the stepparent provides financially for the child;
4. Whether the stepparent disciplines the child as a parent;
5. Whether the stepparent represents to the child, the family, the world, either explicitly or implicitly, that the stepparent is a parent to the child; and
6. The nature or existence of the child's relationship with the absent biological parent.

It is a high bar for a stepparent-child relationship to not incur child support obligations; thus, the above evaluation should become relevant only in the most egregious circumstances: ***Shaw v. Arndt (2016, BCCA).*** *In* ***Shaw*****,** the court ruled that even if the stepparent-child are estranged post-separation, the stepparent has an obligation to pay child maintenance.

CHARTIER V. CHARTIER (1991, SCC)

Facts — P and D were married and separated after a year. P had a child from a previous relationship. D played an active role in caring for the child and even discussed adoption. In proceedings for access, D argued the child was a child of marriage; he was granted access. During divorce proceedings, P applied for child support argued D stands in the place of a parent for the child. D wants to end his relationship with the child, including child support obligations. **Can a person who stands in place of a parent for a child (within the meaning of the DA) unilaterally give up that status and escape child support obligations after the termination of a marriage?**

Held — **In favour of P — question answered NO. Once a person is found to "stand in place of a parent", that person cannot unilaterally terminate the relationship so as to avoid responsibility for support.** D stood in place of a father for the child and assumed parental responsibility. Post-separation, he continued to have access to the child. D's unilateral withdrawal from the relationship does not change the fact that D acted as the child's father and has obligation to pay child support.

The concept of "standing in place of a parent" must be interpreted broadly so as to reflect the purpose and context of the Divorce Act (e.g. the Divorce Act aims to ensure that children are affected as little as possible by divorce; so while you can divorce a spouse, you cannot "divorce" children of the marriage). To determine if a spouse Is in the role of a parent, the court looks at a number of factors, including those listed above.

SHAW V. ARNDT (2016, BCCA)

Facts — Parties departed after 13 years of marriage. D was ordered to pay child support for stepson. Stepson recently turned 20 and had been accepted to university on the condition that he complete his Grade 12 courses. **D applied for declaration that the stepson was no longer a child of the marriage and an order terminating child support.** The child's birth father said that he is disabled and receiving government coverage, so cannot really pay.

Held — **In favour of P; D still has to pay child support.**

The quality of the stepparent-child relationship should be relevant only in the most egregious of circumstances. An unsatisfactory relationship, or an absence of a relationship between the stepparent and child after separation, **does not** terminate the stepparent's obligation to pay child support.

Child of the marriage over age of majority pursuing education: A child over the age of majority can be re-established as child of marriage if pursuing education, but not always – need to meet criteria.

Stepparents in British Columbia (BC Family Law Act)

146. In this Part and s. 247 *[regulations respecting child support]*

"parent" includes a stepparent, if the stepparent has a duty to provide for the child under s. 147(4) *[duty to provide support for child]*;

"stepparent" means a person who is a spouse of the child's parent and lived with the child's parent and the child during the child's life.

147. **(1)** Each **parent** and guardian of a child has **a duty to provide support for the child**, unless the child **(a)** is a spouse, or **(b)** is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were, considered objectively, intolerable.

(4) A child's stepparent does not have a duty to provide support for the child **unless**

(a) the stepparent **contributed to the child's support for at least one year** *(as in spent money to care for the child, either prior to separation from the child's parent or even after separation, with no challenge to support)*, and

(b) the application for support is made **within a year** of the last time the stepparent contributed to support. *(Note that unlike FLA, DA has no time limits)*

(5) If a stepparent has a duty to provide support for a child under **(4)**, the stepparent's duty

(a) is **secondary** to that of the child's parents and guardians, and

(b) extends only as appropriate on consideration of **(i) the standard of living experienced by the child** during the relationship between the stepparent and his or her spouse, and **(ii)** the **length of time during which the child lived with the stepparent.**

In loco parentis in Quebec Civil Law

585. Married or civil union spouses *(i.e. conjugal relationships)*, and relatives in the direct line in the first degree *(i.e. parent-child)*, owe each other support.

In Quebec, children are owed child support and conjugal spouses are owed spousal support. However, stepparents are not part of this regular obligation. **Stepparents do not have status, so no child support obligations attach to them.**

However, Dalphond J's dissenting opinion in ***Droit de la famille - 072895*** (2007 QCCA) says this distinction is unfair to children who have stepparents significantly involved in their lives.

A possible solution may lie in an argument based in s. 39 of the Quebec Charter of Human Rights and Freedoms, which states that "Every child has a right to the protection, security and attention that his parents **or the persons acting in their stead** are capable of providing."

Uncertainties: Biological Connection Between Parent and Child

Uncertainties can arise in case of fathers who mistakenly though they were biological fathers and whether or not they can withdraw from child support obligations by claiming they were not standing in place of a parent. There are tensions over the biological aspects for some parents, but less so for other parents.

CORNELIO V. CORNELIO (2008, ONSC)

Facts — An application was made by AC for an order requiring her ex-husband PC to continue his child support obligations to twins. PC sought to terminate obligations and repayment of child support paid by him because DNA testing confirmed he was not the biological father. He submits that while for approx. 10 years, he always treated the twins as his own children, he proceeded on the mistake belief that he was their biological father. **Should the child support obligations terminate, now that DNA testing confirmed that he is not the biological father?**

Held — **No. PC must continue to pay child support.**

The right to child support is the right of a child, and is independent of a parent's own conduct, whether it be delay in pursuing support, an attempt to contract out of support, or the failure to disclose and extramarital affair that may have led to the conception of the child, as in this case.

Focus on the reality of the relationship and the BIC. The issue is whether the respondent "stood in the place of a parent" toward them. This inquiry depends on the nature of the relationship that had developed and existed before separation, *irrespective of the contention by the respondent that he never would have fostered such a relationship had he known he was not the children's biological father*. Consider BIC and the unfairness that would result to the children if the only father they had known could unilaterally withdraw from the relationship and any obligation to provide support.

EZ V. PZ (2017, BCSC)

Facts — EZ and PZ are divorced. Child D was born during marriage. EZ moved to BC with D, found other partner, and had second child. PZ continued to live in ON. DNA test showed that D was not biological child of PZ. Despite this, EZ alleged PZ carried on acting as a parent to D until their divorce, spending time with him and paying support. PZ claims not to have any contact with D since, and that he voluntarily assumed the role of parent only on the basis of a serious mistake fo fact that vitiates his consent. EZ seeks order of child support from PZ. **Does PZ have child support obligations to D, despite DNA test confirming that he is not the biological father?**

Held — **Technically no. While PZ stood in the place of a parent per *Chartier*, in consideration of the entirety of the facts, court reduced his quantum of support to $0.** Court found that PZ stood in the place of a parent to D, but the whole thing was based on a mistake of fact. The short relationship between PZ and D stands in contrast to facts in *Cornelio*. Moreover, there is a total absence of evidence in the record re: D's natural father, who bears the primary responsibility to support D, nor EZ's new partner who should be standing in the place of the parent for D. It would not be just or fair to order that PZ bear the full responsibility of support. Thus, quantum of support should be $0.

2.8 *Guardianship, Custody, Care and Time*

History and Context

- At the beginning of the 19th century in most Western countries, the custody of children was the prerogative of the husband/father; children were the man's property and so he was vested w/ absolute paternal right of custody regardless of the actual needs of the children or parental capacities of the husband.

- Since then there has been numerous shifts. In terms of young children, there was this development of the "tender years doctrine" that young children were better off w/ their mothers.
- Pendulum swung back to the middle in the 1980s to start conceptualizing custody of children more equally—both parents were equally entitled to the custody of their children.
- This was also related to a changing conception of children rights. Moved from focus on parent's rights to children's rights to the modern focus on the best interests of the child.
- By the 1990s, reforms of child custody laws in many jurisdictions purported to embody these changes and to deepen them by emphasizing **shared parenting.**
- Shared custody in certain jurisdictions (but not in BC) is the presumption of the best model. However this has been criticized for numerous reasons, including the fact that custody is directly related to resources. We think about custody first and support second because the amount of time you are taking care of the child can affect how much child support you get.
- A shared custody presumption also limits the autonomy of the parent. When decisions are made about what will happen to the child, it has effects on the parents (e.g. if a parent wants to move for a good job elsewhere). Its a complicated balance between autonomy of the parents and BIC. No perfect solutions.
- Recently, custody in BC has developed outside of the conjugal paradigm (such as multi-parent agreements) so it is a domain that is shifting and is going to keep doing so.
- When engaging with these concepts, be careful about the hidden assumptions we are making about mothers and fathers and the hidden biases about who is seen in law to be a good parent and 'deserving' of custody.
- Custody, care and time are based on the BIC as the primary consideration. BIC is a determination made by adults with respect to children's interests and although this is the dominant principle for dealing with child related disputes, **BIC has limitations—the BIC principle has a paradoxical nature. It is intertwined with the presumptions we make about the parents**. While focusing substantive decision-making on the best interests of the particular child, it encouraged a decision making process which is often harmful to children. The biases, beliefs, experiences etc of the decision-maker will inevitably affect how the BIC are analyzed.
- Even judges have been critical of the BIC approach. In BC, Justice Southin in ***Rockwell*** said that decisions about BIC are tied to the invisible threads of the decision-maker's own convictions (race, cultural heritage, socio-economic status, sexual orientation, gender identity, etc.)
- In addition to this, we have to be mindful that these decisions are happening post-separation and when the parties cannot agree amongst themselves, so it is a conflict-heavy setting when families are in crisis.
- BIC is the primary concern nonetheless, but please be critical about this. BIC factors have been developed through the case law and s. 37 of FLA which prevents out-of-bounds decisions. However, KIM these are still adults evaluating BIC.

Jurisdiction and Terminology

Guardianship and custody are dealt with in BC FLA Part 4 and DA ss. 16-17.

- **Guardianship** under the FLA is broader in scope and includes the concept of **custody** under the DA.
- There are overlaps — both Acts are concerned with the decision-making aspects and general care with regard to the child
- Remember that **unmarried parents** must use the BC FLA.
- If an order is made and it is not specified under which statute it should operate, and if both the DA and FLA would apply, **assume that the order is made under DA.**

- *Hansen v Mantei-Hansen* (2013 BCSC) — **federal paramountcy could play a role in cases where the DA and the FLA conflict, so the DA may prevail** — para 117: "The [FLA] is not easily and conveniently compatible with the Divorce Act because the concept of guardianship in the FLA subsumes (absorbs) the concept of custody. It may become apparent that orders respecting children should no longer be sought or made under both Acts, and as the Divorce Act must be pleaded if a marriage is to be dissolved, and as the federal legislation is paramount, orders under that Act alone may become more prevalent."

- There are **strategic reasons** for married couples to use either Act, relating to relocation and how BIC is articulated under both Acts. For example, the DA stresses and encourages maximum contact with both spouses (s. 17(9)). This focus is not present in the FLA. Thus a party seeking shared custody is likelier to be successful under the DA.
- **Different terminology** used in each Act:

Divorce Act	BC FLA

• **Custody:** traditionally been defined as almost all rights incidental to **guardianship** of a person (right to determine a child's education, health care, religion, etc.); physical care/control of child
  • **Sole custody**: If sole custody awarded, all rights incidental to guardianship (custody) would be decided by one parent, unlike **co-custody:** decisions are made together
  • **Joint/shared custody**: about equal time with children
  • **Split custody:** 2 or more children involved, not residing in same parental homes
• **Access:** the time a parent has with a child
	• **Guardianship**
	• **Parenting Arrangements:**
	  • Parenting responsibilities
	  • Parenting time
	• **Contact:** a new concept to replace "access" under FLA (access had adversarial/negative tone)

Best Interests of the Child

The **best interests of the child** (BIC) is the sole consideration for an agreement or order of guardianship or custody in both the DA and the FLA.

BC Family Law Act

The FLA provides a precise definition of what BIC constitutes and what factors are considered in assessing the child's needs and circumstances.

37. (1) In making an agreement or order respecting guardianship, parenting arrangements or contact with a child, **the parties and the court must consider the best interests of the child only**.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

(a) the child's health and emotional well-being;
(b) the child's views, unless it would be inappropriate to consider them;
(c) the nature and strength of the relationships bwn the child and significant persons in the child's life;
(d) the history of the child's care;
(e) the child's need for stability, given the child's age and stage of development;
(f) the ability of each person who is a guardian or seeks guardianship or parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

(3) An agreement or order is **not in the best interests of a child unless** it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

(4) In making an order under this Part, a **court may consider a person's conduct** only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

38. **Assessment of family violence — For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:** (a) the nature and seriousness of the family violence; (b) how recently the family violence occurred; (c) the frequency of the family violence; (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member; (e) whether the family violence was directed toward the child; (f) whether the child was exposed to family violence that was not directed toward the child; (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence; (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring; (i) any other relevant matter.

Divorce Act

The DA has a **maximum contact provision (s. 17(9))** but it must be read in context of BIC.

16. **Custody Orders**

(8) **Factors —** in making an order for custody, the court shall take into consideration **only the best interests of the child** of the marriage determined by reference to the condition, means, needs and other circumstances of the child

(9) **Past conduct —** the court shall not take into consideration the past conduct of a person unless it is relevant to their ability to act as a parent of a child

(10) **Maximum contact —** in making an order for custody, the court shall give effect to the principle that a child of the marriage should have **as much contact with each spouse as is consistent with the best interests of the child** and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

- *does not mean presumption for shared custody*

Guardianship under the BC FLA

Who is a guardian?

Fotsch v Begin (2015, BCCA) **at para 4:** "Under the FLA, a guardian is **a person who is responsible for the care of a child and a parent is generally a guardian of the child**. Only a guardian of a child may have "parental responsibilities"."

39. Parents are generally guardians

(1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.

(2) Despite subsection (1), an agreement or order made after separation or when the parents are about to separate may provide that a parent is not the child's guardian.

(3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:

(a) S. 30 [parentage if other arrangement/multiple parenting] applies and the person is a parent under that section;

(b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;

(c) the parent regularly cares for the child.

- *See AAAM v. BC*

(4) If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.

AAAM V. BC (CHILDREN AND FAMILY DEVELOPMENT) (2015, BCCA)

Facts — Baby born between P and woman. Woman signed adoption order for baby soon after birth, indicating on it that the father was "unknown". Adoption Director placed child with family in Alberta. 5 months later, P found out that he was the biological father and sought to be appointed as a guardian of the child under BC FLA. At trial: although P was a parent under FLA, he did not "regularly care for the child" within meaning of s. 39(3)(c) of FLA so can't get guardianship; not in BIC to have half-there father (P was in Canada on a student visa due to expire and his financial and employment situation was unclear; further, he was facing a charge for a potentially serious criminal offence). P appeals.

Held — **In favour of P – appeal allowed. P was unable to "regularly care for the child" because he was not permitted access by R and the child had been moved to AB; he fulfilled the s. 39(3)(c) criterion.** P to be recognized as a co-guardian with R, subject to a condition that he and R attempt to reach an agreement concerning rights and responsibilities.

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50. Who can become a child guardian by agreement?

A person cannot become a child's guardian **by agreement** except **(a)** if the person is the child's parent, or **(b)** as provided under this Division, the Adoption Act or the Child, Family and Community Service Act.

- *50(b) is effectively an exception made for the Minister of Adoption and Child Protection. Other people can still become a guardian fo the child, just not via agreement. If one is not a parent and want to be appointed as a guardian, they need to apply for a court order via s.51(1).*

51. Who can become a child guardian by order?

(1) On application, a court may **(a) appoint** a person as a child's guardian, or **(b)** except in the case of a director who is a child's guardian under the Adoption Act or the Child, Family and Community Service Act, **terminate** a person's guardianship of a child.

(2) An applicant under subsection (1) (a) of this section must provide evidence to the court, in accordance with the Supreme Court Family Rules or the Provincial Court (Family) Rules, respecting the best interests of the child as described in section 37 [best interests of child] of this Act ...

(4) **Views of 12+ y o children:** If a child is 12 years of age or older, a court must not appoint a person other than a parent as the child's guardian without the child's written approval, unless satisfied that the appointment is in the best interests of the child.

Parenting arrangements, parental responsibilities, parenting time

Guardians have a responsibility to care for the child. They can have **parenting arrangements — i.e.** the arrangements set out in an order or agreement that allocates **parental responsibilities** or **parenting time**, or both to a guardian.

40. Parenting arrangements

(1) Only a guardian may have parental responsibilities and parenting time with respect to a child.

(2) Unless an agreement or order allocates parental responsibilities differently, **each child's guardian may exercise all parental responsibilities** wrt the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.

- *i.e. unless agreement/order saying otherwise, understood that a guardian has full bundle of parenting responsibilities*

(3) **Parental responsibilities may be allocated** under an agreement or order such that they may be exercised by (a) one or more guardians only, or (b) each guardian acting separately or all guardians acting together.

(4) In the making of parenting arrangements, **no particular arrangement is presumed to be in the best interests of the chil**d and without limiting that, **the following must not be presumed**: (a) that parental responsibilities should be allocated equally among guardians; (b) that parenting time should be shared equally among guardians; (c) that decisions among guardians should be made separately or together.

- *compare with DA's maximum contact provision*

41. Parental responsibilities —

For the purposes of this Part, parental responsibilities with respect to a child are as follows: (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child; (b) making decisions respecting where the child will reside; (c) making decisions respecting with whom the child will live and associate; (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location; (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity; (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child; (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child; (h) giving, refusing or withdrawing consent for the child, if consent is required; (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive; (j) requesting and receiving from third parties health, education or other information respecting the child; **(k)** subject to any applicable provincial legislation, (i) starting, defending, compromising or settling any proceeding relating to the child, and (ii) identifying, advancing and protecting the child's legal and financial interests; (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

43. Exercise of parental responsibilities

(1) A child's guardian must exercise his or her parental responsibilities in the BIC.

(2) If a guardian is temporarily unable to exercise any of the parental responsibilities described in s. 41 (a), (c), (d), (f) to (j) or (l), the child's guardian, in writing, may authorize a person to exercise one or more of those responsibilities on that guardian's behalf while the guardian is unable to do so and in the BIC.

42. Parenting time

(1) Parenting time is the time that a child is with a guardian, as allocated under an agreement or order.

(2) During parenting time, **a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child** and having day-to-day care, control and supervision of the child.

44. Agreements respecting parenting arrangements

(1) Who can make them? Two or more of a child's guardians may make an agreement respecting one or more of the following: (a) the allocation of parental responsibilities; (b) parenting time; (c) the implementation of an agreement; (d) the means for resolving disputes respecting an agreement.

(2) **When is it binding?** An agreement respecting parenting arrangements is binding only if the agreement is made (a) after separation, or (b) when the parties are about to separate.

(3) A written agreement re: parenting arrangements filed in the court is enforceable as if it were a court order.

(4) **Can the court set it aside?** On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the BIC.

45. Orders respecting parenting arrangements

(1) On application by a guardian, a court may make an order respecting one or more of the following: (a) the allocation of parental responsibilities; (b) parenting time; (c) the implementation of an order made under this Division; (d) the means for resolving disputes respecting an order made under this Division.

(2) An order under (1) must not be made if the child's guardians are the child's parents and are not separated.

(3) The court may make an order to require that the transfer of a child from 1 party to another, or that parenting time w/ a child, be supervised by another person named in the order if the court is satisfied that supervision is in the BIC.

(4) Despite (1), a person applying for **guardianship** may apply, at the same time, for an order under this section.

47. Changing, suspending or terminating orders respecting parenting arrangements

On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

Contact under the BC FLA

Contact is defined as the child's time with a **non-guardian**, terms of which are set out in an agreement or order. **It does not include parental responsibilities or decision-making authority.** It can be conditional or supervised. It is comparable to the concept of "access" under the former FRA.

58. Agreements respecting contact

Who can make agreements respecting contact?

(1) A child's guardian and a person who is not a child's guardian may make an agreement respecting contact with a child, including describing the terms and form of contact.

When is it binding?

(2) An agreement respecting contact with a child is binding only if the agreement is made between all of a child's guardians having parental responsibility for making decisions respecting with whom the child may associate.

(3) A written agreement respecting contact with a child that is filed in the court is enforceable under this Act as if it were an order of the court

Can it be set aside? On what basis?

(4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting contact with a child if satisfied that the agreement is not in the best interests of the child.

Can court orders be made respecting contact? Yes — the court is empowered to do so, on application, under **s. 59.** Orders may include terms and conditions such as supervision requirements, per the BIC. A court may also change, suspend, or terminate an order respecting contact if there has been a change in the needs or circumstances of the child **(s. 60).**

Custody and Access under the Divorce Act

What is custody?

2. (2) **custody** includes care, upbringing and any other incident of custody;
custody order means an order made under subsection 16(1);

While the above DA provision doesn't explain much, case law has conceptualized "**custody**" as the full bundle of rights and responsibilities of a parent to a child, almost akin to **guardianship.** Custody includes the right to determine a child's education, health care, religion, and other matters concerning the child's general well-being; and physical control over the child (***Young v. Young, Gordon v. Goertz*****).**

What is access?

Access includes the right to visit with the child away from the custodial parent — it can supervised or unsupervised. It is a form of temporary possession of the child, with the powers granted by an access order being limited to those necessary to ensure the child's well being. It confers no rights in the parent to influence the upbringing of the child (***Anson v. Anson***). Its BC FLA equivalent is **contact.**

Custody (and Access) Orders

58. Who can apply for an order?

(1) A court of competent jurisdiction may, on application by **either or both spouses or by any other person***, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

(3) *A person, other than a spouse, requires leave of the court before making an application under (1) or (2).

Interim orders

(2) A court may make **an interim order** re: access or custody pending the determination of an app. under (1).

Joint custody or access

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

Rights for spouses granted access

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

- *This right does not seem to be found in the BC FLA. In practice, if your client has "contact" (equivalent of access under the BC FLA) and would like them to be able to make inquiries, specify that in the agreement/order.*

Court may impose terms and conditions

(6) The court may make an order under this section for **a definite or indefinite period or until the happening of a specified event and may impose such other terms**, conditions or restrictions in connection therewith as it thinks fit and just.

Order respecting change of residence

(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to **notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change**, the time at which the change will be made and the new place of residence of the child.

Best interests of the child

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

- *compare with ss. 37-38 of the FLA and how those sections articulate BIC – also, no mention of consideration of a child's views in the DA*

Past conduct

(9) In making an order under this section, **the court shall not take into consideration the past conduct of any person** unless the conduct is relevant to the ability of that person to act as a parent of a child.

Maximum contact

(10) In making an order under this section, the court shall give effect to the principle that **a child of the marriage should have as much contact with each spouse as is consistent with the BIC** and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

- *compare with FLA s. 40(4) – no particular arrangements should be presumed to be in the BIC*

Specific Issues in Parenting: Relocation

A key element of guardianship and custody is the issue of **relocation—a change in the child's residence**—which is connected to key parental responsibility of the determination of child's residence. In recent years, the increased mobility of parents and spouses has spawned a correlating increase in relocation cases. However, it is still very much a grey area of the law in BC. Cases are new and often highly fact-dependent and contextual.

What is your client's marital status and what is their position on relocation? If they are married and wish to oppose relocation, use the Divorce Act, as it is more difficult to establish an argument for relocation. If the client wishes to relocate, use the statutory tests found under the BC FLA.

Relocation under the BC FLA

65. What is relocation?

(1) In this Division, "relocation" means a change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with (a) a guardian, or (b) one or more other persons having a significant role in the child's life.

Under the BC FLA, there are two different approaches to engage with the issue of relocation, depending on whether or not a parenting agreement or order is in place:

46. Division 2 — Parenting Arrangements

Changes to child's residence if no agreement or order

(1) This section applies if all of the following circumstances exist:

- **(a) no written agreement or order respecting parenting arrangements applies in respect of a child;**
- **(b)** an application is made for an order described in section 45 (1) (a) or (b) [*orders respecting parenting arrangements*];
- **(c)** the child's guardian plans to change the location of that child's residence and the change can reasonably be expected to have a **significant impact** on their relationship with another guardian.

(2) To determine the parenting arrangements that would be in the best interests of the child in the circumstances set out in subsection (1) of this section, the court

- **(1)** must consider, in addition to the factors set out in s. 37(2) [*best interests of child*], **the reasons for the change in the location of the child's residence,** and
- **(2)** must **not** consider whether the guardian who is planning to move would do so without the child.

69. Division 6 — Relocation

Changes to child's residence if there is an agreement or order in place

(3) The court must consider, in addition to the factors set out in s. 37(2) [*best interests of the child*], the factors set out in (4)(a).

(4) If an application is made under this section and the relocating guardian and another guardian **do not have substantially equal parenting time** with the child,

(a) the relocating guardian must satisfy the court that
  (i) **the proposed relocation is made in good faith,** and
  (ii) **the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians**, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life

(b) on the court being satisfied of the factors referred to in para. (a), the relocation will be considered to be in the BIC unless another guardian satisfies the court otherwise.

(5) If an application is made under this section and the relocating guardian and another guardian **have substantially equal parenting time** with the child,
  (a) of the factors described in (4)(a) and
  (b) that the relocation is in the best interests of the child.
    - *i.e. unlike in (4), this imposes an extra step – a full determination of BIC will need to be done. This test is more difficult and places a higher burden on the relocating parent than s. 46 and s.69(4). Thus if the relocating guardian opts to go for this test, the court is less concerned about whether the correct test was applied (as in* **Fotsch v. Begin***)*

(6) To determine if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following: (a) the reasons for the proposed relocation; (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities; (c) whether notice of relocation was given under s. 66; (d) any restrictions on relocation contained in a written agreement or an order.

(7) In determining whether to make an order under this section, the court must **not** consider whether a relocating guardian would still relocate if the child's relocation were not permitted.
  - *Court may still consider whether the guardian opposing relocation would still relocate if the child's relocation was permitted (as in* **Fotsch v. Begin***)*

FOTSCH V. BEGIN (2015, BCCA)

Facts – Couple married in 2011, separated in 2013 while they were in Germany, where mother was from and her extended family was located. Father returned to Canada and brought an application under the Hague Convention. Mother and Child returned to Canada in 2013. Mother survived on limited child support, social assistance, limited earnings and monies from her parents. In 2014, parties consented to an interim order that provided for an alternating parenting arrangement between the parties. Parties agreed that this constituted an existing arrangement necessary to use the statutory criteria under s.69 for relocation, so **mother applied under Div 6, s. 69 of the FLA to relocate with the child to Germany, where she believes cost of living and opportunities are better. At trial, she was granted a relocation order. Father is appealing.**

Held – **Upheld trial decision in favour of mother.**

Does an interim order under the FLA provide the necessary threshold for deciding a relocation application under Div 6, s. 69 of the FLA rather than s. 46(2)? Was the right statutory criteria chosen? Court declined to consider this appeal because the parties had specifically requested the judge to determine the issue under s. 69, and in any event, the criteria under s. 69 placed a higher burden on the mother to establish the criteria for relocation, which the judge found that she met, so the father suffered no prejudice.

At trial, the TJ applied the pre-FLA analysis of SSL v. JWW, which addresses mobility issues arising in joint parenting cases under the DA. Must the approach in SSL be followed when determining a relocation application under the FLA? No.FLA provides a comprehensive and mandatory statutory test for determining relocation applications that does not include the analysis from SSL.

Did TJ err in considering whether the father would relocate if the mother's relocation application for her and the child *was granted*? No. S. 69(7) prohibits the court from considering "whether a guardian would still relocate if the child's relocation *was not permitted*" – this is different and expressly limited to the relocating guardian. Moreover, TJ did not rely on that factor for a presumptive disposition in favour of the relocation.

Relocation under the Divorce Act

The Divorce Act does not contain any statutory tests regarding relocation, as in the FLA. The test stems from case law, and originated from *Gordon v. Goertz* (1996, SCC).

GORDON V. GOERTZ (1996, SCC)

Facts — The custodial parent (mother) wanted to move to Australia with her daughter. The non-custodial parent (father) applied for custody or to obtain an order restraining the mother from removing the child from Canada.

Held — **Mother was granted permission to relocate.**

The test is a two-step process, which works under the assumption that there is a written agreement or order:

1. **When making an application for an order (under s. 54), the applicant must meet the threshold requirement of demonstrating a material change in circumstances affecting the child.**
   - Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way.
   - The question is whether the previous order might have been different had the circumstances now existing prevailed earlier.
   - Moreover, the change should represent a distinct departure from what the court could reasonably have foreseen or contemplated in making the previous order.
2. **If the threshold is met, the applicant must establish that the propose move is in the BIC, given all the relevant circumstances for the child's need and the ability of the respective parents to satisfy them.**
   - The judge undertaking this fresh inquiry into the BIC must consider the findings of fact made by the first judge as well as the evidence of changed circumstances.
   - The inquiry does not start with a legal presumption in favour of the parent who has custody of the child, although the custodial parent's views are entitled to great respect.
   - Each case is dependent on its own unique circumstances.
   - The focus is on the BIC, as opposed to the interests and rights of the parents.
   - More particularly the judge should consider, among other things:
     (a) the custody arrangement currently in place and the relationship between the child and the custodial parent
     (b) the access arrangement currently in place and the relationship between the child and the access parent
     (c) the views of the child
     (d) the desirability of maximizing contact between the child and both of the parents
     (e) the custodial parent's reason for moving, only in the exceptional situation where it is relevant to that parent's ability to meet the needs of the child
     (f) disruption to the child of a change in custody
     (g) disruption to the child consequent on removal from family, schools, and the community he/she knows.

2.9 *Child Support*

The right to child support is rooted in the **rights of the child** (and not the rights of their parents): *Earle v. Earle*.

The **duty to provide support falls primarily on the parents,** which can include adoptive parents and stepparents. There is a hierarchy as to duties; the duty of stepparents and guardians to provide support, if any, is secondary to that of the child's parents.

Eligible children include the child, the stepchild, and the adult child (given certain conditions).

Child support takes priority over spousal support. This principle can be found in **DA s.15.3** and **BC FLA s.173.**

Unlike spousal support, **child support has been tax-neutral since 1997**. Prior to that, child support was tax-deductible from the payor.

Like many other issues, both the DA and the BC FLA address child support. However, **regardless of which statute an order for support is made under,** consideration of the federal **Child Support Guidelines** is mandatory in establishing the amount of support a child is entitled to.

Who is eligible to receive child support?

Under the BC FLA:

- A **child** per s. 1: "a person who is **under 19 years of age**;"
- A **child** per s. 146: "includes a person who is **19 years of age or older** and **unable, b/c of illness, disability or another reason**, to obtain the necessaries of life or withdraw from the charge of their parents or guardians."
- Stepchildren, per s. 147(4) — use the ***Chartier*** test

Under the DA, a **child of the marriage** as defined in s. 2(1), which encompasses the following:

- a child **"**who, at the material time, (a) **is under the age of majority** [as determined by the laws of the province where the child ordinarily resides, or, if the child ordinarily resides outside of Canada, 18 years of age] and has not withdrawn from their charge …"
- a child "who, at the material time, (b) **is the age of majority or over** and under their charge but **unable, by reason of illness, disability or other cause**, to withdraw from their charge or to obtain the necessaries of life."
- "a child of two spouses or **former spouses …" — i.e. stepchildren**

Further Notes:

- **Being within a parent's "charge"** means being in the "care", "custody" or "responsible possession" of that parent, including financial care.
- **Stepchildren** do not automatically attract support — use the ***Chartier*** test to see if the stepparent was standing in the place of a parent for their stepchild
- **Adult children**
  - The party seeking child support for an adult child bears the onus of proving that the child is a "child" as defined by s. 146 of the FLA
  - Two important factors to consider in determining whether an adult child with **disabilities** is unable to obtain the necessaries of life are the child's employability and the extent of the child's disability
  - The **pursuit of education** qualifies as "another reason" which may cause an adult child to be unable to withdraw from the charge of his or her parents. In considering whether a child's educational pursuits justify an adult child remaining a child for purposes of child support, the following factors from ***Farden v. Farden (1993, BCSC)*** may be helpful:
    (a) whether the child is enrolled in a course of studies and whether it is full-time or part-time;
    (b) whether or not the child has applied for or is eligible for student loans or other financial assistance;
    (c) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
    (d) the ability of the child to contribute to his own support through part-time employment;
    (e) the age of the child;
    (f) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
    (g) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
    (h) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

    The ***Farden*** factors are of less importance when assessing an adult child with **disabilities**.

Who has a duty to pay child support?

Hierarchy of duties: parents > guardians > stepparents

1. **Parents**
   - Each parent of a child has a duty to provide support.
   - **Exceptions exist under FLA s. 147(1):** if the child is a spouse (i.e. if the child is married to another person or marriage-like relationship, duty shifts to spouse); if the child has voluntarily withdrawn from charge (i.e. without circumstances related to family violence. If there is family violence or other untenable circumstances, the child will still have a right to child support and the parent will still have reciprocal duty to pay it).
2. **Guardians who are not the child's parent**
   - **Secondary duty:** A guardian **who is not the child's parent** *may* have a duty to provide support for that child. If so, then the guardian's duty is **secondary** to that of the child's parents.
   - **Exceptions exist under FLA s. 147(1):** if the child is a spouse (i.e. if the child is married to another person or marriage-like relationship, duty shifts to spouse); if the child has voluntarily withdrawn from charge (i.e. without circumstances related to family violence. If there is family violence or other untenable circumstances, the child will still have a right to child support and the parent will still have reciprocal duty to pay it).
3. **Stepparents**
   - **In the DA:**
     - A spouse, **which includes a former spouse** (i.e. a stepparent), will owe a duty of support to a "child of the marriage", which includes any child for whom at least one spouse "stands in the place of a parent" (ss. 2(1) to (2)) — *use the* **Chartier** *test to establish that the stepparent falls into this status*
   - **In the FLA:**
     - **Eligibility:** Per **s.147(4)**, a stepparent does not have a duty to provide support for the child unless **(a)** the stepparent contributed to the support of the child for at least one year, and **(b)**a proceeding for an order for child support against the stepparent is started within one year after the date the stepparent last contributed to the support of the child.
     - **Secondary duty:** Per **s.147(5),** if a stepparent has a duty to provide support, then the stepparent's duty is **secondary** to that of the child's parents *and* guardians and extends only as appropriate on consideration of (i) the standard of living experienced by the child during the relationship between the stepparent and their spouse, and (ii) the length of time during which the child lived with the stepparent. — *i.e. the* Child Support Guidelines *do not necessarily apply*

Agreements and Orders respecting child support

148. Agreements respecting child support

(1) An agreement respecting child support is binding only if the agreement is made (a) after separation, or (b) when the parties are about to separate, for the purpose of being effective on separation.

(2) A written agreement respecting child support that is filed in the court is enforceable under this Act and the Family Maintenance Enforcement Act as if it were an order of the court.

(3) On app by a party, the court may set aside or replace w/an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in s. 150

149. Orders respecting child support

(1) Subject to (3), on app by a person referred to in (2), a court may make an order requiring a child's parent or guardian to pay child support to a designated person.

(2) An application may be made by (a) a child's parent or guardian, (b) the child or a person acting on behalf of the child, or (c) if the right to apply for an order under this section is assigned to a minister under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act, the minister to whom the right is assigned in the name of the government or the name of the person who made the assignment.

(3) On app by a party, the court may set aside or replace w/an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in s. 150

(4) The making of an order against one person for the support of a child does not affect the liability of, or prevent the making of an order against, any other person responsible for the support of the child.

151. If parentage at issue

If the parentage of a child is at issue in a proceeding for an order respecting child support, the court, regardless of whether an app is made under 31 [orders declaring parentage], may do one or both of the following: (a) make an order respecting the child's parentage in accordance with that section (b) make an order under 33 (2) [parentage tests].

152. Changing, suspending or terminating orders respecting child support

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

(2) Before making an order under (1), the court must be satisfied that at least 1 of the following exists, and take it into consideration: (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made; (b) evidence of a substantial nature that was not available during the previous hearing has become available; (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

Steps to apply the Child Support Guidelines

1. Confirm that the Guidelines apply

If you are divorced or have applied for a divorce and…	**Then…**
You both live in **any** Canadian province/territory **other than** MB, NB, QC	Federal Guidelines
You both live in MB, NB, or QC	Provincial guidelines
You live in different provinces/territories, even if **one or both** are MB, NB, QC	Federal Guidelines
One of you lives in Canada and the other lives in a different country and have applied for divorce under Canada's DA	Federal Guidelines
If you and the other parent…	**Then…**
were never married to each other and you both live in Canada	provincial or territorial guidelines*
are married and have separated but are not divorcing or have already resolved child support under provincial or territorial laws	provincial or territorial guidelines*

* **The CSG are mandatory in BC; there are no provincial or territorial guidelines for child support.**

- **s 15.1(3) DA:** A court making an order [for child support] under subsection (1) or an interim order under subsection (2) **shall do so in accordance with the applicable guidelines**.
- **s 150(1) FLA**: If a court makes an order respecting child support, the amount of child support **must be determined in accordance with the child support guidelines**.

2. Determine the number of children requiring support
   See section: "Who is eligible to receive child support?"

3. Determine the parenting arrangement
   The CSG use the following three terms to describe parenting arrangements: "sole custody," "split custody" and "shared custody." **For child support purposes, these terms refer to the time the child spends with each parent. They do not refer to who has legal authority to make major decisions about the child.**
   - **Sole custody:** You have a sole custody arrangement if your child spends more than 60% of their time with one of you over the course of a year.
   - **Split custody:** You split custody of your children if: you have more than one child; and you each have sole custody of at least one of the children (as in at least one child spends more than 60% of their time with each parent over the course of a year).
   - **Shared custody:** You share custody of your children if they spend at least 40% of the time with each of you in a year.

4. Find the right table
   The CSG have child support tables for each province and territory. The tables set out basic child support amounts that depend on the income, the number of children, and the province or territory of residence. There is a separate federal table for each province and territory. That is because the child support amounts in the tables are based partly on provincial and territorial tax rules. Since provincial and territorial tax rules are different, so are the table amounts.

   If you need to determine how much child support is owed for a period between **December 31, 2011 until November 21, 2017**, use the **2011 Tables** to find that amount. **The updated 2017 Federal Tables should be used to determine child support owed from November 22, 2017 onward.**

If...	Then...
You both live in the same province/territory	Use the table for that province/territory
You live in different provinces/territories and of you has **sole custody** and the other parent must pay support	Use the table for the province/territory where the paying parent lives.
You live in different provinces/territories and you **share** or **split custody**	Use the tables for both provinces/territories where you reside to determine what you would each pay to the other parent.
One of you lives outside Canada	Use the table for the province/territory where the parent in Canada lives. The laws of the other country may apply in some cases.

5. Calculate annual income
   Either **agree in writing about annual income** (If you both agree on an amount and you need to go to court with your case, a judge may use that amount to calculate child support if the amount seems reasonable, based on the documents required and rules found in the CSG) or **apply the rules found in the CSG** (under these rules, the total income shown on line 150 of your most recent income tax return or your notice of

assessment is a good place to start). The court may also **impute income** to you.

There is a threshold level of income below which no amount of child support is payable. The threshold is set at $12,000.

6. Find the table amount

Use the tables in the Federal Guidelines or the Simplified Tables.

- **Sole custody:** Use the federal table for the province or territory where the paying parent lives. On that table, find the amount of support that matches the paying parent's income and the number of children being supported.
- **Split custody:** For each parent, check the table(s) for the province or territory where they live to find out how much support they would pay for the children in the other parent's custody. Once you have found the table amounts that each parent would pay, subtract the lower amount from the higher amount.
  - **e.g.** Raj and Isha have a split custody arrangement. Isha lives in NS and will have sole custody of one child, Dhara. Raj lives in PEI and will have sole custody of two children, Ajay and Amir. They use the table for NS to find out how much support Isha would have to pay for the two children living with Raj (let's say $400/month). They use the table for PEI to find out how much support Raj would have to pay for the one child living with Isha (let's say $160/month). They then subtract the lower amount from the higher amount: $400 - $160 = $240. Thus Isha will have to pay Raj $240 per month.
- **Shared custody:** For each parent, check the table(s) for the province or territory where they live to find out how much support they would pay to the other parent if the other parent had sole custody of all children. Once you have found the table amounts that each parent would pay, subtract the lower amount from the higher amount. Consider also (i) the increased cost of shared custody arrangements; and (ii) the conditions, means, needs and circumstances of each spouse and of any child for whom support is sought.
  - **e.g.** Ingrid and Nathan both live in BC and have decided to share custody of their three children. To determine a support amount, they look at the table for BC to find the amount each of them would pay to the other parent if the other parent had sole custody of both children. Nathan has an annual income of $30,000 — the basic amount for 3 children in BC with that income is $648. Ingrid has an annual income of $70,000 — the basic amount for 3 children in BC with that income is $1422. They then decide to subtract the lower amount from the higher amount: $1422 - $648 = $774. Thus Ingrid will have to pay Nathan $774 per month.
  - Some discretion is allowed. e.g. Ingrid and Nathan then look t the expenses each expect to pay while their children are spending time with them. They find that Nathan will have to pay for more expenses than Ingrid. They agree it is fair for Ingrid to pay Nathan an extra $30 per month to help cover those expenses because she earns more and can take on a greater part. Thus they agree that the amount of child support Inggrid will have to pay Nathan will be $774 + $30 = $804 per month.
- **Income over $150,000:** The child support tables only show an amount for the first $150,000 of income. You have two choices for determining how much child support should be paid on the portion of income over $150,000:
  - Multiply the amount of income over $150,000 by the percentage shown in the table for the province or territory where the paying parent lives; or
  - Parties can agree on an additional amount of support based on the condition, means, needs and other circumstances of the children and their financial ability to contribute.

7. Determine if there are special or extraordinary expenses
8. Determine if there is undue hardship or other exceptions

Federal Child Support Guidelines

Objectives (s. 1)

1. The objectives of these Guidelines are

(a) to establish a **fair standard of support** for children that ensures that they continue to benefit from the financial means of both spouses after separation;

(b) to **reduce conflict and tension** between spouses by making the calculation of child support orders more objective;

(c) to **improve the efficiency of the legal process** by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(d) to **ensure consistent treatment** of spouses and children who are in similar circumstances.

Presumptive rule (s. 3)

3 (1). Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

(a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

(b) the amount, if any, determined under section 7.

Exceptions to the presumptive rule

- **Split custody — s 8 CSG**
- **Shared custody — s 9 CSG**
- **Payor not biological or adoptive parent (stepparent) — s 5 CSG**

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

- **Children over 19 — s 3(2) CSG**

  3 (2). The amount of child support is either the amount determined by **(a)** applying the CSG as if they were under the age of majority; or **(b)** if the court finds that approach inappropriate, the amount it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

- **Income over $150,000 — s 4 CSG**

  4. Can be either **(a)** the amount determined by applying the CSG or **(b)** if the court finds that approach in appropriate, court may (i) apply CSG to determine table amount for first $150k, (ii) for the rest of the income, the court may exercise judicial discretion to determine an appropriate amount; (iii) with regard to special or extraordinary expenses.

- **Income below $12,000 — Federal Child Support Tables, Note 2**

  There is a threshold level of income below which no amount of child support is payable. The threshold is set at $12,000.

- **Undue hardship — s 10 CSG**

  10 (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

  (a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

  (b) the spouse has unusually high expenses in relation to exercising access to a child;

(c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is (i) under the age of majority, or (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and
(e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

- **Agreements — s 15.1(5)(7) DA**

15.1 (5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied
(a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
(b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

15.1 (7) Consent orders — Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

- **BC-specific exception: if for other reasons child is left in an advantageous position (i.e. receiving support in an another way) — s. 150(4) BC FLA**

150 (4) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if satisfied that
(a) an agreement or order respecting the financial duties of the parents or guardians or the division or transfer of property, other than an agreement respecting child support, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, and
(b) applying the child support guidelines would be inequitable on consideration of the agreement, order or special provisions.

Income (ss. 15-20)

Before the court even looks at the Child Support Guidelines tables it has to decide what the payor's income is. The tables set out the amount of child support payable according to the payor's income.

Where spouses agree on income

15. (2) **Where both spouses agree in writing on the annual income of a spouse**, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under s. 21.

Determination of income

16. Subject to ss. 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

Irregular work (e.g. freelance)

17. (1) If the court is of the opinion that the determination of a spouse's annual **income under s. 16 would not be the fairest determination of that income**, the court may have regard to the spouse's income over the **last three years** and determine an amount that is fair and reasonable **in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years**.

(2) **Non-recurring losses — Where a spouse has incurred a non-recurring capital or business investment loss**, the court may, if it is of the opinion that the determination of the spouse's annual **income under s. 16 would not provide the fairest determination of the annual income**, choose not to apply ss. 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Imputing income

19. (1) The court may **impute income** to a spouse as it considers appropriate, including when:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child or by the reasonable educational or health needs of the spouse;

(b) the spouse is exempt from paying federal or provincial income tax;

(c) the spouse lives in a country with significantly lower income tax rates than those in Canada;

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment/business income or that are exempt from tax; and

(i) the spouse is a beneficiary under a trust and is or will receive income or benefits from the trust.

Special or Extraordinary Expenses (s. 7)

7. (1) In a child support order may, on either spouse's request, provide an amount to cover all or any portion of the following expenses — taking into account the **necessity of the expense re: child's BIC** and the **reasonableness of the expense re: spouses' means and the family's spending pattern prior to separation**:

(a) Child care expenses incurred as a result of the custodial parent's employment, illness, disability, education/training for employment

(b) Medical and dental insurance premiums attributable to child

(c) Health-related expenses that exceed insurance reimbursement by at least $100 annually, including counselling and social worker services

(d) Extraordinary expenses for primarily or secondary school education or other educational programs

(e) Post-secondary education expenses

(f) Extraordinary expenses for extracurricular activities

(1.1) **Extraordinary expenses** means expenses that **exceed** those thet the requesting parent can reasonably cover, or expenses the court considers extraordinary, taking into account: the amount in relation to their income, the nature, number, and costs of educational programs and extracurricular activities, any special needs/talents of the child, and any other similar factor the court considers relevant.

(2) **The expenses are generally shared by the spouses *pro rata* (i.e. in proportion to their respective incomes).** However, parties may agree to share the amount in a different way.

Undue Hardship (s. 10)

10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under the CSG if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer **undue hardship (i.e. the applicant spouse's circumstances would make it difficult to pay the required amount or support the child on the amount of support they receive).**

(2) **Circumstances that may cause undue hardship:**

(1) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

(2) the spouse has unusually high expenses in relation to exercising access to a child;

(3) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;

(4) the spouse has a legal duty to support a child, other than a child of the marriage, who is (i) under the age of majority, or (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and

(5) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

(3) **The household of the spouse claiming undue hardship must have a standard of living that is lower than the other parent's household's standard of living.** Despite a determination of undue hardship, an application under must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support, have a higher standard of living than the household of the other spouse.

Circumstances for Variation (s. 14)

14. Any one of the following gives rise to the making of a **variation** order in respect of a child support order:

1. in the case where the amount of child support was determined with the applicable table, a**ny change in circumstances that would result in a different child support order or any provision thereof;**
2. in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support (ie. care of a child increased due to an illness or disability and now parent is less able to work)

3. Adult Relationships

3.1 Introduction

Types of Relationships and Tensions in Law

Some types of adult relationship statuses recognized in law include:

1. **Married**: For a marriage to be legal, the person who performs the marriage ceremony must be licensed or approved by the government. A couple may be married in a religious or a civil (non-religious) ceremony.
    - **Religious ceremony:** A religious official who is registered to marry people in the province can legally marry you, such as a Pastor, Priest, Rabbi or Imam.
    - **Civil ceremony:** A judge, justice of the peace, city clerk or someone else licensed to perform marriages in the province can legally marry a couple
2. **Formal partnerships:** civil union in Quebec – spouses must take certain steps to see relationship formalized and recognized by law
3. **Unmarried**: status traditionally triggered by cohabitation time or a common child

Other relationship types include:

1. **Adult Interdependent Relationships:** exclusive to Alberta, available to both same-sex and opposite-sex couples; imposing some but not all of the obligations of marriage and providing some but not all the rights and benefits thereof.
2. **"Living Apart, Together":** people engaged in an intimate relationship but who live at separate addresses. According to the Vanier Institute, they are most common among younger Canadians but the law struggles to recognize them.
3. **Bigamy**: the practice or condition of marrying one person while still being legally married to another; illegal under s. 290 of the Criminal Code.
4. **Polyamory and polygamy:** polyamory is the practice or condition of participating in more than one intimate relationship at a time; it is unrelated to marriage. Polygamy is the practice or condition of entering into any kind of conjugal union or spousal relationship with more than one person at a time; it is illegal under s. 293 of the Criminal Code.

Different legislative regimes apply to different types of relationships. Some legislative tensions include:

1. **Formal** (e.g. marriage, registered civil partnerships) vs. **functional** (functioning as a unit without taking formal steps to have relationship recognized in law)
2. **De jure** (relationship that are true in fact, but that are not officially sanctioned) vs. **De facto** (relationships that are in accordance with the law and are officially sanctioned)
3. **Conjugal** (two people either legally married or living in a common-law relationship) **vs. Non-conjugal**
    - Law tends to focus most on conjugal relationships, ignoring the diversity and growth of non-conjugal relationships and living arrangements: LCC, *Beyond Conjugalityctioned)*
    - Conjugal relationships can only happen between 2 people; bigamy and polygamy (which does not require marriage) are prohibited in the Criminal Code
4. **Relationship regulation mechanisms: public** (state can channel people into relationships; i.e. prohibited relationships/public order mechanisms) and **private** (statute intrusion into how personal relationship between A and B should be balanced)

Law Commission of Canada, "Beyond Conjugality" Report

In 2001, the Law Commission of Canada (LCC) released a report titled "Beyond Conjugality: Recognizing and Supporting Close Adult Relationships". The LCC:

- Described many types of **non-conjugal** adult relationships: both between relatives (e.g. adult kids with parents, economic families, adult siblings sharing a home, widow's/widower's blended families, multigenerational households) and non-relatives (e.g. families of friends, replacement families)
- argued that **conjugality** ("of, relating to, or characteristic of marriage") has been used by legislatures and governments as a **proxy** for the **recognition of adult personal relationships** and the **legal distribution of rights and responsibilities,** ignoring the diversity of non-conjugal households and personal adult relationships;
- advocated for a legislative regime that more effectively accomplishes its goals by taking into account the **functional attributes of particular relationships** rather than whether people are living in particular kinds of relationships;
- argued that the law should more carefully tailor its definitions of adult personal relationships to the underlying objectives of state regulation;
- Argued that certain **fundamental values,** of which **equality** and **autonomy** are most important, ought to guide the development of government policies impacting personal adult relationships:
    1. **Equality,** of which there are 2 sub-sets:
        a. **relational equality,** which seeks to equalize the legal status among different types of relationships — e.g. the federal *Modernization of Benefits and Obligations Act* largely eliminated distinctions between married spouses and persons living in conjugal relationships outside of marriage, but by focusing on equal treatment of conjugal couples, it entrenches unequal legal treatment of conjugal and non-conjugal relationships; and
        b. **equality within** relationships, which seeks to overcome unequal distributions of income, wealth, and power (much of it rooted in historic inequalities between men and women), or the lack of state support for persons with disabilities
    2. **Autonomy,** which requires that governments put in place the conditions in which people can freely choose their personal relationships. The state should remain neutral with regard o the form or status of relationships and not accord **one** form of relationship more benefits or legal support than others.
    3. **Personal security** enhances the ability of individuals to make healthy choices about entering or remaining in relationships; the state has a role in ensuring physical security within a relationship as well as economic security outside of the relationship
    4. **Privacy:** the state should thus avoid establishing laws that require intrusive examinations or forced disclosure of the intimate details of personal adult relationships, unless the relationship involves violence or exploitation
    5. **Religious freedom:** the state should not take sides in religious matters; laws and policies that regulate relationships should pursue objectives that can be defended in secular than religious terms
    6. **Coherence** requires that laws have clear objectives, and that their legislative design corresponds with the achievement of those objectives
    7. **Efficiency** of a law or policy may be measured by how effective it is in reaching its intended beneficiaries and whether it can be administered without undue costs or delays
- proposed a new **4-part methodology** for assessing any existing or proposed law that employs relational terms to accomplish its objectives:

1. **Are the objectives of the law legitimate?** If not, should the law be repealed or fundamentally revised?
2. **If so, are relationships relevant to achieving the law's objectives?**
3. **If relationships are relevant, can individuals themselves choose which relationships should be subject to the law?**
4. **If relationships are relevant and self-designation is not feasible or appropriate, is there a better way for governments to include relationships?**

- outlined 4 legal models to regulate personal relationships:

1. **Marriage**: the main vehicle by which 2 parties publicly express commitment and sought to ensure stability; civil marriage and religious marriage co-exist
   a. **Cons:** LCC argues it is no longer a sufficient model, given variety of relationships existing today
   b. State's interest in marriage relates to the facilitation of private ordering (i.e. providing an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations)
2. **Private law as government:** when governments do not provide a legal framework, people can use contracts to express commitments and turn to private law remedies upon breach of obligations.
   a. **Cons**: Model may be burdensome and costly and tends to favour party with greater resources.
3. **Ascription:** government imposes obligations on people in conjugal relationships that are presumed to correspond to the expectations of the majority of people involved in such relationships.
   a. **Cons:** Risks treating all conjugal relationships alike; infringes on autonomy, as people may not be aware that they may opt out of certain provisions; inappropriate for non-conjugal relationships
4. Registration: move towards the creation of a new status, often called "registered partnership" — upon registration of relationships, people voluntarily assume range of legal rights and obligations; framework allows registrants to express commitment and receive public recognition, and provides for an orderly and equitable resolution of registrants' affairs upon breakdown.
   a. Merits consideration because it recognizes a broader range of relationships, both conjugal and non-conjugal; affirms autonomy; often does not compromise privacy in the way ascription often does
   b. LCC made comments on the **design of a registration scheme,** specifically that:
      i. re: **formal attributes**, registrations should not be limited to any one kind of couple, nor should it impose a residential requirement. They should be terminable by mutual agreement or unilaterally.
      ii. re: **legal implications**, registration should provide options of models of predetermined rights and obligations reflecting various kinds of relationships; legal consequences may be limited to the rights and responsibilities within the relationship, so clarify the responsibilities each party is voluntarily assuming
      iii. re: **intergovernmental and international implications,** the best scenario would be a coordinated initiative among federal, provincial, territorial governments; Canada should participate in efforts towards international recognition of registration systems
   c. Registration scheme could be used to replace marriage as a legal institution; however, unlikely to be an attractive option for the majority of Canadians currently

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Cossman and Ryder, "Beyond "Beyond Conjugality""

The Law Commission of Canada paid heavily for the Beyond Conjugality Report ("BCL"); Conservative Harper government cut its funding.

Instead of abandoning conjugality, the state extended its definition as well as revamped its "borders of entry":

- the only actual law reforms done by the state, somewhat following BCL, is to introduce cohabiting same-sex couples into the conjugal model, which was previously exclusive to married opposite-sex couples
- marriage now requires "free and enlightened" consent, a specific age (no person under the age of 16 may contract marriage), and dissolution of any previous marriages by death, divorce, or declaration of nullity

Even then, the lines between conjugal/non-conjugal are blurring, if not dissolving altogether (for one, sex is no longer a requirement for recognition as a conjugal cohabitant in Canada). The meaning of conjugality and non-conjugality are being redefined in the application and interpretation of the law to the murkiness and diversity of people's actual relationships.

Evolution of Adult Relationships: Case Law

Hyde v. Hyde and Woodmansee (1866, UK)

- Common-law definition of marriage derived from its understanding "its Christendom" (i.e. imported definition of marriage from religion): "the voluntary union for life of one man and one woman, to the exclusion of all others"; argued that procreation was the legal basis for marriage, and this legal basis was not applicable to same-sex couples for whom conventional procreation was unavailable

Andrews v. Ontario (Minister of Health) (1988, ONSC)

- Definition of "spouse" in Canadian law started to be challenged in the late 1980s
- ONSC ruled that same-sex partners are not spouses for OHIP purposes, even though the plaintiffs had lived together for 9 years, were raising 2 children, and had conventionally co-mingled estates (bank accounts, wills, home ownership, etc); held that same-sex couples are not similarly situated to heterosexual couples because they do not have the same procreative capacities or family responsibilities.

Mossop v. Canada (AG) (1993, SCC)

- First SCC decision to consider equality rights for same-sex couples.
- Gay man sought bereavement leave from his employer to attend the funeral of his same-sex partner's father. Employer denied him leave under the collective agreement on the grounds that his partner was not "immediate family". Sexual orientation was not a prohibited ground of discrimination at that time, so he argued that he had been discriminated against on the basis of his "family status", under section 3 of the Canadian Human Rights Act.The Tribunal found in his favour, but the government appealed to the FCA, and they overturned the judgment. The SCC upheld the FCA's judgment.
  - **Dissent, L'Heureux-Dubé:** "The traditional conception of family is not the only conception. The multiplicity of definitions and approaches illustrates clearly that there is no consensus as to the boundaries of family, and that "family status" may have varied meanings depending on the context or purpose for which the definition is desired. This same diversity in definition is found in Canadian legislation affecting the "family"; the law has evolved and continues to evolve to recognize an increasingly broad range of relationships. The family is not merely a creation of law, and while law may affect the ways in which families behave or structure themselves, the changing nature of family relationships also has an impact on the law. It is clear that many Canadians do not live within traditional families. In defining the scope of the protection for "family status", the Tribunal thought it essential not only to look at families in the traditional sense, but also to consider the values that lie at the base of our support for families. It found that these values are not exclusive to the traditional family and can be advanced in other types of families."

Egan v. Canada (AG) (1995, SCC)

- Delivered the same day as *Miron v. Trudel*.
- Charter case, again attacking the definition of "spouse" under a statute. The SCC ruled that the definition of "spouse" in s. 2 of the *Old Age Security Act,* which excludes same-sex couples, is discriminatory under s. 15 *Charter* but safeguarded in s.1.
- **This was the first time that sexual orientation was recognized as an analogous ground protected by s. 15.**

MIRON V. TRUDEL (1995, SCC)

Facts — Ps were a common law couple. P1 suffered a car accident and attempted to claim injuries under P2's insurance policy. ON *Insurance Act* provided that benefits were only available to legally married spouses. Ps sued insurance company arguing that he was discriminated against and that the *Insurance Act* violated *Charter* s. 15 equality rights.

Held — **In favour of Ps; marital status discrimination within the *Insurance Act* violated s. 15 and could not be saved by s. 1.** *For a violation of s. 15*, one must show (a) denial of equal protection or equal benefit and (b) that the denial constitutes discrimination (i.e. the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground + the unequal treatment is based on the stereotypical application of presumed characteristics). Denial of equal benefit on the basis of marital status is established, and marital status is an analogous ground of discrimination (like other recognized grounds of discrimination, engages violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making). *Unable to save through s.1* — not justified in free and democratic society. *Insurance Act's* legislative goal is to sustain families when injured and not rationally connected to the discriminatory distinction → impairs right more than necessary to achieve goal.

Vriend v. Alberta (1998, SCC)

- Plaintiff Vriend was dismissed from his position at a religious college because of his sexual orientation, then prevented from making a complaint under the *Alberta Individual Rights Protection Act* because it did not include sexual orientation as a prohibited ground of discrimination. SCC held that the omission violates s. 15 of the Canadian Charter of Rights and Freedoms and could not be saved under s. 1 of the Charter.

M V. H (1999, SCC)

Facts — M and H are women who lived together in a same-sex relationship beginning in 1982. In 1992, relationship deteriorated. M sought order for claim of spousal support pursuant to the ON FLA, and served notice of a constitutional question challenging validity of definition of "spouse" in s. 29, which excluded same-sex couples. ONSC ruled that this exclusion violated s.15 and could not be saved under s.1.

Held — **Appeal dismissed. Sexual orientation discrimination within ON FLA violated s. 15 and could not be saved by s. 1. S.29 struck down but declaration to be suspended for 6 months so province may re-legislate.** FLA definition infringes s.15 because it excludes conjugal same-sex partners from spousal support benefit received by equivalent opposite-sex couples — this is sexual orientation discrimination. It is *not justified under s.1* because there is no rational connection between legislative objective (to provide for equitable resolution of economic disputes arising upon breakdown of economically interdependent relationship) and exclusion. What was important under s. 29 of the ON FLA was the financial interdependence of the parties, which was demonstrated in this case, and did not materialize exclusively in same-sex couples. Further, *the nature of the interest affected is fundamental.* Excluding same-sex couples from benefit implies they are incapable of having intimate relationships of economic interdependence.

EGALE Canada Inc. v. Canada (2003, BCCA) / Barbeau v. BC (2003, BCCA)

- BCCA ruled unanimously that denying same-sex couples the right to marry violates their equality rights under s. 15 *Charter:* "Civil marriage should adapt to contemporary notions of marriage as an institution in a society which recognizes the rights of homosexual persons to non-discriminatory treatment."

HALPERN V. CANADA (2003, ONCA)

Historical Significance — **Legalized same-sex marriage in Ontario**

Facts — Does same-sex exclusion from *Hyde v Hyde's* common-law marriage definition infringe Charter s. 2(a) fundamental freedoms or s. 15 equality rights?

Held — **The exclusion infringes s. 15 and is not saved by s. 1 → immediate declaration of invalidity.** Marriage is the basic element of social organization. The ability to marry is a fundamental societal institution. Sexual orientation is an analogous protected by s. 15. The traditional definition of "marriage" is not entrenched. Moreover, religious rights and freedoms are not engaged; only the legal aspects of marriage area. The common-law definition posed differential

treatment by way of sexual orientation, and has the effect of: (1) disadvantaging same-sex couples, who are already disadvantaged; (2) perpetuating the mistaken view that same-sex couples are not capable of loving relationships; (3) failing to serve an ameliorative purpose; and (4) affecting a fundamental interest (i.e. no benefits). *Not saved by s. 1* because there is no pressing objective for excluding same-sex couples from marriage. Encouragement of procreation and childrearing not a pressing objective; heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry + an increasing percentage of children are being born to and raised by same-sex couples. via adoption, surrogacy, donor insemination; no evidence same-sex couples less capable of childrearing.

Catholic Civil Rights League v. Hendricks (2004, QCCA)

- Affirmed judgment of lower court which declared the following inoperative: s. 5 of the *Federal Law–Civil Law Harmonization Act*, s. 1.1 of the *Modernization of Benefits And Obligations Act*, and para. 2 of art. 365 of the *Civil Code of Quebec*, which provided that marriage can only be solemnized between a man and a woman.

REFERENCE RE SAME-SEX MARRIAGE (2004, SCC)

Historical Significance — **Legalized same-sex marriage in Canada (i.e. nation-wide)**

Facts — Following a number of provincial appellate decisions holding that same-sex marriage was constitutionally valid, government submitted 3 questions to the SCC regarding the validity of a proposed same-sex marriage legislation ("the Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes"):

(1) Does the federal government have jurisdiction to legislate regarding the definition of marriage?

(2) If so, is section 1 of the proposed Act consistent with the Charter?

(3) Does freedom of religion protect religious officials who do not believe in same-sex marriage?

(4) Is the opposite-sex requirement consistent with the Charter?

Held —

(1) **Yes** — Pith and substance of the law was federal as it concerned civil marriage, which is in the absolute federal jurisdiction under s. 91(26). Civil marriage has no effect on religious marriage; any legislation protecting freedom of religion with respect to marriage must be done through provincial legislation. Further, civil unions (e.g. Alberta AIPs) are solely in provincial domain and have no relevance here.
Court also rejected *Hyde v Hyde's* common-law definition of marriage by applying living tree doctrine — marriage must evolve with Canadian society, which currently represents a plurality of groups.

(2) **Yes** — Purpose of legislation"flows from" the Charter.

(3) **Yes** — Religious freedom guarantee is broad enough to protect religious officials who disagree with performing same-sex marriages; it is up to provinces to legislate protection for religious groups.

(4) Court decided not to answer; question served no legal purpose.

Definition of "spouse" today

Be careful of differences between jurisdictions. While BC is generally inclusive (see BC FLA ss. 1 and 3), this may not be the case in other provinces. For example, in the ON FLA, a "spouse" must be a married spouse, except for Part 3 (see s. 29).

ON Children's Law Reform Act	1. (1) **"spouse"** means the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage;
AB Matrimonial Property Act	1. (e) **"spouse"** includes a former spouse and a party to marriage, notwithstanding that the marriage is void or voidable;

ON Family Law Act	**Preamble** **1.** (1) **"spouse"** means either of two persons who, **(a)** are married to each other, or **(b)** have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right. (2) **Polygamous marriages are included** in the definition of "spouse", if the marriage was celebrated in a jurisdiction whose system of law recognizes it as valid. **Part III: Support Obligations** **29.** In this Part … "spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited. (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the Children's Law Reform Act.
BC Family Law Act	1. **"spouse"** means a person who is a spouse within the meaning of section 3 [spouses and relationships between spouses]; 3. (1) A person is a spouse for the purposes of this Act if the person (a) is married to another person, or (b) has lived with another person in a marriage-like relationship, and (i) has done so for a continuous period of at least 2 years, or (ii) **except in Parts 5 [Property Division] and 6 [Pension Division],** has a child with the other person. (2) A spouse includes a former spouse. (3) A relationship between spouses begins on the earlier of the following: (a) the date on which they began to live together in a marriage-like relationship; (b) the date of their marriage. (4) For the purposes of this Act, (a) spouses may be separated despite continuing to live in the same residence, and (b) the court may consider, as evidence of separation, (i) communication, by one spouse to the other, of an intention to separate permanently, and (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

3.2 *Essential Validity, Formal Validity (Solemnization) and Nullity*

The law distinguishes between the **essential validity** of a marriage and the **formal validity** of a marriage.

Matters pertaining to the **essential validity** of a marriage are governed by federal powers (per s. 91(26) of the *Constitution Act*). A valid marriage requires the voluntary consent of both parties and the absence of any legal incapacity to marry: *Moss v. Moss,* 1987.

The **formal validity** of a marriage is governed by provincial and territorial legislation (per s. 92(12) of the *Consitution Act*). Provincial legislatures can enact conditions relating to solemnization that affect the validity of marriage; provinces have enacted comprehensive statutes to deal with such ceremonial requirements as the need for a licence, the authority of persons to officiate at marriage ceremonies, the form of the ceremony, and the need for witnesses.

In conflict of laws problems, the choice of laws rule differs depending on whether the essential validity or formal validity of a marriage is at issue. F**ormal validity** is determined by the law of the place where the ceremony occurred. The traditional view is that a person's capacity to marry is governed by the law of the person's pre-marital domicile. AHowever, in ***Canada v. Narwal* (1990, FCA),** the court held that marriage will also be valid if each party has the capacity to marry the other according to the law of the jurisdiction of their intended matrimonial home.

Distinctions: Nullity vs. Divorce, Void vs. Voidable

If the marriage is defective (i.e. not essentially valid), the marriage is null. **Nullity** is complementary to **divorce** because they are both ways to get out of specific relationships; however, they are not the same. Divorce is a declaration ending a valid marriage. **Nullity is a declaration that a valid marriage never existed.**

There are two types of marriages that may be annulled: **void** and **voidable** marriages.

A **voidable** marriage is treated in law as a valid marriage until a decree of annulment is made by a court of competent jurisdiction. A decree of annulment can only be made if one of the parties to the marriage applies to the court for a nullity. If the court decides that your marriage is voidable, it will then declare that the marriage was invalid from the start, and the marriage never happened.

What can render a marriage voidable? Certain aspects of consent (fraud, mistake, duress), non-consummation, formal requirements; sometimes age as well, because the minimum age to marry may be younger in other provinces (i.e. marriage may be voidable if one of the parties is over the age of 7 but under the age of 14).

A marriage that is **void (or void *ab initio)*** is one that is considered null and void from its inception. It is not necessary to seek a declaration of nullity for a marriage that is void, because it is regarded as though it had never taken place. **A marriage is void *ab initio* in British Columbia** if: (1) either of the parties was, at the time of marriage, still married to another person; (2) one of the parties did not consent to the marriage; (3) the parties are related within the bonds of consanguinity; or (4) the formal requirements imposed by the provincial statute (the BC *Marriage Act*) are not fulfilled.

What can render a marriage void: elements tied to legal capacity, certain aspects of consent (mental capacity, intoxication), some formal requirements (though these, more often than not, lead to voidable marriages instead)

The distinction between a void and voidable marriage is less important in matrimonial proceedings in BC today, as the BC FLA and FRA make no distinction between the two. In BC, a spouse is a spouse—married and unmarried spouses are entitled to similar benefits.

Essential Validity

Some issues relevant to essential validity are:

1. **Consent to marriage:** Marriage is defined as a voluntary union, and consent to marriage must be "free and enlightened", per the Civil Marriage Act — but very little is said about what meets that standard. The requirement has been considered in relation to the following issues:
    a. **Unsoundness of mind, or diminished capacity of a spouse:**
        - **At common law, marriage requires the lowest possible threshold of consent → Durham v. Durham (1885, UK):** "The contract of marriage is a very simple one, which does not require a high intelligence to comprehend." **See also Devore-Thompson v. Poulain (2017, BCSC): "**The capacity to marry is a lower threshold than the capacity to manage one's own affairs, make a will, or instruct counsel" **and**

- **Determining mental capacity → Webb v. Webb (1968):** Court held that the test was whether he had the capacity to understand the nature of the contract and the duties marriage entailed. A schizophrenic man wishing to marry was able to understand the basic contract of marriage; just because he had a mental illness does not mean he cannot consent. **See also Banton v. Banton (1998):** Old dying man married young waitress and made will giving her everything. His family argued that the marriage was invalid because he was under undue influence. This did not invalidate the marriage because he seemed to have mental capacity; the man was a "willing victim".
- **Sanctity of marriage = high threshold for nullity → CMD v. RRS (2005, BCSC):** Mere drunkenness is not enough to nullify a marriage contract. Courts will not sanction reckless behaviour that does not meet the legal threshold for a successful annulment in order to preserve the sanctity of marriage. Parties could always ask to divorce.
- **Can drunkenness nullify a marriage? → Davison v. Sweeney (2005, BCSC):** sets out test for determining whether intoxication nullifies or precludes consent to marriage: was the plaintiff so intoxicated as to be incapable of understanding that he or she was entering a marriage? Plaintiff in this case failed to prove lack of consent, given that the parties went through deliberate, time-consuming steps all rationally connected to entering into a marriage (e.g. obtaining a license, finding a chapel).

b. **Duress/undue influence:** A valid marriage is grounded upon the consent of each party. Oppression may vitiate consent, and if there is no consent, there is no valid marriage. Where duress is alleged, the onus of proof is upon the party seeking annulment, and it is an onus that is not lightly discharged.
   - **Any oppression that would mentally or physically affect a spouse would vitiate consent; physical force or the threat of it is not required → S(A) v. S(A) (1998, ONSC):** applicant alleged that she married her husband after pressure being applied by her mother and stepfather, who were to receive payment for arranging the marriage, which would permit her husband to remain in Canada. Applicant alleged that she was particularly sensitive to the pressure bc of a history of sexual abuse toward her by the stepfather. Applicant never lived with the husband nor consummated the marriage. Annulment granted.
   - **Certain factors will influence analysis of whether or not there was duress:**
     - **S(A) v. S(A) (1998, ONSC):** age of the applicant, the maturity of the applicant
     - **RH v. RT (2011, BCSC):** the applicant's emotional state and vulnerability, the lapse of time between the conduct alleged as duress and the marriage ceremony, whether the marriage was consummated, whether the parties resided together, the lapse of time between the marriage ceremony and the institution of the annulment proceeding

c. **Fraud invalidating contract:** must constitute more than misrepresentation about personal traits of the person you are marrying. This warrants a high threshold; it is unclear as to what would be sufficient to constitute a fraud, such that the fraud would vitiate marriage.

d. **Mistake**: reason to nullify a marriage so as to be render it **voidable**. Generally, mistakes will concern errors regarding a spouse (e.g. marrying the wrong person) or mistakes as to the nature of the ceremony. Mistakes as to **consent** would render the marriage **void ab initio.**

e. **Intention/motive, including marriages for a "limited purpose":** e.g. marrying someone for a tax benefit or immigration status in Canada. Consent may be deemed to be lacking because the true intention was not to get married, but to receive a benefit that may come with marriage. The marriage will be considered **voidable.** However, the state may ask parties to apply for a divorce instead.

2. Capacity to consummate

- **Test for capacity to consummate → Gajamugan v. Gajamugan (1979):** Essential factors to be proved in an action for nullity because of impotence: (a) impotence must exist at the time of marriage; (b) incapacity

pleaded must be such as to render intercourse impractical; (c) incapacity may stem from a "physical, mental, or moral disability"; and (d) impotence must be incurable

- **Applications of the test in practice → Juretic v. Ruiz (1999, BCCA)**: Man married mail order bride but she refused contact during sex. Man gave up after 2 attempts at initiating; put off by wife's reaction. Trial judge granted divorce, not nullity. Appellate court held that his inability to form an erection did not meet test for capacity to consummate in law, an "invincible aversion" to the sexual act.
  Sangha v. Aujla (2002, BCSC): Woman and man arranged marriage. Woman thought man had no criminal record. Lived with families and no chance at intercourse. Woman found out man was jailed before and applied to nullify marriage; man seeks divorce instead. Woman did not want a divorce because divorce has negative significance in her culture. Court held that "invincible repugnance" is a high bar, but was met in case. A clear precondition for marriage (i.e. no criminal record) was misrepresented so consummation would be impossible for the woman. Annulment granted.

- **Capacity to consummate and religious beliefs → Sahibalzuaidi v. Bahjat (2011):** Couple married in civil ceremony but did not consummate because of religious belief that a religious blessing and public wedding is required before consummation. When the wife applied for her husband to come to Canada, she found out he was abusive and applied for annulment on basis of non-consummation. Court granted application on basis of non-consummation by reason of wife's strongly held religious beliefs, which made **consummation impossible.**
- **Evidence and credibility in establishing capacity to consummate:**
  - **Falk v. Falk (1999):** usband applied for annulment based on incapacity to consummate; wife didn't show up to court. Court refused to grant simply based on lack of evidence/one's self-described ability.
  - **Leung v. Liang (2001, BCSC; affirmed 2003, BCCA):** capacity to consummate often decided on credibility. Wife sought annulment, giving evidence that they never lived together + husband had rebuffed suggestions of intimacy, claimed to be homosexual. Husband testified that they had resided together and had had intercourse, but no evidence corroborating his assertions, and he was unable to recall any distinguishing features of the wife's body. Court granted annulment, expressly accepting the wife's evidence over the man's.
  - **SSC v. GKC (1999):** husband claimed wife never consummated because she refused, but wife said because husband impotent. The court granted annulment—both parties agreed to no sex, either because of invincible repugnance or impotence—either way the condition is permanent.
- **Annulment based on consummation and ideology about marriage:**
  - **Rae v. Rae (1944):** A marriage ought not to be lightly interfered with. The court ought to be fully satisfied that the grounds advanced by a petitioner are sufficient to justify the termination of the relationship. It is not in the best interest of public morals and social welfare that the burden of proof necessary in law to end the solemn vows and undertakings of married persons should be discharged with any degree of ease.
  - Does the applicant's gender matter? Perhaps there is differential treatment re: how difficult it is for *women* applicants in a heterosexual marriage to annul based on lack of consummation compared to *man:*
    - **Norman v. Norman (1979):** old widow and old widower married and applied nullification. Wife gave evidence that based on her husband's inability to consummate, she did not expect to have a sexual relationship; just "companionship". Court denied application; wife not allowed to complain about intercourse absence when she agreed to "platonic marriage".
    - **M v. M (1984):** Man obtained declaration of annulment on basis that his wife was psychologically unable to consummate, though no physical impediment existed.
    - **W v. W (1987):** Court rejected woman's application for annulment because there was no evidence of her "invincible repugnance" to sexual intercourse, but just an "inability to respond".

3. **Legal Capacity:** Relates to the following issues:

a. Opposite-sex requirement (historic, no longer relevant)

b. Outside of prohibited degrees:
   - **Traditional prohibitions** included **consanguinity** (relationships of blood) and **affinity** (relationships by marriage)
   - **Parliamentary reform legislation:** in 1990, federal government enacted *Marriage (Prohibited Degrees Act).* In the case of persons related by blood, the Act relaxes the law to allow marriage between persons who are related as uncle/niece or as aunt/nephew. There would be no prohibition against marriages involving step-relationships. In the case of persons related by marriage, it clarifies the law by providing that a person whose marriage has been dissolved by divorce may marry relatives of the divorced spouse. Moreover, an amendment to the Bill was included to treat the relationship of adopted persons within the family "as if they were natural relationships".

c. No prior existing marriage: It is necessary to end the first marriage—by a decree of divorce or nullity, or as a result of the death of the spouse—before marrying a second or subsequent time. It is a criminal offence (bigamy) in Canada for a person who is married to go through a form of marriage with another person (CC s. 290); polygamous non-marriage relationships are also illegal (CC s. 293).
   - **Issues may arise re: recognition of foreign divorce decrees → Knight v. Knight (1995):** Couple married in Canada but divorced in Mexico. Man married another woman in US and gave evidence that he did so because Ontario did not recognize the Mexican divorce. When his second marriage ended, he argued it was void because he was still validly married to his first wife at time of second marriage. Court decided it would be against public policy to allow this argument.
   - **"Disappearance" of a first spouse:** s. 9 of ON *Marriage Act* permits a subsequent marriage to be solemnized in accordance with procedures, but it does not end the marriage.
   - **Polygamy and plural unions → BC Reference Case (2009):** question posed as to whether polygamy offence infringes freedom of religion and if polygyny (multiple wives) harms women and children. Charter challenge to freedom of religion may succeed, which may lead to potential challenge to definition of marriage in the *Civil Marriage Act* as a "union of two persons", but would likely be saved under s.1. "Harms" to women include non-exclusivity, competition between wives, mental health and sexual reproduction issues, and economic harms.
     - **There is some limited economic protection or spouses in polygamous marriages who are in Canada.** Ontario's FLA defines "spouse", specifically for purposes of property sharing and spousal support, to include marriages that are actually or potentially polygamous, but only if the marriage was celebrated in a jurisdiction where such a marriage is valid.

d. Of required age: minimum 16 years of age, per s.2.2 of the *Civil Marriage Act.* In the civil law, there are mechanisms to validate or to monitor the consent of people between the ages of 16-19.

Formal Validity (Solemnization)

Solemnization requirements will be found in provincial Marriage Acts. For example, the BC *Marriage Act* addresses issues such as:

1. **Who can celebrate or solemnize a marriage?** Per s. 7(3), 3 categories of people can solemnize a marriage: religious representatives registered under the Act as authorized to solemnize marriage; marriage commissioners acting under the Act; a treaty first nation member designated under the laws of the treaty first nation to solemnize marriages
2. **What is a marriage licence?** There are two types of licenses:
   a. **Licences authorizing persons to solemnizing a marriage (s. 8):** a religious representatives or treaty First Nation designate may only solemnize marriage only under a licence issued under this Act.

b. **Licences authorizing the marriage itself (ss. 15-18):** these are necessary in BC and require a fee. An application for a marriage licence must be made by filing with the issuer of marriage licences an affidavit, in the form required by the registrar general **(s. 16)**. They must bear the date of issuance and authorize the solemnization of the marriage of the persons named in it, required to take place within 3 months from the date of issuance **(ss. 15(3) and 17)**. If the province issues a license with "irregularities", the marriage is generally protected from invalidation so long as the licence was obtained in good faith **(s. 18)**. Licence requirements are mostly set out in **s. 16**.

3. **What requirements must be fulfilled during the marriage ceremony?**
   a. **Marriages solemnized by a religious representative (s. 9):** must be in the presence of 2 or more witnesses besides the religious representative; must be performed in a public manner, unless otherwise permitted by licence; both parties to the marriage must be present in person at the ceremony.
   b. **Civil marriages solemnized by a marriage commissioner (s. 20):** must be a public celebration in the presence of the marriage commissioner and 2 or more witnesses; each of the parties to the marriage must make specific declarations ("I solemnly declare that I do not know of any lawful impediment why I, A.B., may not be joined in matrimony to C.D." and "I call on those present to witness that I, A.B., take C.D. to be my lawful wedded wife/husband/spouse.")
   c. **Other requirements:**
      - Cannot re-solemnize a marriage between parties who have previously been married to and aren't divorced from each other, unless the registrar general is satisfied that an informality exists in proceedings of previous marriage or that the registration/certificate of the previous marriage was lost/destroyed bc of circumstances beyond parties' control **(s. 22)**
      - **Age:** If a party to marriage is under 19, requires consent of parent or guardian **(s. 28).** No one under 16 can marry **(s. 29)**; but in certain circumstances, the court discretion allows for celebration of these types of marriages if not harmful to spouses/necessary for well-being **(s. 29(2)).** Nothing in section 28 or 29 invalidates a marriage **(s. 30)**.
      - No publication or public announcement of the marriage (to the registrar's website or otherwise) is required (unlike in the civil law, per arts 368-371, CCQ)

4. **Registration and certificates:**
   1. The solemnizer must register the marriage by entering a memo of it in a book supplied by the registrar general **(s.25)**.
   2. **Per s. 26 of the BC *Marriage Act, t*hey must also perform the duties imposed on them under s. 15 and s. 37 of the BC *Vital Statistics Act:***
      - **S. 15: (2)** The solemnizer must prepare statement in the form required by the registrar general, signed by each party to the marriage, at least 2 witnesses, and the solemnizer. **(3)** The solemnizer must provide this statement within 2 days of the date of marriage. **(4)** Within a year of receipt of a statement, the registrar general must register the marriage if satisfied as to its truth and sufficiency.
      - **S. 37: (1)** A **certificate of marriage** may be issued, on application in the form required and on payment of a fee, only to: parties to the marriage, a person who has written authorization from either parties, a governmental officer performing official duties, or any other person who satisfies the registrar general concerning their good faith cause for requiring the certificate.

        (2) A **certified copy or certified electronic extract of a registration of marriage** may be issued, on application in the form required and on payment of a fee, only to: persons in subsection (1); if they are deceased, their nearest living relatives; any person, if both parties to the marriage have been dead for 20+ years or if 75+ years have passed since the marriage; or any other person who satisfies the registrar general concerning their good faith cause for requiring the copy or extract.

3.3 *Effects of Adult Relationships*

Effects materialize **during** and **after** a personal adult relationship. Effects can vary depending on the type of relationship and the province the parties are in.

Effects of marriage during the relationship

In the common law, it is unclear as to what the duties of the parties are **during** the marriage. However, we may be able to glean some duties based on our relational understanding of **what constitutes "fault" in a marriage** and what can lead to divorce. Per s. 8(2) of the *Divorce Act,* breakdown of a marriage is established only if:

- **s. 8(2)(a):** the spouses have lived separate and apart → duty to live together
- **s. 8(2)(b)(i)**: the spouse has committed adultery → duty of fidelity
- **s. 8(2)(b)(ii):** the spouse has treated the other spouse with physical or mental cruelty → duty of respect

The status of spouses have dramatically changed over time. In today's world, the idea that respect is something that matters during the union is more easily understood. However, this is a recent development. Historically, there was such a thing in common law as coverture, where legal capacity of the married woman was suspended. Until the mid-80s, there were legal exemptions for marital rape.

In Quebec, the effects of marriage during the marriage are even more explicit. They are mandatory and not things the parties can contract out of. They are also quite broad in scope: **see art. 391-400 QCC**. Some articles of note include:

- **Art. 392:** the spouses have the same rights and obligations in marriage; they owe each other respect, fidelity, succour and assistance and are bound too hare a community of life.
- **Art. 393:** both spouses retain their respective names and exercise respective civil rights under those names (i.e. it is difficult for the woman to take her husband's surname)
- **Art. 394:** joint decision-making in the "moral and material direction of the family", including the exercise of parental authority
- **Art. 395:** joint-decision-making in choosing the family residence
- **Art. 396:** spouses contribute towards the expenses of the marriage in proportion to their respective means. This includes contributions in diverse ways (activities within the home, family businesses, etc.)
- **Art. 397:** A spouse who enters into a contract for the needs of the family also binds the other spouse for the whole. The other spouse may inform the contracting spouse of an unwillingness to be bound, which renders them not liable for the debt
- **Art. 398:** either spouse may give the other a mandate in order to be represented in a its re: moral and material direction of the family
- **Art. 399:** either spouse may be authorized by the court to enter alone into any act for which the consent of the other would be required, if consent is unobtainable for any reason or its refusal is not justified by the family's interest
- **Art. 400:** if the spouses disagree as to the exercise fo their rights and duties, they may apply to the court, which will decide in the interest of the family

Effects of marriage after breakdown

Where the effects of marriage become very important and where the differences in treatment become salient is during the breakdown of a relationship. The general effects generally relate to support and property division.

Certain relationships are tied to certain effects. In **different provinces**, there are certain mechanisms that are tied only to married spouses. I**n BC**, as of 2013, it is clear that there are no distinctions to be made between married and unmarried spouses.

Nevertheless, the case below, **Walsh v. Bona (2002, SCC),** is still useful to engage with, although no longer "good law". The majority's decision, specifically Bastarache J.'s conception of marriage as about personal freedom and choice, has been influential in future cases and in our thinking about marriage.

WALSH V. BONA (2002, SCC) — NOT GOOD LAW

Facts — After the end of her non-marital union with Bona—a 10-year relationship that produced 2 children—Walsh challenged her exclusion from the benefit of the shared property regime in the *Nova Scotia Matrimonial Property Act*. She claimed the definition of "spouse" under the *Act* was unconstitutional because it did not extend the presumption of equal division of matrimonial property to unmarried opposite-sex couples, violating s. 15. She was denied her claim in the first instance and was successful on appeal. AG nevertheless appealed to clarify whether or not the regime was discriminatory to a married spouse.

Held — **The exclusion of unmarried couples from the *Matrimonial Property Act* was not discriminatory because the distinction does not affect a person's dignity or deny them access to a benefit.** While the Act imposes differential treatment between the claimant and others in purpose or effect, and involves marital status (an analogous ground of discrimination per *Miron*) as the basis for the differential treatment, the Act's effect is not discriminatory within the meaning of the equality guarantee.

Ignoring heterogeneity of cohabitants = nullifying state's respect for their autonomy: Many opposite sex individuals in conjugal relationships choose to avoid marriage to avoid the legal consequences that flow from it. To ignore the differences/heterogeneity among cohabiting couples presumes a commonality of intention that does not exist. To find otherwise would effectively nullify the individual's autonomy to choose alternative family forms and to have that choice respected by the state.

Marriage (and non-marriage) is a personal choice, and engages social, political, religious, economic dimensions: Unmarried cohabitants maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end. If they so choose they are free to marry, enter into domestic contracts, own property jointly or register as domestic partners. As a result, the application of the Act to married persons only is not discriminatory in this case as the distinction reflects and corresponds to the differences between those relationships.

Dissent — **Act is discriminatory and not saved by s.1.** The goal of matrimonial property regimes is a redistribution of economic resources on the breakdown of a family—the purpose does not change for unmarried relationships.

Critical of majority's logic re: people in functional units having different needs: Whether unmarried or married, relationships are functionally the same; moreover, unmarried couples are rising in number. By excluding unmarried couples, the Act implies that they are not worthy of the same recognition.

Choice is complex: It is problematic to think that people enter marriage to freely accept mutual rights and obligations because many do not know the law when getting married. Moreover, reasons to remain unmarried are numerous; many do not choose to do so to avoid obligations. Sometimes one person wants to marry, while the other does not.

In Quebec, there is a distinction drawn between married and unmarried spouses. The mandatory (i.e. cannot opt out) regime applies to all married spouses. For example:

- **Family residence (401-413 CCQ):** set of rules protecting the family residence and its contents; regardless of the owner, use can be allocated to the spouse in need
- **Family patrimony (415-426 CCQ):** the core thing that parties disagree on upon breakdown; a pool of properties and assets to be divided when the marriage ends, regardless of who owned what. Some elements can be withdrawn from this, including things acquired before marriage and acquired via inheritance. For most, however, these assets represent the entirety of things they own, including residences of the family, removable property, furnishings or decorations, benefits that accrue during marriage as part of a retirement

plan, etc. Certain properties can be renounced once negotiations begin in the divorce process, but parties cannot contract out of the family patrimony regime before the breakdown.

- **Compensatory allowance (427-430 CCQ):** judge has discretion to allow spouse A to claim money that spouse B made with spouse A's contribution (in property or services), arguing that it is unfair to allow spouse B to keep all that money because spouse A contributed to spouse B's enrichment
- **Partnership of acquests (441 CCQ):** Acquests include everything that is not private property (i.e. something you have a clear title on, or is something so attached to your personality that, regardless of lack of title, is yours). While private property is kept with its owner, acquests are divided between parties (e.g. bank accounts). **This is optional** — only spouses who, before the solemnization of their marriage, have not fixed their matrimonial regime in a marriage contract, are subject to the regime of partnership of acquests.
- **Obligation of support (585 and following, CCQ):** Right to claim spousal support is only available to married spouses, NOT unmarried.

QUEBEC (AG) V. A / ERIC V. LOLA (2013, SCC)

Facts — Eric and Lola lived together in a cohabiting relationship for 7 years and had 3 children. Although Lola wanted to get married, Eric maintained that he did not believe in marriage. When they separated, pursuant to a contract, Lola remained in the family home with her children while Eric provided substantial child support. Lola did not have access to any of the spousal support entitlements or property sharing entitlements that were available to married or civil union spouses upon separation. Lola challenged provisions of the CCQ (specifically arts. 401-430, 432, 433, 448-484, and 585) as violations of the equality guarantee under s. 15 of the Charter. In so doing, she sought to extend the legal regime applying to married and civil union spouses to cohabiting couples.

Held — **On the issue of s. 15, majority (Abella, McLachlin, Deschamps, Karakatsanis, Cromwell) held that the provisions violated s. 15.** Despite similarities, cohabiting spouses still cannot claim any protections available to those marriages/civil unions; this distinction = discriminatory + imposes disadvantage. **The minority (Lebel, Rothstein, Fish and Moldaver) argued that the provisions did not violate s. 15, and so did not consider the issue of s. 1.**

However, on the issue of s. 1, that majority was split: Abella found that none of the provisions could be saved under s. 1; McLachlin found that all of the provisions could be saved under s. 1; Deschamps, Karakatsanis, and Cromwell found that all of the provisions except art 585 (spousal support entitlements) were constitutional. McLachlin concurred with LeBel as to the result, which means judgment was rendered by him.

LeBel employed the rhetoric of choice and freedom regarding marriage found in *Bona v. Walsh*. The legislature does not favour one kind of union over other. Different frameworks show respect to conjugality's various conceptions; no need for a uniform framework for each type of union for s.15 purposes. QB regimes are about respecting choices.

Dissent of note — **Abella:** Regarding s.1, the provisions fell at the minimal impairment stage; opt-out scheme would've worked to give couples the freedom to contract out of the regime if they want, while protecting vulnerable cohabiting spouses. Further, *the benefits of ensuring the vulnerable spouse is protected far outweighs any concerns about freedom of choice and autonomy that the non-vulnerable spouse could bring to the table.*

Commentary — Note the different policy rationales relied on by Abella and LeBel: Abella focuses on the protection of vulnerable spouses while Lebel focuses on respect for autonomy and choice. Woven through this tension are certain gendered aspects of familial relationships that tend to arise at family breakdown—particularly, the feminization of poverty (which is understood to mean that women and children have little access to economic support either from their former spouses or the state). The feminization of poverty typically results from gendered divisions of labour in the household whereby women remain outside of the paid labour force. As such, upon separation, the woman is left entirely dependent on her spouse and the state to provide resources. Abella noted that this phenomenon played an important role in the development of spousal support entitlements and family property division in the CCQ. Importantly, the idea of diminished earning capacity can apply regardless of whether the relationship is opposite-sex or same-sex, assuming that one of the spouses remains home to care for the children (or other dependents); the right to and obligation of support rests on the reality of the dependence or vulnerability that the spousal relationship creates, regardless of gender.

3.4 *Family Breakdown: Divorce and Separation*

Divorce is the legal end of a valid marriage and is necessarily between **married spouses.** It is accomplished by an order of the court.

For **unmarried couples**, including unmarried couples who qualify as spouses under the BC FLA, **separation** is all that's required to end the relationship. Under the FLA, the date of separation is relevant to time limits for property + pension division and spousal support; it will also be the triggering event for division of property.

Note that under the *Divorce Act*, "separation" takes on a different meaning; it is not the end of a relationship—rather, it is the event that marks the beginning of the one year period a couple must live separate and apart before beginning a proceeding and receiving an order for divorce (at the earliest).

Separation is accomplished, in most cases, by simply leaving the family home with the intention of living separate and apart, although technically speaking it isn't necessary to move out at all. Once you or your spouse has left the family home or announced that the relationship (or marriage) is at an end, you're separated. There are no special legal documents to sign or file in court to become separated, and there is no such thing as a legal separation in BC.

The proportion of marriages in Canada that will end by the 30th year of marriage is 41%, as per a 2008 estimate by the Vanier Institute. We have seen a consistent increase in divorce, and know that people are more likely to divorce upon subsequent marriages. The rise of divorce is correlated with the rise of blended families.

Jurisdiction in BC: BCSC vs. BCPC

Empowered by	Supreme Court of BC "BCSC")	Provincial (Family) Court of BC ("BCPC")
Other matters of note	• Inherent jurisdiction, including *parens patriae* jurisdiction and jurisdiction in equity • Statutory jurisdiction • Governed by Supreme Court Family Rules • refers to parties as **claimant** and **respondent**	• Statutory jurisdiction only • Governed by Provincial Court (Family Rules) • refers to parties as **applicant** and **respondent**
Family Law Act	**Domestic orders:** • Determination of parentage • Guardianship of children • Parenting arrangements • Contact with a child • Relocation of guardians and children • **Child support** • **Spousal support** • Protection orders • Conduct orders and case management orders • Variation and enforcement of orders • Setting aside and enforcement of agreements • Family property, family debt and excluded property • Ownership and division of foreign property • Care of children's property	**Domestic orders:** • Determination of parentage, if necessary to resolve claim within court's jurisdiction • Guardianship of children • Parenting arrangements • Contact with a child • Relocation of guardians and children • **Child support** • **Spousal support** • Protection orders • Conduct orders and case management orders • Variation and enforcement of orders • Setting aside and enforcement of agreements • Enforcement of Supreme Court orders for parental responsibilities, parenting time, and contact with a child
	Foreign and extra-provincial orders: • Enforcement and superseding of foreign orders for guardianship, parenting arrangements and contact	**Foreign and extra-provincial orders:** • Enforcement and superseding of foreign orders for guardianship, parenting arrangements and contact

Empowered by	Supreme Court of BC "BCSC")	Provincial (Family) Court of BC ("BCPC")
Divorce Act	**Domestic orders:** • Divorce • Custody of children • Access to children • Child support • Spousal support • Variation and enforcement of orders	*None*
	Foreign and extra-provincial orders: • Validity of foreign divorce orders • Provisional variation of extra provincial support orders	

The issue being brought forward to the courts and the Act you are bringing a legal action under determines which BC Court you should go to. For example, **the issue of divorce is only ever dealt with in the BCSC**.

However, jurisdictions can overlap for certain issues (e.g. most of the issues outlined in the BC FLA). There are some **strategic advantages** to go to a specific court, which generally relates to time limitations.

Jurisdiction under the **Divorce Act** requires residency requirements under **s. 3(1):** for superior courts of provinces to have jurisdiction, at least one spouse must have been a resident of that province for at least a year before commencing divorce proceedings. This criterion speaks to ordinary residency: the province must be the place of that spouse's customary, routine activities. The onus to prove that a spouse did not have ordinary residency in a province is on the party asking for displacement.

Duties of legal professionals in cases of family breakdown

***Divorce Act*: ss 9-10**

9. The legal advisor has a duty to advise clients about family law dispute resolution alternatives.

10. The legal advisor also has a duty to mention that reconciliation is an option for the parties. The court also has a duty to mention that reconciliation is an avenue that they can pursue.
- Note that this may not always be appropriate, especially in high-conflict situations involving violence

BC *Family Law Act*: ss. 8, 197

8. A lawyer is a family law dispute resolution professional (see Definitions s. 1), a class which carries with them specific duties, including the duty to:
(1) Assess whether or not there is family violence (s. 8(1))
(2) **(a)** Discuss client of advisability of using various types of family dispute resolution (s. 8(2)(a))
(b) Inform parties of resources available to assist (s. 8(2)(b))
(3) advise parties that when children are involved, all decisions must be made in light of BIC (s. 8(3))

197. Before an action is started, it must be certified that the lawyer has complied with duties outlined in s. 8.

Grounds for divorce under the *Divorce Act*

***Divorce Act*: s. 8**

8. **(1)** The only ground for divorce in Canada is a **breakdown of the marriage.**
(2) The breakdown of a marriage is established **only** if:
(a) The spouses have **lived separate and apart for at least one year** immediately preceding the determination of the divorce proceeding, and were living separate and apart at the commencement of the proceeding; or

(b) The spouses have, since the celebration of the marriage,
  (i) Committed **adultery**, or
  (ii) Treated the other spouse with **physical or mental cruelty** of such a kind as to render continued cohabitation intolerable.

8(2)(a): Living separate and apart for at least one year

- Interpreted liberally; emphasis on intention and communication of this intention
- The **capacity to separate** is the same standard required both under the FLA and DA. The intention to separate requires the lowest level of understanding, and it is lower in the hierarchy than the capacity to manage one's affairs: **Wolfman-Stotland v. Stotland (2011, BCCA).**
  - **The capacity of only one person is enough;** the courts do not require both parties to have capacity or intention. It is OK to divorce one-sidedly.
  - Furthermore, **DA s. 8(3)(b)(i)** states that if it is clear that a spouse's intention was to separate and that spouse becomes incapable of living separate and apart, it does not mean that their intention has stopped. e.g. if two spouses have, for the last half-year, been living separate and apart, and one spouse suffers a car accident and becomes incapable, it does not been that that spouse's intention to separate no longer exists. The court will assume that this intention would have continued.
- Courts will consider spouses as "living separate and apart" even as they continue to live under the same roof and remain financially interdependent — "living separate and apart" does not speak to physical location so much as an intention to no longer being in the marriage; it is about a shift in the nature and quality of the relationship: ***Hughes v. Aefano*** (2006, BCSC)
- **DA s. 8(3)(a) provides guidance as to the calculation of the period of separation:** "Spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other."
- **DA s. 8(3)(b)(ii)** states that the period of separation does not stop or restart based on sporadic reconciliations. A married couple may attempt to reconcile and can resume a cohabiting relationship for a maximum of 90 days total without stopping the clock on separation as a ground of divorce. If a couple have lived together for more than 90 days since the first separation, the clock will start again at the end of the last period in which they lived together as a married couple. The 90 days needn't be consecutive in order to stop the clock. A spouse cannot have resumed their relationship for a total of 90 days within the one-year period of separation.

8(2)(b): Fault-based grounds

8(2)(b)(i): Adultery

- **Historical background:** the definition of "adultery" is not found in the Divorce Act, but used to stem from the common law. That definition was explicit and highly gendered (i.e. only wives could commit adultery). As early as the late 1920s, the question as to whether or not conceiving through artificial reproduction could be considered adultery was raised. Now, adultery is more about the nature of conduct, and not necessarily about the common law understanding
- Expansion to include same-sex couples and adulterous same-sex acts:
  - Same-sex sexual acts now qualify as adultery: ***P(SE) v. P(DD)*** (2005, BCSC)
  - Adultery as a fault that constitutes breakdown as marriage applies for same-sex marriages as well: ***Thebeau v. Thebeau*** (2006, NBQB)
- Parties cannot agree to commit this fault together, then use it as a ground for divorce (e.g. spouses who enter into sexual relationships with other people upon the agreement of both spouses/swingers/open marriages).

8(2)(b)(ii): Physical or mental cruelty

- A cruelty finding bears stigma, and should be avoided where no useful purpose is served and a divorce can be granted on the ground of a one-year separation: ***McPhail v. McPhail*** (2001, BCCA)

Divorce for non-residents under the *Civil Marriage Act*

Part 2 of the *Civil Marriage Act* addresses **the divorce of non-residents:**

***Civil Marriage Act*, s. 7**

6. In this Part, ***court***, in respect of a province, means ...
   (a) For ... British Columbia, the **Supreme Court** of the province; ...
7. **(1)** The court of the province where the marriage was performed may, on application, grant the spouses a divorce if
   (a) there has been a breakdown of the marriage as established by the spouses having **lived separate and apart for at least one year before the making of the application**;
   (b) neither spouse resides in Canada at the time the application is made; and
   (c) each of the spouses is residing — and for at least one year immediately before the application is made, has resided — in a state where a divorce cannot be granted because that state does not recognize the validity of the marriage.

   (2) The application **may be made by both of the spouses or one of the spouses with the other spouse's consent** or, in the absence of that consent, on presentation of an order from the Canadian court or a court located in the state where one of the spouses besides that declares the other spouse
   (a) is incapable of making decisions re: civil status because of a mental disability;
   (b) is unreasonably withholding consent; or
   (c) cannot be found ...
8. **No corollary relief (e.g. issues of spousal support, child support, parenting, and division of property)** — the *Divorce Act* does not apply to a divorce granted under this Act. ...
11. On taking effect, a divorce granted under this Act dissolves the marriage of the spouses.

The effects of this kind of divorce are limited to the legal dissolution of the marriage in Canada; parties cannot ask for corollary relief (s. 8).

The context is limited as well. These provisions apply largely to non-resident same-sex couples who were married in Canada under the *Civil Marriage Act* (indeed, many same-sex couples came to Canada specifically to get married, as their home country would not allow them to do so) and are now seeking a divorce, but cannot divorce in their current country of residence because their marriage is not recognized there.

Marriage-like Relationships in BC

BC *Family Law Act*, s. 3

3. **(1)** A person is a ***spouse*** for the purposes of this Act if the person
   (a) is married to another person, or
   (b) has lived with another person in a **marriage-like relationship,** and
      (i) has done so for **a continuous period of at least 2 years**, or
      (ii) except in Parts 5 [Property Division] and 6 [Pension Division], **has a child with the other person.**

   (2) A spouse **includes a former spouse**. *[Note: this allows ex-spouses to claim things they were entitled to during the relatioship]*

   (3) A relationship between spouses begins on the earlier of the following:
   (a) the date on which they began to live together in a marriage-like relationship;
   (b) the date of their marriage. ...

"Marriage-like relationships" ("MLR") are a class of spouses and are partly defined under s.3 of the BC FLA.

What makes a relationship "marriage-like" is a factual determination that is made on a case-by-case basis and goes to the nature, quality, and essence of the relationship. The determination will change depending on the context; a "checklist of factors" approach is not approach.

Nevertheless, the common law has developed the historic ***Molodowich* test** that outlined 7 factors which may **help** in determining whether or not a relationship is "marriage-like" in essence, even if they are not determinative and have changed with fluctuating norms (see notes below). They are still used in court today (e.g. **Su v. Lam**, 2011 ONSC):

1. Shelter	Not determinative; couples do not have to share residence indefinitely: ***Roach v Dutra*** (2010, BCCA)
2. Sexual and personal behaviour	Not determinative; ***Smith v Lanthier*** (2017, BCSC) confirmed that scrutinization of parties' sexual activity is **not** appropriate.
3. Services	Outdated; originally referred to the services that the wife was rendering to her husband (perhaps re-fashion to the services spouses are rendering to each other, regardless of gender)
4. Social	Referred to engaging in social and societal activities and presenting yourself as a couple
5. Societal	
6. Support ($)	i.e. financial interdependency. We have seen that this is not a determining factor: ***Austin v. Goerz*** **(2007, BCCA),** ***Weber v. Leclerc*** **(2015, BCCA)**
7. Children	

The following cases clarify what affects (or does not affect) MLR status.

WEBER V. LECLERC (2015, BCCA)

Facts — A seeks a declaration that she and R were not spouses in a MLR per the FLA. The parties began cohabiting in 2002 and lived together until 2011. They raised their kids (from previous relationships) and a dog together, kept family portraits, shared a bedroom and were monogamous, purchased property together, vacationed together, shared meals together, had extended contact with the other's families, and went out as a couple. When A fell ill, she expected R to care for her and was disappointed when R did not. They never married and their finances were kept separate. **Were the parties in a MLR?**

Held — **The parties were in a marriage-like relationship.**

What isn't necessary for a determination of MLR:

- **The fact that one party never considered marriage is of limited importance.** It is the quality of the parties' existing relationship that is important, not their intentions to transform it into a marriage.
- **The parties' intentions are important for determining if the parties are in a MLR, but need not include an intention to be financially interdependent.** While financial dependency is one of many factors to be considered, it is not an essential characteristic of marriage.

Other aspects re: MLRs:

- The intention that is critical is not the intention to be bound by a statutory regime of mutual support, but rather **the intention to enter into a relationship similar to marriage**.
- **What constitutes "marriage-like" is not monolithic:** "Social norms surrounding marriage have changed considerably over the years, and it should not be surprising that, along with those changes, evaluations of what relationships are "marriage-like" have also evolved."
- Referencing *Gostlin v. Kergin* (1986): **a couple must do more than merely cohabit for a court to determine that they are in a MLR.**

Factors weighing for and against a MLR:

- **In this case, several factors support the idea that the relationship in this case was marriage-like:** cohabitation coupled with romantic and sexual relations; couple's intentions were to remain together for an indefinite, but relatively lengthy, period; significant social interactions between them closely resembling those typical of married couples; parties treating themselves and their children as a family unit; an expectation on the part of the parties that they would, during the currency of their relations, provide one another with emotional support.
- **Other factors supported the idea that the relationship in this case was NOT marriage-like:** limited role each of the parties undertook re: the other's children; parties treating themselves as "single" for income tax purposes and purposes of other government programs; one spouse's relatively detached reaction to the other's illness.

ROACH V. DUTRA (2010, BCCA)

Facts — D and R met in 1999. Each had two kids from previous relationships. In 2000, they got engaged. In 2001, R and her children went to live with D and his son in a trailer on his dairy farm. In 2002, everyone moved into D's home. In 2003, because of tensions between R and D's daughter, the relationship continued under separate residences. The relationship continued until late 2006, because R no longer believed D was going to marry her. D argues that they were not in a MLR after 2003 because they lived in separate residences. **Were the parties in an MLR at the end of the relationship?**

Held — **Yes. The court found that moving out to live in separate residences did not change the fundamental nature of the relationship. Spouses moving out and no longer living together =/= end of the MLR, if in other ways their relationship remains marriage-like in nature.** In this case, the trial judge used evidence such as how both parties were exclusively monogamous and had an expectation of fidelity, undertook joint vacations, presented as a couple to the public, were close to each other's kids, D paid R's bills, etc. The TJ concluded that despite the move, both parties continued to relate to each other as spouses.

AUSTIN V. GOERZ (2007, BCCA)

Facts — Austin died intestate. He never divorced from his first wife. Goerz lived with Austin for the last 6 years of his life. Austin's estate argued that it is impossible for Austin and Goerz to have been in a MLR because he was still married to his first wife at the time of his death, and could never have married Goerz. **Were Austin and Goerz in an MLR, even though Austin could never have married her?**

Held — **No. MLRs are not restricted to parties who could marry each other.** The determination of an MLR is not about a checklist of factors, but a holistic evaluation of **the nature and character of the relationship.**

NEWTON V. CROUCH (2016, BCCA)

Facts — Newton and Crouch were unmarried partners who separated before FLA came into force. Their relationship fell within the FLA's definition of "spouse", and Crouch brought her claim seeking spousal support and division of property within the time limits set out in the FLA (as they were in a MLR, within 2 years of the date the spouses separated). **Does the FLA apply to them?**

Held — **Yes. To be an unmarried partner eligible to apply for division of property pursuant to Part 5 of the FLA, that person must only: (1) have lived with another person in a MLR for a continuous period of 2 years (s.3(1)(b)); and started a proceeding to divide property no later than 2 years after the date of separation (s.198(2)(b)).** Persons who were formerly in a MLR can take advantage of Part 5 of the FLA provided they do so within 2 years of separation.

TAKACS V. GALLO (1998, BCCA)

Facts — About a younger couple, Takacs and his girlfriend. Tragically, Takacs died in a motorcycle accident. **Was his girlfriend a spouse for the purposes of the *Family Compensation Act*?**

Held — **Using the principle that all facts are relevant to final determination, the majority of court found that relationship was not marriage-like; it is not enough for younger people to have future plans to engage in a spousal relationship or MLR.** In deciding this, the court considered very specific facts of their relationship to support the contentment that the relationship was not marriage-like: they lived separately, attended different universities in different cities, etc.

Separation under the BC *Family Law Act*

BC *Family Law Act*

3. (4) For the purposes of this Act,
   (a) Spouses may be separated **despite continuing to live in the same residence,** and
   (b) The court may consider, as evidence of separation,
      (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
      (ii) **an action**, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

Part 5 — Property Division

83. (1) For the purposes of this Part, spouses are **not** considered to have separated if, within one year after separation,
   (a) They begin to live together again and the primary purpose for doing so is to reconcile, and
   (b) They continue to live together for one or more periods, **totalling at least 90 days**.

BC FLA s.(4) provides guidance as to what separation can mean. It clarifies that even if parties live under the same roof, they can be separated. What is important is:

1. **Intention to separate: r**ecall that the intention to separate requires the lowest level of understanding, and is lower in the hierarchy of capacity than that required to manage one's own affairs: ***Wolfman-Stotland v. Stotland (2011, BCCA)*****.** Moreover, intention is not something that needs to be shared: **McGrail v McGrail (2016, BCSC).**
2. **Communication of intention:** put in some form of writing is best, so as to have clear evidence of where + when it was communicated and what was understood
3. **Consistent actions taken to demonstrate that intention:** refer to the traditional indicators of separation from ***Oswell v. Oswell (1991, ONCA)*** for some ideas:
   - Physical separation (e.g. not sharing a bedroom)
   - Withdrawal from matrimonial obligations
   - Limited discussion of family problems and communication between the spouses
   - Absence of joint social activities, including meals and public outings
   - Performance of household tasks

Separated parties may try and decide to give their relationship another go. S. 83(1) of the BC FLA states that **if a couple have lived together for a total of 90 days within the one-year period of separation, the original date of separation becomes moot and spouses will not be considered to have separated**. If they choose to separate later on, the clock will reset to the end of the last period in which they lived together as spouses.

Under the FLA, the date of separation is important for the determination of property interests, debt responsibility, and support claims, as well as time limits pertaining to it (s. 198(2)(b): a spouse may start a proceeding for property division, pension division, or spousal support no later than 2 years after the date the spouses separated).

Note that under the *Divorce Act*, "separation" takes on a different meaning; it is not the end of a relationship —rather, it is the event that marks the beginning of the one year period a couple must live separate and apart before beginning a proceeding and receiving an order for divorce (at the earliest).

3.5 Dispute Resolution and Family Violence

Family Violence

Family violence is defined under **s.1 of the BC FLA** to include physical, sexual, and emotional abuse of a family member, including attempts to commit abuse. Emotional abuse includes intentional damage to property, unreasonable restrictions on a family member's financial or personal autonomy, stalking, harassment, coercion and intimidation, including threats to other persons, pets or property.

In the case of a child, **s. 1** states that family violence also includes direct or indirect exposure to that violence. **S. 38 of the FLA** requires the court to consider the following when assessing for family violence in determining the best interests of the child: nature and seriousness of violence, frequency, recency, whether the violence was directed at the child, whether the child was exposed to violence directed towards other family members, whether the abuse constitutes a pattern of coercive and controlling behaviour, the harm to the child's physical/psychological/emotional safety, steps taken by abuser to prevent further abuse, and any other relevant matters.

Family dispute resolution professionals have a duty to screen for family violence and consider its impact on the ability of the parties to negotiate a fair agreement, the appropriateness of FDR mechanisms to resolve the matter, and the safety of the parties **(s. 8).**

Family members may seek **protection from family violence** — Part 9 of the FLA deals with this entirely. Under **s. 183,** family members have the option to apply for a protection order.

Per *B(MW) v. B(AR) (2013, BCSC)*, what constitutes family violence must be interpreted from a liberal and expansive view and can include many forms of behaviour:

- **B(MW) v B(AR)** → dispute over primary residence. Mother is primary caregiver for kids but constantly interferes with father–children access/communication, prolonging litigation and conflict. Court holds this is emotionally abusive + constitute family violence
- **P(JC) v B(J)** → father refuses to pay child support, secretly records parenting time exchanges, uses child to get mother to do things; court says his actions and words constitute family violence
- **NS v. CE (2014, BCPC)** → court held that a calculated and deliberate failure to pay child support to inflict emotional harm or to control another party's behaviour can constitute family violence, but this will not often be the case. To make such a finding it will be necessary for a party to prove that the payor knows that his or her failure to pay will inflict trauma, and that the payor has the intent to so inflict it on a family member.
- **R(LA) v R(EJ)** → father violent twice during marriage but not in front of kids; made emotionally abusive comments to mother during separation; assaulted mother's new boyfriend. Court held that his behaviour had potentially harmful effects to kids; kids stay with mother as primary caregiver + father's time to be supervised
- **B(CM)** → the party alleging family violence does not have to prove that they are an innocent victim – even if victims participate in harm, they still experience harm themselves, including kids. However, line between self-defence and initiating violence is still unclear

Exposing children to drug use does not necessarily constitute family violence under the FLA:

- **BC v M(A)** → both parents were drug users who exposed kids to drug stuff. Father took over care with facilitated access but still smoked marijuana when kids were sleeping. This did not constitute family violence because father removed child from mother + mature + evidence that he looked after child best interest
- **H(ST)** → both parents drug addicts; had taken active steps to get clean, and had been for a year or so. Explosive relationship between mother and father, mother had dated violent men since separation, and had inappropriately spanked child. The court held no family violence. Mother had learned spanking was a mistake and had made a clean break from her previous violent relationship. Drug use was not a factor and the potential for poor judgment in the future could be mitigated with counselling and professional help.

The frequency, nature, and seriousness of the abuse matters:

- **Van Kooten v More** → repeated arguments with parents; although child felt anxious from parents' behaviour, court could not see as family violence
- **P(C) v C(B)** → violence happened during separation when father was drunk and broke into house and grabbed mother's face; but since violence only occurred once and did not impair father's ability to meet the child's needs, not family violence, although father's parenting time was limited

Termination of guardianship is the last measure for courts:

- **D(CE) v L(CL)** → key question is whether family violence risk manageable by victimized party with court order assistance that protect child safety + well being
- **R(NC) v C(KD)** → father violent to mother in front of child and restrict mother freedom – court decline to terminate guardianship/issue protection order because thought no longer family violence action even though father take no steps to mitigate anger issues

Principle that maximum contact with parents is beneficial for child development – even though not mentioned in FLA:

- **L(DN) v S(CN)** → mother primary caregiver; child loves dad but scared because he makes derogatory remarks about mother to child and about child, resulting in psychological abuse; but court say while family violence, father did not intend to harm child
- **R(BT) v A(U)** → both parents physically + emotionally abusive but court maintains equal parenting regime with both parents retaining guardianship, advising parents to seek parenting without physical violence
- **F(NA) v M(CD)** → mother took kids and moved alleging violence on part of father; court holds that the move was because mother was worried for her own safety rather than the kids', so she was ordered to bring kids back with joint custody granted
  - Children not found to be in direct danger of abuse from father; assumption that violence towards the spouse does not inhibit the parent's capacity to parent

But if violence consistent + overwhelming, courts will take steps to protect child:

- **M(LJS) v S(LT)** → parents had a toxic relationship; mother alleged daughter had told her that her father sexually abused her. Medical opinion admitted that corroborated that father was a sexual abuse risk toward girls. Father's access to daughter was limited to daytime access at a neutral location only, per daughter's request; barred phone communication.

Cultural considerations influence court decisions too:

- **G(BK) v G(HS)** → Sikh family from India. Arranged marriage with quick separation. Child living with mother. Mother alleged family violence and evidence that father was upset his child was female, controlled mother and did not pay child support – but court held culture dictated it, mother was exaggerating, father did not harm the child - mother granted sole custody under DA but both parents are guardians under FLA
  - Invocation of "culture" to diminish the mother's concerns; spectre of cultural relativism

Family violence provisions are not to be invoked as a weapon of "war" between parents:

- **SL v. SG (2014, BCCA)** → the Court of Appeal upheld a finding that the failure to produce children for parenting time did not amount to family violence, as there was no evidence that the children had suffered any physical or emotional harm as a result. In particular, the court held that the family violence provisions in the FLA are intended to address a serious social issue and to protect children and spouses from actual harm; **their meaning and application should not be stretched to the point that they become just another weapon in a "war" between the parents.**

Family Dispute Resolution in the BC *Family Law Act*

Per **s.1 of the FLA, "family dispute resolution" (FDR)** means a process used by parties to a family law dispute to attempt to resolve one or more of the disputed issues **outside court**, and includes assistance from a family justice counsellor; the services of a parenting coordinator; mediation, arbitration, collaborative family law and other processes; and other prescribed processes.

A **"family dispute resolution professional"** means any of the following: a family justice counsellor; a parenting coordinator; a lawyer advising a party in relation to a family law dispute; a mediator conducting a mediation in relation to a family law dispute; and an arbitrator conducting an arbitration in relation to a family law dispute.

Some provisions of the FLA can be seen as mechanisms that allow for FDR to meaningfully happen. Part 2, Division 1 of the FLA is titled **"Part 2 — Resolution of Family Law Disputes; Division 1 — Resolution Out of Court Preferred"**. Within that Division:

- **S. 4** explicitly states that families are encouraged to resolve disputes through agreements and appropriate family dispute resolution before making an application to a court
- **S. 5** imposes a general duty on parties to disclose full and true information for the purposes of resolving a family law dispute.
- **S. 6** allows parties to make agreements respecting family law disputes generally.
- **S. 8** imposes a duty on FDR professionals to *inter alia* screen for family violence and consider its impact on the ability of the parties to negotiate a fair agreement, the appropriateness of FDR mechanisms to resolve the matter, and the safety of the parties.

FDR affects time limits. Court proceedings about spousal support or the division of property and debt must normally be started within two years of the date of divorce, for married spouses, or within two years of the date of separation, for unmarried spouses. **Under s. 198(5) of the FLA**, the countdown for the 2-year limit stops while the spouses are involved in a FDR process with a FDR professional.

Some reasons to consider FDR: less costly; less adversarial; clients get to make own decisions vs. a stranger deciding for them; gives the best chance of maintaining amicable relationship post-separation, especially when kids involved; and can still be used while parties are in litigation.

Below are some types of out-of-court processes:

Mediation, Arbitration, and Med-Arb

Mediation is a co-operative problem-solving process where a couple jointly retains a neutral professional, the mediator, who helps parties come to an agreement.

- **The mediator does not make decisions.** They mediator's role is to create an environment for more constructive discussions, and assists the parties to a dispute to define the issues and reach a resolution which satisfies each parties' needs and interests.
- **Mediators may or may not be lawyers.** Lawyer mediators can help clients draft a separation agreement, whereas non-lawyer mediators can specialize in different areas (e.g. child issues).
- **Lawyers (that are not the mediator) may or may not be involved.** If they are, lawyers are able to talk on behalf of their clients and their interests. This can get costly, with each client pays for their lawyer's time and half of the mediator's time. When lawyers are present, mediation can be accomplished through a **"shuttle mediation"** method, with parties being in different room and the mediator "shuttling" between rooms to talk to parties.
- **There are different types of mediation: evaluative mediation** (where the focus is on compromise; the mediator provides opinions and evaluates parties positions, and can tell the parties what is likely to happen if they choose to go to court) and **interspaced mediation** (where the mediator tries to go beyond

the position of the parties and look at the goals, needs, and concerns behind those positions. They can help people get to more creative results and can bring attention to both common and different interests). Mediators sometimes use a mix of both types.

- **The mediator must meet the requirements of s.4 of the FLA Regulation.** Only a mediator who is qualified as a FDR professional may conduct a mediation re: a family law dispute. To be qualified as a FDR professional, they must be a member in good standing of the LSBC/Mediate BC Family Roster/ Family Mediation Canada, meet training requirements, or otherwise have experience in family-related practice and completed required training. Before engaging in mediation, the mediator must enter into a written agreement to mediate with the parties to the dispute and must provide written confirmation that they meet the professional requirements.
- **Be careful to consider the power imbalance between parties and the costs of mediation** (i.e. if it is an affordable option for the client). Like most FDR processes, **mediation is almost always inappropriate where there is family law violence.**
- **Mediation does not divorce parties.** A divorce order is always required for client's status to change. To file for a divorce in court, one must include agreements reached via FDR. However, the FDR process itself will NOT change the status of the participants.

In **arbitration,** a couple jointly retains a neutral professional, the arbitrator, who helps parties come to an agreement. Unlike mediation, decisions made in arbitration are binding.

- **Arbitrators must meet the requirements of s. 5 of the FLA Regulation and procedural requirements of the *Arbitration Act*.** Only a mediator who is qualified as a FDR professional may conduct a mediation re: a family law dispute. To be qualified as a FDR professional, they must be a member in good standing of the LSBC/BC College of Psychologists/BC College of Social Workers and meet training requirements, including training on family violence. Before engaging in mediation, the mediator must enter into a written agreement to mediate with the parties to the dispute and must provide written confirmation that they meet the professional requirements.
  - To be an arbitrator in BC, a lawyer must be, at minimum, a 10-year call.
- **Non-lawyer arbitrators** are qualified to conduct arbitrations relating to parenting arrangements, contact with a child, and child support subject to certain conditions only.

Mediation-arbitration (or Med-Arb) is a mix between the two, and consists of a two-stage process. It starts off as a mediation and if parties cannot resolve their matters, then parties go to arbitration, at which point the same person (or a different person) is authorized to make binding decisions on behalf of the parties.

Parenting Coordinators

Parenting coordination is a **child-focused FDR process** that gives parents access to a neutral decision-maker who can resolve day-to-day parenting conflicts as they arise, with the goal of minimizing further conflict and additional appearances in court.

- **Parenting coordination is not available in all provinces.**
- **The process is meant for high-conflict families.**
- **The parenting coordinator must meet the requirements outlined in s. 6 of the FLA Regulations.** To be a parenting coordinator in BC, a lawyer must be, at minimum, a 10-year call.
- **A court can order that a parenting coordinator be appointed to act for up to two years.**
- **Parenting coordinators assist in a mediation role but are empowered to make certain decisions regarding parenting arrangements and contact with a child** (e.g. parenting time during holidays, a child's daily routine; education, including special needs; discipline; the temporary care of a child by a non-guardian), although big decisions are excluded (e.g. relocation, change to guardianship, giving parenting time to a person who does not have it, changes in the allocation of parental responsibilities).

Collaborative Law

The goal of the **collaborative law model** is to remove the adversarial component inherent in family law and replace it with mutual respect and team problem solving (communication, not confrontation) in meeting the needs of the parties and their children (if applicable).

The collaborative process uses a "multi-disciplinary" model, includes participation agreements, **does not involve court**, and teamwork between the parties *and* third-party figures (divorce/parenting coaches, child specialists, financial neutrals).

Collaborative lawyers, child specialists and financial neutrals require mediation training, specialized collaborative training, and professional standards training.

Collaborative law is **most suitable for low-conflict or medium-conflict couples.** It is not suitable for high-conflict couples with a history of family violence.

The Participation Agreement (a 'must-have' for the process):

- No court proceedings
- Good faith negotiations, honest disclosure
- Withdrawal from the process (i.e. clients can withdraw and switch collaborative lawyers)
- Communications in the 'spirit of settlement'
- Outside professionals
- Signed agreements, which end the process
- Without prejudice settlement process
- Lawyer-client privilege is a blurry line — in collaborative law, your role is to encourage clients to bring an issue of note forward. If the client refuses, then lawyers may withdraw because of the non-disclosure
- Focus on the dynamic of the group — what is best for the family may not be what is best for the client

During the process, both parties retain collaborative lawyers. Unlike mediators who neutral and cannot give advice, collaborative lawyers focus on client and can give legal advice. Parties may engage in individual and 4-way meetings. Interim and final agreements may be reached, and these agreements must be made in writing.

Collaborative family law (and other methods of FDR) are responding to the challenges of the traditional adversarial approach to family law cases. The FLA now encourages, and in some cases requires, parties to access FDR services before going to court. Settlement based negotiations are becoming the best way for families to adjust to separation.

Other "out-of-court" processes

1. **"Kitchen table" agreements:**
   - Couples try to come to agreements themselves. This option is lowest on the cost continuum, with only the 2 parties involved.
   - Some may use cut-and-paste written agreements via the internet, but clients should avoid doing this— advise them to see a lawyer, get independent advise, and sign off on the agreement with a witness to make the agreement enforceable.
   - Verbal, unwitnessed agreements may also be made, but these are difficult to enforce. In parenting, such informal agreements may become part of a child's routine, at which point they cannot be changed without the consent of the other party (FLA s.48).
2. **Lawyer-negotiated agreements:** negotiated through letters between counsel or a 4-way meeting between the couple and their lawyers. Agreements often deal with difficult areas of family law, such as child support.

3. **Unbundled Services (or limited scope retainer):** Can be used in ADR or litigation. Lawyers provide a limited scope of services to clients, but refrain from full representation (e.g. drafting pleadings but not on record as counsel OR representing the client as counsel, but not drafting pleadings)
    - Unbundling is needed because of the growing gap between those who qualify for legal aid and those who can afford to retain a lawyer for full representation. Unfortunately, there is a disconnect between the demand for unbundled services and the supply within the legal community
    - Unbundling can benefit everyone: benefits the public by improving access to justice, price predictability, etc. They benefit lawyers by providing new markets, allowing them to contribute to A2J, and improving work/balance. They benefit the court system by producing clearer pleadings, reducing the number of hearings, improving public perception, etc.

3.6 *Division of Property and Debts*

Context: White Paper on Family Relations Act Reform (2010)

There are 2 aspects to property division law: (a) identifying family property and (b) distributing it.

In 2010, while the old Family Relations Act ("FRA") was still in effect, BC identified divisible property based on whether the property was "ordinarily used for a family purpose". All other places in Canada (except the Yukon) have classes of property that are excluded from the pool of assets subject to distribution, including pre-relationship property, personal injury awards, and inheritances.

Criticisms of existing model: time consuming + expensive, hard to determine if property was used for a family purpose, similar property treated differently, no clarity for other property i.e. gifts, fails to address debt division, does not apply to unmarried spouses (who require a constructive trust claim to share property).

Pros of proposed "excluded property" model: simpler, clearer, easier to apply and understand, and standard expectations for fairness. Spouses can "keep what theirs" but must share the property/debt accumulated during relationship. Model would also decrease judicial discretion for identification of property, used greatly in current regime. The model presumes 50/50 division. If that is unfair, the judge must address.

White paper's recommendations:

- Legislative move to excluded property model.
    - **Family property will include:** real and personal property owned by one or both spouses at the date of separation, unless the asset is excluded (see below), in which case only the increase in the value of the asset during the relationship is divisible.
    - **Exclusions include:** gifts and inheritances to one spouse; settlements or damage awards from tort claims, unless meant to compensate both spouses or to replace wages; non-property related insurance proceeds, unless meant to compensate both spouses or to replace wages; pre- and post- relationship property; trust property, unless the beneficiary spouse has an immediate and absolute interest in the trust property or has power to terminate the trust.
    - If there is a dispute as to whether property is excluded, the burden of proof is on the person claiming exclusion.
- New statute should apply to both married and unmarried spouses who have been in a marriage-like relationship for at least 2 years (maybe less if they have a child together)

Statute (FRA vs. FLA) and Court of Jurisdiction

Court of jurisdiction: Per **s. 192 and s. 193(2)(b) of the FLA**, all issues under Part 5 (property division) must be dealt with in the **BC Supreme Court.**

Relevant statute: Before delving into a property division question, one must first determine whether the FLA or the FRA applies (the Divorce Act does not address property division). **Per s. 252(2) of the FLA,** If the proceeding was started before the FLA came into force (2011) and the client does not agree to use the FLA, then one must use the FRA. **Note that this class will only cover FLA rules.**

Time Limits under the BC *Family Law Act*

198.(1) Subject to this Act, a proceeding under this Act may be started at any time.

(2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, **no later than 2 years after,**

(a) in the case of spouses who were **married**, the date **(i)** a judgment granting a divorce of the spouses is made, or **(ii)** an order is made declaring the marriage of the spouses to be a nullity, or

(b) in the case of spouses who were living in a **MLR**, the date the spouses separated.

(3) Despite (2), a spouse may make an application for an order to set aside all or part of an agreement respecting property or spousal support **no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.** A spouse may also replace the agreement with an order made under Parts 5, 6, or 7.

(4) The time limits set out in (2) do not apply to a review under s. 168 *[review of spousal support]* or 169 *[review of spousal support if pension benefits].*

(5) The running of the time limits set out in (2) is suspended during any period in which persons are engaged in FDR with a FDR professional.

Who is entitled to property division?

Equal entitlement and reponsibility

81. Subject to an agreement or order that provides otherwise and except as set out in this Part…

(a) **spouses are both entitled to family property and responsible for family debt**, regardless of their respective use or contribution, and

(b) **equal division of family property and debt:** on separation, each spouse has a right to an undivided **half interest** in all family property as a tenant in common, and is **equally** responsible for family debt.

The rights and remedies under Part 5 of the FLA are available only to persons qualifying as spouses, of which there are two kinds:

1. Married spouses, and
2. As of 2013 in BC, spouses in a MLR who have cohabited for at least 2 years (remember that the definition of spouse for these parts of the FLA are a bit different from the rest of the Act. People who lived together for less than 2 years are not spouses for the purposes of property division, **regardless of whether or not they've had a child together**). However, this is not the case in many other provinces.

The burden of establishing standing as a spouse lies on the party claiming the status.

Because property division falls wholly under provincial powers, and BC has committed to treat married and unmarried spouses as functionally equal, **the same rules will apply regardless of whether spouses are married or in an MLR in which they have cohabited for at least 2 years**.

Excluded Property

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

- **(a)** property acquired by a spouse before the relationship between the spouses began;
- **(b)** inheritances to a spouse;
- **(b.1)** gifts to a spouse from a third party **(note: if the gift was intended to be gifted to both spouses, the gift is included in family property. Moreover, barring evidence to the contrary, the presumption is that a gift from parent to child is a gift to that child and their spouse:** *Cabezas v. Maxim (2016, BCCA)*);
- **(c)** a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for (i) loss to both spouses, or (ii) lost income of a spouse;
- **(d)** money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for (i) loss to both spouses, or (ii) lost income of a spouse;
- **(e)** property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse; **(*trans*: categories of excluded property will remain regardless of fact that they are held in trust for the benefit of a spouse)**
- **(f)** a spouse's beneficial interest in property held in a discretionary trust (i) to which the spouse did not contribute, and (ii) that is settled by a person other than the spouse;
- **(g)** property derived from excluded property or the disposition of property referred to in any of paragraphs (a) to (f). **(*e.g.* X inherits $, which is considered excluded property. X buys a car with that $. If X can prove that the car was bought with $ from an inheritance, that car will remain excluded property).**

(2) **Burden of proof:** A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

While family property is generally divided half-and-half (although there are exceptions), **excluded property** will generally remain with the owner upon separation. However, the **increase in value of excluded property** will generally be considered family property.

Family Property

84. **(1)** family property includes all real and personal property, unless it is excluded property — then only the increase in the value of the asset during the relationship is family property. It includes:

- **(a)** Property that, at the **date of separation**, is owned by at least one spouse, or in which at least at least one spouse has a beneficial interest; and or
- **(b)** Property that, **after separation**, was acquired by at least one spouse, or in which at least one spouse acquires a beneficial interest, that is **derived from family property**

(2) Non-exhaustive list of examples includes: a share or an interest in a corp; (b) an interest in a partnership, an association, an organization, a biz or a venture; (c) property owing to a spouse (i) as a refund, including an income tax refund, or (ii) in return for the provision of a good or service; (d) money in bank accounts; (e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan; (f) property, other than property to which (3) applies, that a spouse disposes of after the

relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or w/another person, to require its return or to direct its use or further disposition in any way; (g) the amount by which the value of excluded property has increased since the later of the date (i) the relationship between the spouses began, or (ii) the excluded property was acquired.

(2.1) For 2(g), any increase in value of a beneficial interest in property held in a discretionary trust does not include the value of any property received from the trust.

(3) Family property includes that part of trust property contributed by a spouse to a trust in which
- (a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,
- (b) the spouse has a power to transfer to himself or herself that part of the trust property, or
- (c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse

While family property is generally divided half-and-half (although there are exceptions), **excluded property** will generally remain with the owner upon separation.

W(SLM) v W(MRG): judges know that the trust can be used to avoid certain obligations; some trust property is included under the understanding of family property. Trust property is to be family property if any of 84(3)(a) to (c) apply, whether or not the spouse owns, or has a beneficial interest in, the trust property.

Gratuitous transfers between spouses

While generally, a transfer without consideration will give rise to a presumption that the transferee holds the asset in trust for the transferor, by way of resulting trust—because "equity presumes bargains, not gifts"—in certain situations, a different presumption operates: **the presumption of advancement.** In these circumstances, the law will assume that there was an intention to give this property as a gift, meaning that the burden rests on opposing spouse to prove it wasn't a gift. The presumption of advancement arises in two scenarios:

1. a gift from husband to wife
   - some cases will extend it from spouse to spouse, but sometimes does not apply (not even from wife to husband). If this presumption is still alive, burden shifts on husband to prove it was not a gift.
2. A gift from a parent to a minor child

F(VJ) v W(SK) (2016, BCCA) outlined two lines of authority regarding gratuitous transfers between spouses:

1. **Remmem v. Remmem (2014, BCSC)**
   - Part 5 of the FLA operates as a complete code, excluding the application of other legal principles, including the presumption of advancement.
   - Excluded property transferred to a spouse remains excluded property.
2. **Wells v. Campbell (2015, BCSC)**
   - Excluded property gifted to a spouse becomes family property.
   - The FLA is not a complete code and must be read in addition to equity principles and general principles of the law, including the presumption of advancement.
   - **The key is to prove intention—at the time of the gifting, did the spouse intend to gift the property to the other spouse?**

The court in F(VJ) favoured the approach taken in *Wells v. Campbell* (2015, BCCA) and confirmed the availability of the presumption of advancement. **The FLA does not prohibit gifts between spouses and will not**

reverse gifts simply because of the spouses' separation. In F(VJ), when husband voluntary gifted wife money that was initially his excluded property, that money lost its exclusion and became "property owned by at least one spouse" per s.84 (family property).

In F(VJ), the court spoke of ways to protect from losing exclusion—subject to other relevant provisions of the FLA, for example, the transferor can require the transferee to acknowledge that no gift of the excluded property (or its value) is intended.

Family Debt

86. Family debt includes all financial obligations incurred by a spouse
- **(a)** **during** the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- **(b)** after the date of separation, if incurred for the purpose of maintaining family property ***(e.g. a loan taken out to pay property taxes)***

Courts encourage a **broad understanding** of family debt. However, the definition set out in s. 86 means that debt incurred by a spouse before the spouses married or began to live together is that spouse's **personal debt,** which are excluded from division.

Under s. 81, responsibility for family debt is presumed to be s**hared between the spouses equally**, regardless of their use or contribution to that debt.

There is no requirement that family debt be incurred for family purposes, or even that the other spouse consents to the debt. For example, in the case of a spouse's gambling problem, gambling debt will be considered family debt. However, there are mechanisms to make this more "fair", like asking for division of excluded property.

Note that the beginning of the relationship, for property division purposes, starts from the date a couple begins living together, not the date the couple becomes common law (i.e. started living together Jan 1, 2014 and became CL Jan 1, 2016 → property division starts from Jan 1, 2014)

Valuation

87. **Unless an agreement or order provides otherwise** and except in relation to a division of family property under Part 6 (Pension Division),
- **(a)** The value of family property must be based on its **fair market value,** and
- **(b)** The value of family property and family debt must be determined as of the date (i) an agreement dividing the family property and debt is made, or (ii) of the hearing before the court respecting the division of family property and debt.

The FLA states that valuation of family property and debt must be made according to the f**air market value,** unless an order says or parties agree to do otherwise.

Re: the date of the valuation: unless parties agree otherwise, the value of family property and debt is their fair market value either at the moment of the agreement dividing the property + debt is made, or at the moment of the hearing (i.e. when parties go to court). Parties can provide for a different date in an agreement. However, "**the significant unfairness threshold** should be met before the court departs from the date of trial as the valuation date pursuant to s. 87": ***Blair v. Johnson*** **(2015, BCSC).**

Maguire v. Maguire **(2016, BCCA) defines fair market value at para. 30:** "the price at which a transaction would occur, in an open an unrestricted market between informed and prudent parties acting at arm's length, where neither party is acting under compulsion."

Unequal division of family property and debt — significant unfairness

95. **(1)** The Supreme Court may order an **unequal division** of family property, debt, or both, if it would be **significantly unfair** to **(a)** equally divide family property, debt, or both …

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following ***(nb: not an exhaustive list)***:

(a) the **duration** of the relationship between the spouses;

(b) the **terms of any agreement between the spouses**, other than an agreement described in s. 93 (1) [setting aside agreements respecting property division];

(c) a spouse's **contribution to the career** or career potential of the other spouse;

(d) whether **family debt** was incurred in the normal course of the relationship between the spouses;

(e) if the amount of family debt exceeds the value of family property, the **ability of each spouse** to pay a share of the family debt;

(f) whether a spouse, after the date of separation, **caused a significant decrease or increase in the value of family property or family debt** beyond market trends;

(g) the fact that a spouse, **not acting in good faith,** (i) substantially **reduced the value** of family property, or (ii) disposed of, transferred or converted family property, or exchanged family property into another form, causing the other spouse's interest in the property to be defeated or adversely affected;

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

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

(3) **Relationship between family property/debt and spousal support: If, on making a determination re: spousal support, the objectives of spousal support under s. 161 (e.g. self-sufficiency) have not been met,** the Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses.

The "significantly unfair" threshold

S. 95 empowers the court to divide family property and debt unequally, but **imposes a high threshold ("significant unfairness")**, aimed at constraining judicial discretion in rebutting the presumption of equal division set out in s. 81.

- "Significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling": ***Remmem v. Remmem*** (2014, BCSC)
- "Reapportionment will require something objectively unjust, unreasonable or unfair in some important or substantial sense": ***Jaszczewska v Kostanski*** (2016, BCCA)
- Look to the **non-exhaustive list of factors in s. 95(2)** and the **relationship between family property/debt and spousal support (s. 95(3))** to establish that equal division under s. 81 would be unfair.
- **Factors that may lead to a finding of significant unfairness in the division of family property include:** deliberate depletion of family property (gambling) (G(JG v. V(JJ)); nondisclosure of assets (Chang v. Xia); disproportionate responsibility for childcare (H.C.); agreements for an unequal division of family property (Slavenova); contributions to the career of a spouse (Jaszczewska); considerably disproportionate contributions to the family property (Jaszczewska, A.M.D.); failure to contribute to excluded property owned by the other spouse (Blair); a spouse's role in increasing the value family of family property beyond market trends (Blair);

failure to achieve the objects of spousal support when a spouse is entitled to support (C.M.); relationships of short duration (A.M.D.); and, tax liabilities incurred as a result of the transfer of property (A.M.D.).

- **Factors that may not lead to a finding of significant unfairness in the division of family property include:** differing contributions to the family property (Slavenova); relationships of medium duration (Jaszczewska, Blair); the absence of contributions to the career of a spouse (Jaszczewska); and, the disproportionate ownership of property brought into a relationship (Jaszczewska, A.M.D.).

Division of excluded property

96. The Supreme Court **must not** order a division of excluded property **unless**
    1. family property or family debt **located outside British Columbia** cannot practically be divided, or
    2. it would be **significantly unfair** not to divide excluded property on consideration of (i) the **duration** of the relationship between the spouses, **and** (ii) a spouse's **direct contribution** to the preservation, maintenance, improvement, operation or management of excluded property.

Since what is being divided is **excluded** property, it does not fall under s. 81 and so does not have to be divided between spouses. Thus, while it also uses the "**significantly unfair**" threshold, the standard is higher than for unequal division of family property.

In *Parton v. Parton* (2016, BCSC), the court held that a 33-year old marriage was lengthy but the claimant's direct contributions were not sufficient to support unequal division. The court also considered that the spouses **possess sufficient family property** which can be reapportioned by **applying the provisions of s. 95 (unequal division of family property) instead** to offset any weighty or compelling unfairness that would be created if that property were to be divided equally.

Agreements respecting property division

Recall that **s. 6** of the FLA allows two or more persons to make **binding** agreements respecting family law disputes generally. A single agreement may be made respecting **one or more matters**. An agreement **does not need** to be filed with the court and does not require consideration or assistance from a FDR professional. **S. 6(5)** specifically states that **spouses who are underage** can still enter into agreements re: division of property and debt. Agreements can be entered into at any time; before, during, after a spousal relationship—even literally seconds before a hearing is OK. Oral agreements respecting property division can nonetheless be enforceable, if properly proven on evidence: Asselin v. Roy (2013, BCSC).

FLA S.92 provides guidance as to what spouses can do when it comes to agreements respecting property division:

92. Subject to s. 93 [setting aside agreements], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:
- ***(a) Ignoring s. 81 (entitlement, responsibility, and presumption of equal division) by agreement:*** divide family property or debt, or both, equally or unequally; **(note: can also exclude self from division or entitlement entirely)**
- ***(b) Expanding s. 84 (family property) by agreement:*** include as family property or debt items that would not otherwise be included;
- ***(c) Expanding s. 85 (excluded property) by agreement:*** exclude as family property or family debt items that would otherwise be included;
- ***(d) Ignoring s. 87 (valuation) by agreement:*** value family property or debt differently than it would be valued under section 87 [valuing family property and family debt].

Setting aside agreements

When agreements are in writing, signed by each spouse and witnessed by at least one person, courts have little discretion to set aside agreement (in whole or in part). However, courts can set aside agreements **for lack of procedural fairness, common law pitfalls, or if (when applied) they are "significantly unfair".** Per **s. 94(2)**, the court cannot make an order re: division of property and debt if an agreement is in place, unless the agreement is set aside in whole or in part, per **s. 93:**

93. ***(1)*** This section applies to: agreements re: division of property and debt made in writing, with the signature of each spouse witnessed by at least one other person ***(note: oral agreements are not covered by this section, but can still be considered as a factor under significant unfairness considerations for unequal division of property/ debt) …***

(3) Procedural fairness: On application by a spouse, the court may set aside or replace with another order part/all of an agreement, only if satisfied that one or more of following circumstances existed when the agreement was entered into:

- ***(a)*** a spouse failed to disclose significant property or debts or other info relevant to negotiation;
- ***(b)*** a spouse took improper advantage of the other spouse's vulnerability, including their ignorance, need or distress;
- ***(c)*** a spouse did not understand the nature or consequences of agreement;
- ***(d)*** other circumstances that would, under the CL, cause all or part of a K to be voidable ***(note: unconscionability, fraud, mispreresentation, undue influence, etc).***

(4) Court may decline to act on (3) if agreement wouldn't be replaced with substantially different order

(5) **Even if the agreement is procedurally fair (i.e. none of the circumstances in (3) exist),** the court can set aside/replace if the agreement is **significantly unfair** having regard to:

- ***(a)*** the length of time that has passed since the agreement was made;
- ***(b)*** the intention of the spouses, in making the agreement, to achieve certainty;
- ***(c)*** the degree to which the spouses relied on the terms of the agreement;

(6) Court may apply this section to an unwitnessed written agreements if appropriate

The procedure of the negotiation of the agreement must in itself be fair. Challenging the agreement under **procedural fairness** (93(3)) to have an agreement set aside is easier. If one receives legal counselling, this requirement of procedural fairness is hard to challenge: ***Miglin.*** If the process was procedurally fair, a spouse may attempt to claim **significant unfairness** under s. 93(5).

Interim orders respecting property

88. A spouse may make an application for an interim order at any time before a final agreement or final order is made in relation to a family law dispute respecting property division.

89. If satisfied that it would not be harmful to the interests of a spouse, the court may make an order for an interim distribution of family property to provide money to a disadvantaged spouse who needs the money to fund (a) FDR, (b) all or part of a proceeding under the FLA, or (c) obtaining info or evidence in support of FDR or an application to court. ***(note: funds can only be used in relation to the family law dispute)***

90. ***(1)*** "Family residence" is a residence owned or leased by at least one spouse, and is the ordinary place of residence of the spouses.

(2) **Temporary order respecting family residence:** court may make an order granting, for a specified period of time, (a) exclusive occupation of a family residence, or (b) possession/use of specified personal property stored at the family residence, including to the exclusion of the other spouse.

(3) An order under this section does not (a) authorize a spouse to materially alter the substance of the family residence or personal property, (b) grant to a spouse a proprietary interest in the family residence or personal property, or (c) subject to subsection (4), grant to a spouse any right that continues after the rights of the other spouse, or of both spouses, as owner or lessee are terminated.

91. ***(1)*** **Temporary orders respecting property:** On application by a spouse, the court **must** make an order restraining the other spouse from disposing of property. ***(note: requires compelling motive or reasons)***

(2) Court can make one of the following orders:

(a) for the possession, delivery, safekeeping and preservation of property;

(b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected, (i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or (ii) vesting all or a portion of property in, or in trust for, the applicant.

Advanced Issues: Trusts

Trusts are advanced issues—**ask an expert!** Assess the risks of going to court, as well. Because most cases are settled, there is little conclusive case law regarding trusts.

Be aware of valuation issues—it can be difficult to attach value to property held in trust, or the trust itself.

MCV v. FV (2018, BCSC): The FLA refers to trust interests in four provisions:

85. **(1)(f): Discretionary trusts as excluded property** — A spouse's beneficial interest in property held in a discretionary trust (to which the spouse did not contribute and is settled by a person other than the spouse) is excluded property

- The FLA does not provide us with definition of what discretionary trusts is, but generally it is a trust where a beneficiary (likely the spouse) will have no right/power to demand income or capital. In such a trust, the beneficiary is not considered as owning any property or as being entitled to any form of income
- Technically an increase in the value of an excluded trust should become family property, but practically it might never be divided if it is impossible for the beneficiary spouse to get information about the actual assets in the trust. For example, in ***MCV v. FV (2018, BCSC),*** regardless of numerous actions taken by the beneficiary and other parties, it was impossible for them to discern the value, # of beneficiaries, or even the terms of the trust.
- Important to be mindful that to be excluded property, a trust needs to be a discretionary trust for which the spouse does not contribute (specified in s. 85(1)(f)(i)) and settled by someone other than the spouse — this reinforces the idea that the spouse has very limited control over what is happening with these assets

85. **(1)(e): Property held in trust as excluded property** — Property referred to in any of paragraphs 85(a) to 85(d) that is held in trust for the benefit of a spouse remains excluded property

84. **(3): Trust property as family property** — family property includes trust property contributed to by a spouse and in which the spouse is either a beneficiary or has a vested interest, or over which the spouse has some form of power (i.e. to transfer that part of the trust to him/herself or to terminate the trust such that, on termination, that part of trust property reverts to the spouse)

- Can be split as family property
- Under control of one spouse
- Way to prevent one spouse to hide assets/use mechanisms to prevent property division
- Does not matter whether or not the spouse owns, or has a beneficial interest in, the trust property

84. (2)(f): **Trust property as family property** — If s. 84(3) does not apply, property that a spouse disposes of after the spousal relationship began (e.g. settling the property upon a trust), but over which the spouse retains authority such that they are able to require its return or to direct its use/disposition, is deemed family property
    - i.e. spouse sets up trust after relationship but spouse still retains power
    - Presumption that what is done with assets doesn't change its nature as family property

The above categories are not exhaustive as other trust interests may recaptured under s. 84(1)(a)(ii).

W(SLM) v W(MRG) (2016, BCSC): judges know that trusts have always been used to avoid legal obligations. However, if its application is well established in law (e.g. in this case, family trusts are common in New Zealand), there might be no basis for concluding that the trust is a sham.

Advanced Issues: Family Homes on Reserves and Matrimonial Interests or Rights Act ("FHR")

The FHR (came into effect 2013) deals specifically with **interests and rights in family homes on reserves on separation and death**, where at least one of the spouses or common-law partners is an Indian or First Nation band member. Specifically, it addresses:

- the use, occupation and possession of family homes on reserves, and
- the division of the value of, and compensation for, any interests or rights held by spouses or common-law partners in structures and lands on reserve lands during a conjugal relationship, when the relationship breaks down or on the death of a spouse or common-law partner

The uniqueness of the FHR is that the legislation recognizes and authorizes interests and rights in reserve lands to spouses and common-law partners, even if the beneficiary of the interest or right is not an Indian or First Nation band member: see ***Toney v. Toney (2018, NSSC)***

The FHR includes detailed "Provisional Federal Rules" ("Rules") intended to govern First Nation communities that have not enacted matrimonial property laws of their own. The Rules apply ***only*** to First Nations that have not yet enacted matrimonial property rules under the FHR. They can be broken down into three parts:

1. ss. 13 to 27 deal with the entitlement of each spouse to occupancy of the family home during the conjugal relationship, the procedure to grant exclusive occupation through an emergency protection order in the event of domestic violence, and procedures to grant exclusive occupation on the separation of spouses and common-law partners, or to the surviving partner upon the death of one of them.
2. ss. 28 to 40 deal with the determination of the value of each spouse's interests and rights to the family home, and other matrimonial interests and rights, upon separation either during the lifetime of both partners or on the death of one of the spouses.
    - **Matrimonial interests or rights**, defined in s. 2, are interests or rights unrelated to the family home that are held by at least one of the spouses/common-law partners that were acquired during the conjugal relationship or before (but in specific contemplation of the relationship and/or have appreciated in value)
3. ss. 41 to 52 deal with the conduct of proceedings to determine rights and interests, the entitlement to notice to the affected First Nation and other affected persons and participation in the process, and the enforcement of orders resulting from process.

When does the FHR not apply? Any validly enacted First Nation laws and land codes oust the whole of the FHR Rules in respect of that First Nation. Moreover, the FHR does not apply to any First Nation that has signed a self-government agreement with the federal government, under which it has power to manage its reserve lands, even if that First Nation has not enacted any laws re: matrimonial property.

Conclusions re: FHR from *Toney v. Toney*:

1. The FHR respects the principle of non-alienation of reserve lands. The Rules do not lead to non-Indians or non-band members acquiring permanent or tangible interests in reserve lands pursuant to s. 21, or receiving compensation for the value of reserve lands – unlike Indians or band members, pursuant to s. 34.
2. The FHR balances the equality rights of spouses under ss. 15 and 28 of the Charter with recognition of aboriginal and treaty rights under s. 35 of the Constitution Act (1982).
3. The property provisions of the *Indian Act* and related property legislation not helpful as they "completely disregard traditional FN core values".
4. Take into consideration the pre-colonial, traditional FN core values when interpreting the FHR.
   - e.g. in pre-colonial times, women appeared to have played, in most First Nations, an important and equal role in all aspects of tribal life and governance. Some were matrilineal societies. Interpretation of the FHR in a way that recognizes the role and status of spouses of both genders, whether or not they are members of the band, is not inconsistent with what appears to have been aboriginal values in pre-colonial times.

TONEY V. TONEY ESTATE (2018, NSSC)

Facts — P is non-Aboriginal widow of former Aboriginal band chief. She seeks indefinite exclusive occupation of their family home, located on reserve land held by the Crown in trust for FN's exclusive benefit.

P and late husband lived on house with a grant of $23000 from Dept of Indigenous Affairs. They spent over 30 years living there and used $140k in personal funds to improve the house, largely to suit P's health needs as she has severe MS. Late husband got Certificate of Possession in 1998. Late husband's only substantial asset is the house.

Late husband left his estate to P, and alternatively their two sons, in approved will. Because P is not Indigenous, she is unable to get Cert of Possession transferred to her; thus, seeks occupation of home.

FN band argues that it is not fair to give the home to P to occupy alone, as there is a long waitlist for homes in the reserve. Late husband's child from the first marriage is also challenging P's entitlement to occupy the home as a non-band member. P argues that if she is unable occupy the home, she will be put on welfare. She is already very sick.

Issues — (1) Determination of application for indefinite exclusive occupancy of family home by non-band member widow; (2) Matrimonial interests that non-band member widow is entitled to upon death of spouse

Held — **In favour of P; granted order for indefinite exclusive occupation and half of value of matrimonial interests.**

(1) Occupancy of family home by non-band member: S.21(3) provides that court must give attention to 11 enumerated considerations in exercising judicial discretion to determine whether to grant exclusive occupation to a survivor, how long and on what conditions. **Judge held that the following militated in favour of occupation:** terms of the will and intent of the deceased; medical condition of the survivor; the period during which the survivor has resided on the reserve; that the family home is the only property of significant value in the estate; and other factors, including the $140k in personal funds P and her late husband spent on improvements to the home, largely to make house more accessible to P. **Judge held that the collective interests of FN and the aboriginal tradition of communal sharing militated against occupation**. Overall, indefinite exclusive occupation was found to be appropriate. Judge added that the order was subject to the condition that the widow would not cohabit in the home with any other person in a conjugal relationship (weird and intrusive tbh)

(2) Division of value of matrimonial interests: FHR s. 34 deals with this issue. Survivor is presumptively entitled to 1/2 the value of deceased's interest or right in family home and matrimonial interests, to be valued on date of deceased's death. Municipal tax assessment of home not accepted as fair basis of valuation—no evidence re: its relationship to fair market value. Replacement cost for family home on insurance plan also not reliable. Vale is limited by the ability of the estate to raise funds to compensate P because the home cannot be mortgaged and can only be transferred to other FN members—a "very small and relatively economically disadvantaged community". Judge considered the $140k spent by P and late husband on home improvements. This was used as value of family home. P found to be entitled to an award of $70k, an amount equalling to half of the value of the deceased's interest in family residence at time of death. There was no transfer of the certificate of possession whatsoever.

Best practices regarding property division

Ask help from experts, especially with issues regarding pensions, tax, trusts — these are complex issues and it is a lawyer's duty to reach out to specialists.

Asselin v. Roy **(2013, BCSC):** "Litigants should prepare a **Scott Schedule** detailing the assets and liabilities of each party as of the date of separation. One of the apparent objectives of the FLA is to create more certainty for litigants in the division of their assets, replacing the broad judicial discretion formerly available under the FRA. To implement the objectives, more certainty from a clear evidentiary record is required. Where inheritances are said to come into play, estate documents should be produced. Where exclusion of property is sought, documents showing the value of property at the time cohabitation commenced and at the date of separation will be critical in the assessment which the court is to perform. Where one party suggests that excluded property has changed character into another asset, documents should be provided to allow the court to trace the transaction back to the property said to be excluded."

A **Scott Schedule** is typically prepared by the person seeking an order as to family property, usually after there has been an exam for discovery and the full particulars of all assets and debts are available. It includes the following:

- ***(a)*** a listing of each significant asset, with a description;
- ***(b)*** Brief particulars of the acquisition or disposition of each asset, including the date of acquisition and the value at that date;
- ***(c)*** Value of each asset, if known;
- ***(d)*** The position of one or both parties regarding ownership and apportionment; and
- ***(e)*** Provision for a reference or cross-reference to the exhibit to be filed in support of the particular item on the Scott Schedule.

3.7 *Spousal Support*

Spousal support is a payment made by one spouse, the **payor**, to the other spouse, the **recipient**, to help with his/her day-to-day living expenses or to compensate the recipient for the financial choices the spouses made during the relationship. There is **no automatic right** to spousal support; whether it will be paid is determined on a case-by-case basis.

Understandings of spousal support differ between jurisdictions. In common-law provinces, both married and unmarried spouses are entitled to support in certain circumstances, thanks to ***M v. H*** **(1999, SCC)**. However, spousal support is **not available to unmarried spouses in Quebec** (recall that this was unsuccessfully challenged in ***AG v. A*** *aka* ***Eric v. Lola (2013, SCC)*****).**

Moreover, spousal support has **fiscal impacts**: unlike child support, it is considered **taxable income** of the recipient and is **tax-deductible** by the payor. However, **child support has priority over spousal support** (FLA s. 173, DA s. 15.3). In situations where support is limited, child support would be prioritized.

Spousal support regimes are found in **s.15.2 of the Divorce Act** and **Part 7, Division 4 of the FLA (ss. 160-168).**

Jurisdiction and Time Limits

A claim for spousal support can be brought under both the Divorce Act or the BC Family Law Act. The legislative regimes in both statutes are quite equivalent; but for the parties' marital status (i.e. DA only applies to married spouses), cost awareness, and situations in which married couples have exceeded the time limits under the FLA, there are no real compelling reasons to choose one over the other.

	Divorce Act	BC Family Law Act
BC Court of Jurisdiction	BCSC or BCPC	BCSC or BCPC
Other requirements	***Spouses must be married.*** ***s.3, s.4:*** at least one spouse must have been ordinarily resident in the province for at least one year immediately before start of divorce proceedings	***s.3:*** claimant must qualify as a ***spouse***: i.e. **married** to another person OR has lived with another person in a **MLR** for at least 2 years, or has a child with the other person.
When and how a claim for SS can be brought, including any time limits	***ss. 3 , 4, 15.2:*** a claim for spousal support can be brought during divorce proceedings or in a procedure for corollary relief alone after the divorce is granted. **There are no time limitations.**	***s. 198:*** spouses must make a claim within 2 years of either: **(2)(a): for married couples**, the date a judgment granting a divorce is made, or an order declaring marriage to be null **(2)(b): for couples in an MLR,** the date the spouses separated. ***s. 198(3):*** in case a spouse discovers grounds for making an order to set aside or replace an order for SS, they can apply to do so within 2 years of discovery ***s. 198(4):*** time limits do not apply to a review of SS

Entitlement: Objectives + Grounds or conceptual models

A spouse seeking spousal support must first demonstrate that they are entitled to spousal support. First, a review of the objectives of spousal support, per **FLA s.161** and **DA s.15.2(6)**:

- ***(a)*** To **recognize any economic (dis)advantages** to the spouses arising from the relationship or its breakdown**;**
- ***(b)*** To **apportion any financial consequences** arising from the **care of their child;**
- ***(c)*** To **relieve any economic hardship** of the spouses arising from the breakdown of the relationship;
- ***(d)*** As far as practicable, to **promote the economic self-sufficiency** of each spouse within a reasonable period of time.

Judicial discretion is very necessary **(broad approach)** in considering all 4 objectives. While each objective needs to be taken into account, each should be weighed differently depending on the context of each case: *Moge*.

Through case law, Canada has developed **3 grounds/conceptual models** for entitlement for support partially based on the above objectives:

1. **Compensatory:** Normally awarded because of an economic disadvantage caused by the marriage. Intends that both spouses profit from the joint venture of marriage, and should be compensated for relationship contributions and losses incurred upon its breakdown.
    - The question is not what the disadvantaged spouse would have achieved had they not entered the marriage. Rather, the question is: what was that spouse's contribution to the marriage, and was the other spouse advantaged by that contribution? Under this model, a spouse claiming support will be **compensated** for specific actions/efforts/behaviours during the relationship.
    - ***Bracklow v. Bracklow (1999, SCC):*** based on independent, "clean-break" model of marriage that emphasizes equality, autonomy, and post-separation self-maximization.

- *Moge v. Moge (1992, SCC):* applies where spouse has foregone opportunities or endured hardships due to marriage
  - Relied upon most frequently in situations where one spouse, more often the woman, has left the workforce to care for the children, BUT can be compensated even in childless marriages
  - Can apply to situations where the spouse foregoes workplace advancement but is still working (ie. decline promotion, refuses transfer, leaves position to allow the other spouse to take advantage of an opportunity for advancement, incurring economic loss for other spouse)
  - Purpose: **to relieve economic hardship** that results from marriage or its breakdown; focus of the inquiry is whether the effect of the marriage impaired or improved each party's economic prospects.
  - Any economic disadvantage to that spouse flowing from that shared decision should be regarded as compensable – not guaranteed the same standard of living, but the longer the relationship, the closer the economic union, the greater the presumptive claim to equal standards of living.
  - **"equalising standard of living"** factor under compensatory grounds however hard to define/apply
  - Clarified that **self-sufficiency is not paramount**. While it should be promoted, it should not be the only thing looked at in spousal support claims. "To elevate self-sufficiency to the pre-eminent objective would be inconsistent … with the social context in which support orders are made. There is no doubt that divorce and its economic effects are playing a role in the **feminization of poverty.**"
    - Sacrifice results in diminished earning capacity so forcing/expecting someone to become self-sufficient as soon as possible is almost punishment
  - **Doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown** recognizes that unpaid work done at home is actually worth something and should be recognized and taken into account
- *Chutter v. Chutter (2008, BCCA):* A large property award does not necessarily preclude entitlement on either compensatory or non-compensatory grounds; however, there is an inter-relationship between property and spousal support, which might in some cases warrant an outcome outside the SSAG ranges for amount and duration (larger property award = lower end of spousal support)

2. **Non-compensatory (aka the basic obligation model or the income replacement model):** needs-based support. Acknowledges that married couples often become economically interdependent, and after a marriage breakdown, one spouse may require support from the other to continue to meet their needs. May also be awarded if one spouse's standard of living significantly declines from the standard they enjoyed during the marriage.
   - Arises out of the relationship itself and based on the "basic social obligation" of a spouse to look after a former partner who is in difficulty, rather than letting than burden fall upon the public or the government: *Bracklow*
     - Marriage and relationships creates interdependency. The longer the relationship is, the greater the need for interdependency
     - Sends a strong message as to what marriage is: once you decide to marry someone, you are responsible for that person for life
   - "Need" is contextual and not limited to the need to meet basic necessities of life. In defining "need" in terms of a dependent spouse's ability to meet her own expenses, must consider the **relative** nature of that concept in the spousal support context and its relationship to both the **marital standard of living** and both spouses' **post-separation standards of living** (want to avoid having one be much better off while other is struggling): *Chutter*
   - *Bracklow*: Even if a spouse has not foregone career opportunities or has not otherwise been handicapped by the marriage, the court is required to consider spouse's actual ability for self

sufficiency + effort that has been made towards it, including efforts after marriage breakdown. Economic hardship may arise from the mere fact that a person no longer enjoys intra-spousal entitlement.

- Overlaps between the compensatory and non-compensatory: both posit standard of living needs to be met and the state is not involved. **A claimant can claim both** (esp. when relationship is longer and to maintain the position that you were in. In a shorter relationship, must allude to more special facts)
- Applies in situations where the spouse's needs exceed entitlement to be compensated, and can be combined with compensatory ground if the compensatory support does not cover the spouse fully
- **Quantum**: the same factors used to determine entitlement also determine the amount and duration – will vary with circumstances of each case

3. **Contractual:** agreements between parties; see below

Agreements respecting spousal support: tests to set aside/revise

Spouses can negate or create modified spousal support arrangements through **agreements**.

Courts can choose whether to give agreements weight or to set aside/revise agreements. Courts must strike a delicate balance between respecting agreements, thereby enforcing the security + predictability of contract law vs. meeting spousal support objectives and respecting their objectives

To set aside agreements, follow the appropriate test(s) according to which statute applies:

Divorce Act: ***Miglin v. Miglin (2003, SCR)*** provides a 2-stage test for setting aside an agreement:

1. Consider the **circumstances in which the agreement was made** to determine:
   (a) whether the agreement was obtained fairly (made freely from oppression, pressure, advantage); and
   (b) whether the agreement conformed with the objectives of the DA **(s. 15.2(6))**.
2. Consider the **current circumstances** to determine:
   (a) whether the terms and results of the agreement still reflects the intentions of the parties; and
   (b) whether the terms and results of the agreement are still substantially in line with the objectives of the DA.

✶ **Ask**: on application of the terms of the agreement, would the circumstances make continued reliance on the existing agreement unacceptable?

✶ Agreements on support are still entitled to **deference**. It is unlikely that the court will disregard an agreement in its entirety but for **a significant change in the parties' circumstances** from what could reasonably be anticipated at the time of negotiation.

✶ On the other hand, if there is significant change, and it has led to a situation that cannot be condoned, the court may give little weight to an agreement.

BC FLA: **S. 164** provides for when a court can make an order that replaces all or part of an existing agreement for spousal support. However, **per s.165(3),** the original agreement must be set aside (entirely or in part) first.

First test: procedural fairness

164.(3) If any of the following circumstances existed **when the parties entered into the agreement,** the court may set it aside:

(a) a spouse failed to disclose income, significant property or debts, or other info relevant to the negotiation of the agreement;
(b) a spouse took improper advantage of the other spouse's vulnerability (financial, physical/mental health), including the other party's ignorance, need or distress;
(c) a spouse did not understand the nature or consequences of the agreement;
(d) other circumstances that would, under CL, cause all or part of a K to be voidable.

Second test: significant unfairness

164.(5) **If none of the circumstances in (3) were present**, the court may also set aside an agreement if it is satisfied that the agreement is **significantly unfair**; the court may consider:

(a) The length of time that has passed since the agreement was made;
(b) Any change, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
(c) The intention of the spouses, in making the agreement, to achieve certainty;
(d) The degree to which the spouses relied on the terms of the agreement;
(e) The degree to which the agreement meets the objectives set out in s 161 of the FLA

Spousal Misconduct

Spousal misconduct is **irrelevant** to spousal support outcomes and **should not be considered** unless the consequences of the misconduct affect factors which must be considered when making a spousal support order, such as a spouse's ability to become self-sufficient: ***Leskun v. Leskun*** (2006, SCC)**.**

Divorce Act	BC FLA
11. directs the court to have "regard to the **conduct of the parties** and the condition, means, and other circumstances of each of them" in exercising its discretion in making an award of spousal support. 15. **2(5):** In making an interim or final spousal support order, the court **shall not take into consideration any misconduct** of a spouse in relation to the marriage *(e.g. can't get compensated for being cheated on unless cheating led to other grievances (misuse of family funds, mental health/health issues etc))*	**166.**In making an order respecting spousal support, **the court must not consider any misconduct of a spouse,** except conduct that arbitrarily or unreasonably (a) causes, prolongs or aggravates the need for spousal support (e.g. *by dragging out litigation*) or (b) affects the ability to provide spousal support. **167.(1)(c)** A court may change a support order in certain circumstances, including **lack of financial disclosure** → Can result in **court simply imputing an income on a payor** and forcing them to pay it

Quantum of Spousal Support

Quantum dictates the **amount** and **duration** of spousal support.

Per FLA s. 162 and DA 15.2(4): In making a final or interim order of spousal support, the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including: (a) the **length of time** the spouses **cohabited**; (b) the **functions performed** by each spouse during cohabitation; and (c) any order, agreement or arrangement relating to support of either spouse.

Also use the **Spousal Support Advisory Guidelines,** outlined below.

3.8 *Spousal Support Advisory Guidelines*

Objectives and Context

The SSAG suggest **appropriate ranges** (two amounts: an upper number and a lower number) of spousal support in a variety of situations for spouses entitled to support. The guidelines **do not deal with entitlement** (so assess whether a spouse is entitled to support before using the SSAG). However, the SSAG Guidelines state that as a general matter, a significant income disparity will generate an entitlement to some support.

The SSAG were developed to bring more certainty and predictability to the determination of spousal support under the *Divorce Act*. The SSAG is therefore based on the factors and tests set out in the *Divorce Act* rather than those set out in the different provincial laws about family breakdown and spousal support.

That said, **the SSAG works just as well to decide spousal support for married spouses and unmarried spouses** since the laws that apply to determine spousal support for unmarried spouses in the BC FLA work in exactly the same way as the *Divorce Act*.

The SSAG were never intended to be legislated or mandatory, but rather intended as **informal guidelines** operating on an advisory basis only. While **in BC it is mandatory to use the SSAG** (***Dunnigan v. Park (2007, BCCA), Redpath v. Redpath (2006, BCCA)***), in other provinces it may not be.

- ***Redpath v. Redpath (2006, BCCA)***: incorporated the SSAG ranges into the standard of appellate review. **If an award deviates substantially from the SSAG with no explanation this can be grounds for appeal.**
- ***Dunnigan v. Park (2007, BCCA)***: Judges and parties are now obliged to use the guidelines when making determinations related to spousal support — "in determining the quantum of support the trial judge referred to the SSAG, as he is **obliged to do**"

The most fundamental aspect of the SSAG is that they are based on income sharing. Income sharing does not imply equal sharing of the combined income of the spouses. Mathematical formulas have been devised to determine the proportion of the spousal incomes to be shared.

Advantages of the SSAG (from Payne reading): guidelines provide the parties with a starting point for negotiations; reduce conflict and encourage settlement; reduce cost; improve efficiency; provide for consistency and legitimacy; provide a basic structure for further judicial elaboration; simplify the process

Disadvantages of the SSAG (from Payne reading): can be seen as too rigid, too complicated (especially with the second formula); still too discretionary, allowing for intuitive reasoning; does not take into account regional variations (to compare, child support tables are based on different standards of living from province to province); will foreclose litigation.

There are two basic formulas to determine the quantum (amount and duration) of spousal support:

1. **Without child support formula:** applies to marriages w/o dependent children for whom child support is payable.
2. **With child support formula:** applies to marriages with dependent children for whom child support is payable.

Without Child Support Formula

Notes:

- Applies when child support is not being paid, as might be the case if the couple have no children at all or if all children are no longer dependents at the time of separation
- Uses the gross income of the spouses
- **Floors and ceilings:** Income below $20,000 requires adjustments. Above $350,000, discretion is used.
- The maximum amount payable under this formula ranges from 37.5% to 50% of the difference between the parties' incomes.
- **Duration** (i.e. the length of time support will be paid) will be **indefinite** (i.e. an unspecified length; does not necessarily mean forever) in the following circumstances:
  - If the marriage/MLR is 20 years or longer in duration
  - If the marriage/MLR is at least 5 years in duration, when the length of the marriage/MLR plus the age of the support recipient (at separation) added together total 65 or more ("the rule of 65")

Steps:

1. **Calculate the ranges for the amount of support payments.**
   1.1. **Determine the gross income difference between the parties.**

- Gross income difference = Party A's gross income - Party B's gross income

➡ e.g. Party A has an income of $90,000. Party B has an income of $30,000.
$90,000 - $30,000 = $60,000

1.2. **Determine the applicable percentage by multiplying the length of the marriage or MLR by 1.5-2 percent per year.**

- Applicable percentage for lower range = Length of marriage or MLR × 1.5%
- Applicable percentage for upper range = Length of marriage or MLR × 2%

➡ e.g. The marriage between A and B lasted 5 years.
5 years * 1.5% = 7.5%
5 years * 2% = 10%

1.3. **Apply the applicable percentage to the income difference to calculate the yearly dollar amount for upper and lower monetary ranges.**

- Yearly dollar amount for lower range = Applicable percentage for lower range × Gross income difference
- Yearly dollar amount for upper range = Applicable percentage for upper range × Gross income difference

➡ e.g.
7.5% (or 0.075) × $60,000 = $4,500
10% (or 0.10) × $60,000 = $6,000

1.4. **Divide the yearly dollar amounts by 12 to calculate the monthly dollar amounts.**

- Monthly dollar amount for lower range = Yearly dollar amount for lower range ÷ 12
- Monthly dollar amount for upper range = Yearly dollar amount for upper range ÷ 12

➡ e.g.
$4,500 ÷ 12 = $375
$6,000 ÷ 12 = $500

2. **Calculate the ranges for the <u>duration</u> of support payments.**

- Lower range for duration, in years = Length of marriage or MLR × 0.5
- Upper range for duration, in years = Length of marriage or MLR × 1
- Duration will be **indefinite** in the following circumstances:
  - If the marriage/MLR is 20 years or longer in duration
  - If the marriage/MLR is at least 5 years in duration, when the length of the marriage/MLR plus the age of the support recipient (at separation) added together total 65 or more ("the rule of 65")

➡ e.g. The marriage between A and B lasted 5 years. The age of the support recipient (at separation) is 30 years old.
5 × 0.5 = 2.5
5 × 1 = 5

➡ e.g. The marriage between A and B lasted 5 years. The age of the support recipient (at separation) is 62 years old. Indefinite support, as the rule of 65 applies — 5 + 62 = 67.

With Child Support Formula

<u>Notes:</u>

- Having regard to the impact of child support obligations on the ability to pay spousal support, the priority accorded to child support under s. 15.3 of the DA, the income tax implications of child support, and child-related federal and provincial benefits and credits, this separate formula has been devised for calculating spousal support **<u>where the person receiving spousal support is also the person entitled to receive child support, regardless of whether child support is actually being paid or not.</u>**

- This formula is based on the "parental partnership model" premised on the compensatory model in ***Moge*** and ***Bracklow***, which looks not only at past loss but also at the continuing economic disadvantages that result from ongoing parental responsibilities.
- **Differences from *Without Child Support Formula*:** in this formula, (1) net incomes are used; (2) the pool of combined net incomes between the spouses, instead of the gross income difference, is divided; (3) the upper and lower percentage limits of net income division do not change with the length of the marriage.
- **The SSAG describe a few other formulas that apply when:** (1) all children are over the age of majority, (2) the parents have split custody of the children, (3) the parents have shared custody of the children, (4) the children live with the payor, or (5) the children are step-children to the payor. These formulas use modified/hybrid versions of the Without Child Support and basic With Child Support formulas.
  - In **split custody arrangements**, where one or more children are primarily resident with each parent, the formula acknowledges the costs faced by each parent in supporting child by deducting a notional table amount of child support from the income of each parent.
  - In **shared custody arrangements**, the SSAG proposes that, in computing the INDI of each spouse, the full table amount of child support + section 7 contributions be deducted from the payor's income; and the notional table amount + section 7 contributions be deducted from the recipient's income.
  - There is no specific formula dealing with **stepchildren.** Where, pursuant to s. 5 of the Child Support Guidelines, a court orders a stepparent to pay less than the table amount of support for a stepchild, the authors fo the SSAG Draft Proposal suggest that this formula should be applied using the full able amount rather than the reduced amount of child support. Courts may impose a time limit.
- Calculation of a spouse's individual net disposable income under this formula will require **use of a computer software:** ***RL v LAB (2013, PESC)***
- The maximum amount payable under this formula ranges from 40% to 46% of the difference between the parties' incomes.
- **Floors and ceilings:** Income below $20,000 requires adjustments. Above $350,000, discretion is used.

Steps (Basic Formula):

1. **Amount**

   1.1. Determine the individual net disposable income (INDI) of each spouse:
   - Guidelines Income - Child Support - Taxes and Deductions = Payor's INDI
   - Guidelines Income - Notional Child Support - Taxes and Deductions + Government Benefits and Credits = Recipient's INDI

   1.2. Add together the individual net disposable incomes. By iteration, determine the range of spousal support amounts that would be require to leave the lower income recipient spouse with between 40% to 46% of the combined INDI.

2. **Duration**
   - **Initial orders** under the basic formula would be **indefinite** in form, but would be subject to outside time limits that would inform the processes of subsequent review or variation.
   - **Maximum time limit: the longer of (a) the length of the marriage or MLR,** or (b) the date the last or youngest child finishes high school
   - **Minimum time limit:** the longer of (a) one-half the length of marriage or MLR, or (b) the date the youngest child starts full-time school

Restructuring

Parties may revise the duration and amount of spousal support quantum to fit their circumstances better. For example, parties can decide to use lump sum payments rather than monthly payments, can reduce amounts and increase duration, can increase amounts and reduce duration, etc.

Restructuring can be used in three ways:

1. To **front-end load** awards by increasing the amount beyond the formulas' ranges and shortening duration
2. To **extend duration** beyond the formulas' ranges by lowering the monthly amount; and
3. To formulate a **lump sum payment** by combining amount and duration.
    - Spousal support taxable so if using lump sum, could have important tax impact in first year.

Restructuring works best when duration is clearly defined, and will thus have its primary application under the *Without Child Support* formula.

In practice, restructuring has often been ignored. In many cases, particularly short marriages under the without child support formula, courts have found the amounts generated by the formula too low and have then simply concluded that the SSAG do not yield an appropriate outcome and are of no further use. The failure to consider restructuring is unfortunate because it means that an important element of flexibility is not being utilized. The structure and guidance provided by the SSAG are thus being lost in a number of cases where these benefits would otherwise be available.

Exceptions

When formula outcomes, even after consideration of restructuring, will not generate results consistent with the support objective and factors under the DA or FLA, remember that the advisory nature of the SSAG means that the formula outcomes are never binding, and departures are always possible on a case-by-case basis where the formula outcomes are found to be inappropriate.

The SSAG do, however, itemize a series of exceptions. Although **not exhaustive,** they are intended to assist in framing and assessing departures from the formulas.

The exceptions are more likely to be needed under the *Without Child Support* formula as its simpler formula does not respond as flexibly to the diverse fact situations in these cases.

1. **Compelling financial circumstances in the interim period:** based on the recognition that the amount may need to be different—either higher or lower—during the interim period while parties are sorting out their financial situation immediately after separation
2. **Debt payments:** applicable only when debts exceed assets and, even then, only when debt payments are so large that they cannot be adjusted for by location in the range
3. **Prior support obligations:** often not mentioned, partly because this often simply requires a mathematical adjustment in the software. However, in some cases courts have done the adjustment manually: ***Ponkin v. Werden,*** 2015 ONSC. Usually will be an adjustment for a prior obligation for child support; however, sometimes it will be a prior spousal support obligation: ***Ponkin*****.**
4. **Illness or disability of a recipient spouse:** will generally be relevant where the marriage is short-to-medium length and there are no children in the care of the recipient, but the disability is long-term.
5. **A compensatory exception for shorter marriages without children:** In shorter marriages, the formula assumes the sole basis for spousal support is non-compensatory, which then leads to a brief transitional award. Where there are compensatory claims in shorter marriages, an exception is required, to generate potentially larger and longer awards of spousal support. There are typically 3 situations where compensatory support can be claimed in shorter marriages without children:

5.1. where the **recipient spouse moves to marry the payor, giving up his or her job or career to do so:** *RMS v. FPCS* (2011, BCCA)

5.2. where the **recipient spouse has moved and given up or compromised his or her job or career, to facilitate the payor spouse's job or career:** *Beardsall v. Dubois* (2009, ONSC)

5.3. **where the recipient spouse worked to put the other spouse through an education program, but the couple separates** before the recipient spouse has been able to enjoy any of the benefits of the payor spouse's enhanced earning capacity: *Stergios v. Kim* (2011, ONCA)

6. **Reapportionment of property (applicable only in BC):** S. 95(3) of the FLA makes reapportionment of property on spousal support grounds a residual remedy, only available if the spousal support objectives cannot be met through spousal support; has become a "more restricted discretion".

7. **Basic needs/hardship under the *without child support* and *custodial payor* formula:** specific problem with shorter marriages (1-10 years) where the recipient has little or no income and the formula is seen as generating too little support for the recipient to meet his or her basic needs for any transitional period that extends beyond the interim exception. The exception allows for awards higher in amount than the SSAG ranges, enough to meet basic needs, but does not allow for an extension of duration.

8. **Non-taxable payor income:** where a payor has income based entirely or mostly on legitimately non-taxable sources (e.g. worker's compensation, disability payments, income earned by an aboriginal person on reserve, overseas employments arrangements) or the payor resides in a country where domestic law does not permit deductibility of spousal support. Usually, the recipient of spousal support will still have to include the support as income and pay tax on it. Under this exception, it will be necessary to balance the tax positions and interests of the spouses.

9. **Non-primary parent to fulfil parenting role under the *custodial payor* formula:** This exception arises under the custodial payor formula in shorter marriages on a specific set of facts, to justify increased spousal support for parenting purposes. There are 3 requirements for this exception: (1) the recipient spouse and non-custodial parent must play an important role in the child's care and upbringing after separation; (2) the marriage is shorter and the child is younger; (3) the ranges for amount and duration are low enough and short enough under the formula that the non-custodial parent may not be able to continue to fulfil his or her parental role.

10. **Special needs of a child:** A child with special needs can raise issues of both amount and duration of spousal support, issues that can often, but not always, be accommodated within the ranges. In some cases, the duration of spousal support may have to be extended and/or the amount may have to be increased above the upper end of the range.

11. **Section 15.3 for small amounts and inadequate compensation under the *with child support* formula:** s. 15.3 of the DA requires that child support be given priority over spousal support, which can mean little or no spousal support, even in cases where there is a strong claim for compensatory support. This exception recognizes that after child support ends there may still be unmet compensatory claims and that **duration** under the SSAG may need to be extended to provide adequate compensation to the recipient.

Variation and Interim Support Orders

Under **s. 17(4.1)** of the *Divorce Act*, a **material change of circumstances** is a threshold requirement for the variation of court-ordered spousal support. **S. 17(7)** sets out the objectives of an order varying spousal support and **s. 17(10)** addresses variations after spousal support has ended, imposing a further condition that the changed circumstances be related to the marriage.

S. 167 of the BC FLA addresses variation and is clearer on what is necessary for a variation order:

> ***167.(1)*** On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.
>
> ***(2)*** The court must be satisfied that at least one of the following exists:
>
> ***(a)*** a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
>
> ***(b)*** evidence of a substantial nature that was not available during the previous hearing has become available;
>
> ***(c)*** evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

The SSAG do not affect the basic legal structure of variation and review. The Advisory Guidelines will only be helpful after the ***Miglin*** analysis, if a finding has been made that a final agreement is not determinative and spousal support is to be determined afresh by the court.

Variation of interim orders

The BCCA has said that interim orders for spousal support are intended to be temporary, rough-and-ready decisions intended only to tide the parties over until a final order is made, rather than an exhaustive review of the merits of a claim for spousal support. As such, **the courts often prefer not to change interim orders on an interim basis; rather, they would prefer the parties go straight to trial.**

However, ***Janmohamed v. Janmohamed (2014, BSCC)*** further clarifies that variation of an interim order is possible when there is "**a compelling change of circumstances such that one or both parties would be seriously prejudiced by waiting at trial.**"

This compelling change in circumstances must be serious and of such importance that one or both of the parties will be severely disadvantaged unless the matter is addressed immediately. From the point of view of the spouse receiving support, the recipient, a compelling change in circumstances might be:

- a loss of supplementary income, such as employment income or WCB benefits, without which the recipient cannot support themselves on the amount of spousal support presently being paid
- an unexpected increase in expenses, such that the amount of spousal support being paid becomes inadequate
- an unexpected increase in child care obligations, because of, for example, the extended illness of a child or the birth of a new child, such that the spousal support paid is no longer adequate.

From the point of view of the spouse paying support, the payor, a compelling change might be:

- a loss of income, or an unexpected but long-lasting drop in income, such that they can no longer afford to make the spousal support payments
- an unexpected increase in the payor's child care or child support obligations, such that their disposable income has decreased and the spousal support payments cannot be maintained.

If the court agrees and varies the interim order before trial, **the new order will also be an interim order** and will remain in effect until the issue of spousal support is determined by a final order following trial or a settlement (or until it is varied by another interim order).