# Family Law - Professor Regine Tremblay – Spring 2018

# Introduction: families, relationships and laws [4 classes including Jan 4]

## What is a family?

#### Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, Minister of Public Work and Government Services, December 21st 2001, pp i-28.

**Written at time govt was considering same sex marriage in Canada**

* Addresses adult relationships (not parent-child) - Outdated but ahead of its time

**Govt objectives in regulating personal relationships**

* Recognition of economic interdependence - Promote stability - Protect people’s expectations in relationships

**Adults can be emotionally and financially interdependent and these relationships matter too.**

* Diversity of adult personal relationships: marriage partners, conjugal common law partners, sharing home with parents, grandparents, adult siblings, or caregivers, blended fams
* Legal recognition of family relationships generally linked to conjugality, not other forms

**Fundamental values and principles**

1. **Relational equality**

**Seeks to equalize legal status among different types of relationships,   
All relationships should have same benefits in law if they are interdependent**

* Focusing on conjugal relationships entrenches unequal legal treatment of conjugal/non-conjugal relationships that may share the functional characteristics of emotional and financial interdependence.
  + Therefore, relational equality requires more than equal treatment of conjugal couples
* Addition of same sex marriage through constitutional challenges added to relational equality
* **Modernization of Benefits and Obligations Act 2000** – largely eliminated distinctions between married and CL spouses – all now have equal protection in all federal laws
* Equality within relationships and after relationships – power imbalances etc

1. **Autonomy**
   * Requires govt allowing people to freely choose their personal relationships.

* Stepping away from hierarchy in relationships

1. **Other values**

* Can enhance **personal security** (addressing risks and vulnerabilities, financial and economic security)
* Should promote **privacy** btwn partners through legal relationships, protect privacy rights (no unwarranted intrusion by the government into private relationships)
* **Coherence** (between laws) **Efficiency Stability Solidarity Equality**
* Marriage laws should be **secular**, respect religious freedoms

**Methodology for assessing a law’s ability to accomplish its objectives:**

1. Are the objectives of the law legitimate? If no, repeal or revise
2. Do relationships matter to the relevance of the laws objectives
3. If relationships matter, can individual be permitted to designate the relevant relationship themselves?
4. If relationships matter and self-designation is not feasible is there a better way to include relationships?

**4 Models for regulating close personal adult relationships**

**Private Law Model**

* Using the private law to regulate the family

**Ascription**

* Imposition of rules based on a presumption that relationships correspond to the expectations of the majority
* Assumes that certain individuals in relationships expect consequences to apply to their relationships
* One size fits all approach

**Marriage**

* Was defined as man and woman only, law commission was seeking to expand it to same sex “2 persons”

**Registered partnerships**

* Inclusive, aims to not compromise privacy
* Based on a positive action to choose to register
* Presumes that adults will take the steps to register and understand the resulting obligations
* **New status which allows people to recognize their close personal relationships**
  + Opens up range of rights and responsibilities and obligations
  + Vehicle for recognizing a broader range of caring and supportive relationships including non-conjugal
* **Affirm autonomy of choices**
  + Registration schemes should not be restricted to conjugal couples or same sex couples
  + Should be able to terminate by mutual agreement
* **Could registration replace Marriage?**
  + A registration scheme could be used to replace marriage as a legal institution.
  + Religious marriage ceremonies would continue to exist, but they would no longer have legal consequences.
  + Only a system of civil registration would bind two people to a range of legal rights and responsibilities, and any two people who wanted to obtain public recognition and support of their relationship could register.
* **Objective in marriage is to register couples**; facilitate private ordering; provide an orderly framework in which people can express commitment to each other, receive public recognition and support, and assume rights and obligations, so why not extend beyond conjugal.

#### Robert Leckey, Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past (2009) 15:8 IRPP Choices 2, introduction.

**Family is an aggregation of the relationships, rights, obligations connecting those individuals who form a family**

* Rights and obligations can inform spousal/child support, parental leave, insurance benefits, welfare, legal recognition or social recognition

**Oppositions:**

* **Private law vs public law**
  + **Private law** – regulates relationships between persons and between persons/property
    - Right and duties operate between family members bc of their relationships
    - Private law of the family treats matters of status and property as between family members (parent/child, adult partners).
  + **Public law** concerns the relationship between individuals and the state. How the state distributes services and goods to individuals by virtue of their family relationships
    - Govt policies ie taxation and social welfare produce the family in law
    - Problem: policies and regulatory schemes relate back to 19th century
* **Recognition of family can be instrumental** (functional, produces a result, applies legal rights and duties) **or non-instrumental** (symbolic, give meaning to family bonds).
  + Same sex marriage – instrumental (opening definition and legislation to include same sex marriage to help identify partners in other law, to know who to provide benefits and recognition to) and symbolic (recognition of the importance of same sex intimate relationships)
* **Formal (legal) vs functional (social)**
  + **Formal** – defined structures of relationships, identified through formalities like marriage, parentage
  + **Functional** – what people do, function of the relationship (de jure formal, de facto functional)
* **Formal equality vs substantive equality**
  + **Formal equality** (in the law, equal treatment, identical treatment of individuals who are similarly situated)
  + **Substantive equality** (securing respect for individuals in a way that takes their differences into account)

**Lecture**: No definition in law of the family. Definitions are contextual and contingent on factors. Definitions vary over time.

**Census family – Statistics Canada 1998-2006 Definition**

* No same sex families included
* Husband wife only
* Now married or CL or lone-parent

**Census family – Statistics Canada 2016 Definition**

* Married or CL, couple with/out children
* Same or opposite sex
* Children by birth, marriage, CL union, adoption
* No age limit on child or no limitation by child’s marital status as long as live in same house without their own spouse or child.
* Includes grandchildren living with grandparents but not parents.

#### Vanier Institute, What's in a name?

* Vanier Institute of the Family, Canadian, founded 1965, independent non-profit,
* Mission: to seek to understand families in Canada, family life, and family experience expectations and aspirations. How families interact with social economic environmental forces.

**DEFINITION**: as any combination of two or more persons (can’t be alone) who are bound together over time (this can fluctuate – birth and marriage mean instant family!) by ties of mutual consent, birth and/or adoption or placement, and who together assume responsibilities for variant combinations of some of the following:

**Features**: 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).

**Deliberately broad definition**

* Goal to use inclusive term that captured everyone’s experience of family
* Definitions for family too often relate to the definition of the people writing it, but this could negate others’ experiences (ie poly/LGBT etc)
* The Institute’s definition is not about the status of the adults looking after the child. It’s a family if there is a set of relationships over time with individuals looking after the needs of another. It’s not about a marriage per se, but rather the commitment made – it could be common-law, sole-support or any number of family structures. The definition doesn’t require children, but it does require at least one relationship between an adult and another person – a relationship over time, which signifies that a commitment has been made.
* How it’s made and what specific form it takes is independent of the definition.

**Definition looks at what families do – not what they look like.**

* What families are not what “we” might want them to be (ideal families vs reality of families)
* Families do the same things, they just do them differently
* Definition addresses the relationship between families and society. – families are shaped by and react to social, economic and cultural factors, but they have an impact on these same forces as well.

#### Vanier Institute, Modern Couples in Canada. Census update 2016

* Married #s down to 79% of couples, but same sex increasing.
* Cohabitation on the rise
* Divorce rate increasing 1 out of 2 in Quebec!
* Repartnering with increase in step parent families
* Increase in single parent households
* Increase in dual-earner couples
* 21% couples common law, 44% are raising kids <14 years
* 9.9 million families in Canada

#### Vanier Institute, 50 Years of Families in Canada (2015).

* 1968 Divorce Act introduced
* 1971 UI Act introduced to provide benefits for sickness, maternity, retirement
* 1978 Child tax credit introduced
* 1981 “head of family” term dropped
* 1981 CL couples counted in census
* 1982 Charter introduced
* 1986 DA revised, reduces separation period to one year (from??)
* 1990 10 weeks added to parental leave benefits (2000 – 25 more weeks added)
* 2005 same sex marriage legalized through Civil Marriage Act

#### Carl E Schneider, “The Channelling Function in Family Law” (1992) Spring, 20 Hofstra L Rev 495, pp 495-512 + conclusion.

**In the channeling function, the law recruits, builds, shapes, sustains and promotes social institutions**

* Interplay between the social and legal worlds – law is shaped by society, society shaped by law. Law decides cases, cases create law.
* **Social institution** – a pattern of expected actions of individuals or groups enforced by social sanctions both positive and negative. By their very existence institutions control human conduct by creating patterns of behaviour.

**Purpose of channeling function**

* Fosters social institutions and channels people into them
* Makes the world predictable by setting laws and frameworks for ways to be, expectations of rewards
* Past and future are linked (constant cycling – circularity) – family law is normatively neutral

**Family law creates these institutions and channels people into them**

* How? By rewarding participation in the institution, challenging competing institutions, penalizing the non-use of the institution Ie. Singles don’t get tax benefits, spouses get shared benefits
* Social permanence – security and stability you get from a legal marriage document

**5 functions of family law:**

1. **protective** protect citizens against harms done by others; physical psychological harms
2. **facilitative** organize lives and affairs of people in the way they prefer; creating and enforcing contracts between people
3. **arbitral** resolve disputes; ie custody / property division / alimony
4. **expressive** symbolic expression of people’s relationships. 2 aspects: providing people with a way to speak to others, behaviours
5. **channeling** creates social institutions (ie marriage), channeling function means people are channeled toward the institution because of the law in order to make the world a predictable place with socially desirable place. This is a link between the past and the future when it comes to regulation of the families.

**Marriage and parenthood** - **two broad social institutions that illustrate family laws channeling function**

* Normative values (marriage is monogamous, heterosexual, parenthood (must be married, biological parents, authority over children).
* Normative values describe ideals which have won and retained substantial allegiance in society

**How might a legislator interpret law as supporting these two institutions and channeling people into them?**

* should laws be used to set frameworks to shape sponsor and sustain ideal models and then channel people into institutions (legal recognition of a marriage or parenthood)
* rewards participation in an institution (ie tax benefits, welfare benefits)
* dis-favours competing institutions (prostitution, polyamory, same sex, single parent)

#### Mark Henaghan, “The Normal Order of Family Law” (2008) 28:1 Oxf J Leg Stud 165

**Reaction to Dewar’s piece on the chaos of family law**

* Family law historically based on power dynamics (between partners, between individual and state)
* Functional model – look at people’s needs vs. broadly applying procedures with a goal of achieving specific ends

**John Eekelaar promoted family law and social policy functions –**

* 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”
  3. **Support function** “direct social support to families which are in need of resources”

**Challenging power –**

* need to re-evalute why one has power over another,
* why ideas of family should bind future generations based on ‘the way things have always been’
* the past should not bind the future – individuals should make their own decisions separate from pre-ordered ideals

**Criticism**: Eekelaar’s frameworks are highly theoretical, not necessarily practical. Not conscious of types of relationships where there is vulnerability and imbalance of power.

**Eekelaar understanding of power.**

* He sees law as a powerful tool
* Law needs to be aware of its power
* “The function of law is to constrain the wrongful exercise of power and to leave room for individuals to make free choices in the privileged sphere of their intimate lives” p 180
  + power can be misused by family members, and by law
* “The law should not be solely about controlling human behaviour, but about leaving space for people to find their own ways of leading their intimate lives and achieving love and fulfilment” p 181

**Two instruments of power in family law:**

* **Instrumentalism** – promoting the interest of a dominant member (ie CL giving absolute right to husbands and fathers to govern their children) based on historical power of a monarch over their people
* **Welfarism** – power is subject to a legal duty to advance the interests of the vulnerable
  + Can take on instrumentalism power and become patriarchal

**Suggestion: Replace ‘family law’ with ‘personal law’**

* Friendship, friendship PLUS – includes a life plan and shared property
* Responsibility exists during and after the union

**Lecture Notes:**

**Twelve Tables, Rome 450 BC**

* Rules of family law
* One of the first known written law code
* Rooted in power and hierarchy (men over women and children)

**William Blackstone, Commentaries on the Laws of England 1765-1769**

* Included family law rules
* **Coverture** – by marriage the identity of the woman was suspended so that she had no legal identity, was incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything

**An Act Concerning Marriage with a Deceased Wife’s Sister 1882**

* Law prohibiting was repeated in 1882. So now you can marry your SIL

**Law and Equity Act article 60** – women are still specified to be equals when they are married STILL

#### Spousal capacity and property

**60**  (1) a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.

(2) A married person has and must be accorded legal capacity for all purposes and in all respects as if the person were unmarried.

(3)Without limiting subsections (1) and (2),

(a) each spouse has the same right of action in tort against the other as if they were not married,

(b) a married woman is capable of acting as litigation guardian or next friend as if she were an unmarried woman

(c) a married woman is capable of acquiring a domicile independent from that of her husband,

#### Responsibility for former spouse

**60.1** (1) This section applies if spouses are a) divorced b) marriage dissolved c) separated d) marriage null and void

(2)Subject to the [Family Law Act](http://www.bclaws.ca/civix/document/id/complete/statreg/11025_01), on the happening of an event described in subsection (1),

(a) each former spouse must be considered an unmarried person in respect of property, the right to contract, and rights and duties in civil proceedings, and

(b) a former spouse is not, except if the liability arose during the marriage, liable for

(i) a contract the other former spouse enters into,

(ii) a wrongful act or omission by the other former spouse, or

(iii) costs incurred by the other former spouse in a proceeding.

## Legal framework

**Federal legislation**

* 1968: First divorce act (no no-fault divorce)
* 1982: Charter
* 1985: Revised divorce act added no-fault
* 1990: Prohibited degrees
* **2001: Harmonization act (no 1)**
  + looks at substance of marriage
  + provinces had different age limits for marriage
  + clarified that marriage under federal powers, age requirement under federal power
* **2005: Civil Marriage Act – allowed for same sex marriage**
* Illegitimate children 1963
  + Effect of illegitimacy – if born out of wedlock no equality until after 1985 with charter
  + Law and equity act – section 60 still refers to wives not being persons
  + Family relations act 1978
  + Family law act 2013 (and Ontario CLRA 2017 revision)

**Quebec**

* 1866-1994 CCLC family was included in the law of persons (marriage and its effect, children were part of the effects of marriage)
* 1994 CCQ
  + family in the code since 1980
  + first book was enacted in 1980 (before the whole revised book was all enacted in 1994), had a book on the family

#### Marriage Reforms

**1990 modification of ‘prohibited degrees of consanguinity and affinity’**

* **Marriage (Prohibited Degrees) Act SC 1990 c 46**
* **Prohibition 2(2**) no person shall marry another person if they are related lineally or as brother or sister or half-brother or half-sister including by adoption
* **Marriage void 3(2)** a marriage between persons above is void

**2005 same sex marriage legalized**

* Initially, the Civil Marriage Act only removed the common law’s requirement that spouses be of different sexes for their marriage to be valid. In 2015, amendments fueled by a political agenda focusing on forced marriage and polygamy added requirements of ‘free and enlightened consent’, a minimum age of 16, and the dissolution of any prior existing marriage.
* Cases leading up:
  + 1. **Miron v Trudel 1995** – challenged unmarried cohabs protected under charter
    2. **M v H 1999** - granted unmarried SAME SEX cohabs protected under charter
    3. **Egale BC 2001** – same sex marriage – union of 2 persons not man and woman
    4. **Halpern 2002** – same sex marriage
    5. **Walsh 2002** – unmarried spouses / property division on breakdown
    6. **Hendricks 2004** – same sex marriage
    7. **Reference 2004** – same sex marriage
    8. **AG v A 2013** – unmarried cohab, are spouses entitled to same mechanisms upon breakup in Quebec Common Law – property division, protection of residence, etc.

#### Divorce

**<1968 only by private court order.**

* Was not supposed to be easily accessible.
* Purposefully difficult to obtain.
* Chevrette and morel

>**1968 Divorce Act no fault 2 years separation**

* Be skepticcal, maybe it existed prior? 1925 Divorce Act. When marriage was understood as life-long commitment. Women could seek court divorce if husband cheated on her.
* Divorce was possible but not optimal
* In 1890- An act respecting jurisdiction in proceedings for divorce.

**>1985 period of separation shortened to 1 yr for no fault**

* DA includes support for child and spouse and parental authority – prima facie within prov power but considered ancillary to

#### Division of powers

**Jurisdiction over family matters Superior and Provincial courts, constrained by s 96.**

**Federal s 91**

**91(26)** **marriage and divorce** – **matters of legal status – requirements for marriage’s essential validity**

* Has a lot to do with morality (and morality is usually federal issue)

**Why under federal? To stop divorce from happening perhaps in provinces?**

* Couldn’t be exclusively federally regulated, would be unacceptable due to the private nature of family
* Federal role in regulating families is a limited one
* Provides uniform rules for the recognition of marriage and divorce – matters of legal status.
* In the exercise of its divorce power, the federal government has led in developing family law policy, and federal norms have influenced the enactment of provincial laws and their judicial interpretation.
* Federal head of power intended to minimize the role of religion in laws defining the institution of marriage.

**Essential validity of marriage (capacity to marry) in federal jurisdiction –** essense of marriage, divorce, some of its effects

**Formal validity of marriage (ceremony and procedural requirements) in provincial jurisdiction.**

* provincial power has been interpreted generously to include the granting of marriage licenses and the imposition of requirements regarding minimum age and parental consent
* **All of the common law provinces have enacted comprehensive Marriage Acts dealing with matters such as the requirement of a license, the authority of officiants, the form of the ceremony, and the need for witnesses**

**Federal powers deal with issues of consent and legal capacity**

* Marriage requires s 2.1 free and enlightened consent of two persons to be the spouse of each other
* S 2 marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others. 2005

**Federal legislation:**

* **Divorce Act RSC 1985**
* **Civil Marriage Act SC 2005, c 33**
  + S 2 marriage for civil purposes is the lawful union of two persons to the exclusion of all others
* **Marriage (Prohibited Degrees) Act**
  + **Prohibition 2(2)** cannot marry your linear relations including bro, sis, half-bro, half-sis or by adoption
  + **Marriage void 3(2)** if above applies
* **Zero Tolerance for Barbaric Cultural Practices Act SC 2015 c. 29**
  + **Amends the Civil Marriage Act** – requires free and enlightened consent to marriage, and that a former marriage be dissolved first, and requires minimum age of 16 for marriage in BC

**91(24)** **Indians** – completely different in Ab law

**91(27) criminal**– offences against consanguinity, AHRA

**91(29)** declaratory power

**Provincial s 92**

**92(12)** **solemnization** of marriage in the province – limits the federal scope of power - *Marriage Act* RSBC 1996 c 282,

Anything to do with regulation of families: *Vital Stats Act, Family Law Act, Adoption Act,* etc

**92(13)** **property and civil rights**

**92(14)** **administration** of justice (and establishment of provincial courts)

**92(16)** **matters of a local or private nature** – inherently private nature of family law. Open to regional diversity.

* However, these assumptions about the inherently ‘private’ nature of family law and the inevitability of significant regional diversity are open to question.
* Practice in Canada and other federal jurisdictions has shown that ideas about the nature of family law are shaped by social and political context: it is possible to understand family law as having a public dimension and as reflecting the evolution of national norms.

**Civil Law**

Substantive conditions Formal conditions

Physiological (age) Publication

Psychological (consent) (Prenup medical exam)

Sociologial (consanguinity) Parental consent

Solemnization

**Charter**: **S 1, 2, 6, 7, 15**

#### Provincial frameworks

**BC**

Vital stats act, marriage act, family law act

**ALBERTA**

**ONTARIO**

* **Marriage Act** for marriage solemnization and
* **Vital statistics act** for registering births deaths etc
* **Family law act**, defines spousal support obligations **s 29** **(M v H)**
  + Division of family property
  + Definition of **Spouse 1(1) – does not include cohabs** – have separate def for cohabiter
  + Domestic contracts – for those who are married or intend to marry – analogy to cohab agrmts

**FLA supplemented by other rules:**

* **Children’s Law Reform Act** – custody, access, guardianship **Amended in 2017**
* **Child and Family Services Act** – child protection, adoption, rights of children
* **Family Responsibility and support arrears act**

**QUEBEC - CCQ**

**Book 1 The Person**

* Acts of civil status
* Outlines means of registering: Marriage birth death CUs

**Book 2 The Family**

**\* FORMAL ADULT RELATIONSHIPS (NO COHAB) \***

**SECTION 1 – Marriage**

* 365-377 solemnization of marriage
* 378-379 proof of marriage
* 380-390 nullity of marriage
* 391-430 effect of marriage – spousal rights
* 431-492 matrimonial regimes – property division
* 493-515 separation from bed and board – marriage but separated
* 516-520 dissolution of marriage

**SECTION 1.1 CIVIL UNIONS (AMENDMENTS ADDED LATER)**

* 521.2 civil union – CL marriage – for SScouples before SS marriage existed – added 2002

**\* PARENT CHILD RELATIONSHIPS \***

**SECTION 2 – Filiation (not parentage!)**

* Blood
* Assisted Reproduction
* Adoption

**\* ADULT-ADULT AND PARENT-CHILD (formal spouses only, not cohabs) \***

**SECTION 3** – Obligation of Support

**\* PARENT-CHILD ONLY \***

**SECTION 4 –** Parental Authority – rights and obligations of a parent to child

#### Jurisdiction

**The Provincial (Family) Court can deal with:**

* guardianship of children under the **Family Law Act**
* parental responsibilities, parenting time and contact under the **Family Law Act**
* child support,
* spousal support, and
* orders protecting people.

**The Supreme Court can deal with all family law problems.**

* guardianship and the care of children, child support and spousal support under the Family Law Act
* divorce
* custody and access under the Divorce Act
* dividing family property and family debt, and
* orders protecting property.
* appeals of decisions made by the Provincial Court.

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

#### BC FLA ON JURISDICTION

**Part 10 FLA – Court Processes**

* **SUPREME COURT** Division 1 – Jurisdiction of court generally
* 192(1) subject to the divorce act the SC has jurisdiction in all matters under this act
* 192(2) subject to the divorce act the SC continues have jurisdiction in all matters respecting marriage and divorce
* 192(3) inherent parens patriae jurisdiction vested with SC

**PROVINCIAL COURT**

* 193(1) all FLA matters; 193(2) but cannot do (2a) parentage (declaration or order of parentage), 2(b) property division, pension division, childrens property
* in some instances they could make a parentage declaration – when the parties are there in the prov court for another reason (ie child support)

**Section 197** Positive duty to inform clients that the court is not where to resolve disputes – should use ADR

**Section 198** Time limit for division of property or family debt, and for spousal support 2 YEARS

**198(2)(a)** from date of divorce / marriage nullity order

**198(2)(b)** from date of separation of CL spouses

Part 2 FLA – Resolution of FLAs, clear preference for ADR

Division 3 – standing in Ab matters

Division 4 – general orders the court may make

Division 5 – orders respecting conduct

Division 6 – enforcement

Division 7 – rules about appeals

# Adult Relationships

## Types of Adult Relationships

**Marriage**: religious or civil

**Formal partnerships** – registration schemes for non-conjugal partners

* civil union in QC
* Alberta statute about adult interdependence

**Unmarried**

* Difference of sex
* Living apart together (LAT)

**Formal (de jure) vs functional (de facto)**

**Number of partners**

* You cannot be married to more than one person
* But you can have another lover!

**Bigamy s 290** **(1)**

Every one commits bigamy who **(a)** in Canada,

**(i)** being married, goes through a form of marriage with another person,

**(ii)** knowing that another person is married, goes through a form of marriage with that person, or

**(iii)** on the same day or simultaneously, goes through a form of marriage with more than one person; or

**(b)** being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

###### **(2)** No person commits bigamy by going through a form of marriage if

**(a)** that person in good faith and on reasonable grounds believes that his spouse is dead;

**(b)** the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew they were alive!

**(c)** that person has been divorced from the bond of the first marriage; or

**(d)** the former marriage has been declared void by a court of competent jurisdiction.

**Polygamy s 293(1)**

* + Any form of conjugal union with more than 1 person at the same time
  + Polyamory not separated in law

## Marriage and Civil Union

**De jure – marriage, civil union**

**De facto – cohab, unmarried relationships**

#### Common law definition of marriage:

**Evolution of Spouse definitions:**

***Hyde v Hude and Woodmansee:*** voluntary union for life of one man and one woman. Person of opposite sex.

***Andrews v Ontario Min of Health 1988 CanLII 4825 (ONSC)* Spouse has to be opposite sex**

* Charter s 15 case
* Health insurance under provincial policy, same sex female couple denied dependant coverage
* Parties cohabitated, one had 2 kids from prev marriage, one no kids

**ISSUE:** EXTENSION OF BENEFITS same as those of opposite sex partners

**Decision:** Province would cover the partner’s children, but not the partner! Definition “the spouse of an insured person”

* Spouse had to be person of the opposite sex, claim dismissed

***Canada (Attorney General) v Mossop [1993] 1 SCR 554* Immed family not CL same sex. Denied discrimination**

* Male/Male partners. Denied bereavement leave to attend partners father funeral
* Collective agreement – defined “immediate family” included only CL spouse of opposite sex
* **ISSUE**: FAMILY STATUS DISCRIMINATION?
* **Decision**: Denied discrimination claim

***Miron v Trudel [1995] 2 SCR* Unmarried cohabitation is analogous ground**

* extending auto accident benefits to non-married cohabitating opposite sex couples
* imposing legal disadvantages on unmarried opposite sex cohabs relative to married cohabs violates constitutional prohibition on marital status discrimination.
* Marital status was not found to be a reasonable marker of the financially interdependent relationships relevant to the achievement of the legislative objective. Equality rights required that the legislature find a better way of identifying relationships characterized by financial interdependence.
* **Decision**: **Marriage is not simply a choice, you should extend benefits to all spouses, cohab or married**
* **RATIO: The definition of spouse needs to be expanded to include cohabitating partners**

***Egan v Canada [1995] 2 SCR 513* Sexual orientation is analogous ground**

* Old Age security allowance for SS partners
* Only extended to opposite sex spouses
* Denied claim of discrimination on s 15 BUT sexual orientation was recognized as an analogous ground

***M v H [1999] 2 RCS* Unmarried same sex cohabitation is analogous ground, entitled to s 29 spousal support**

* **Ontario’s FLA violated Charter in excluding same sex couples**
* Imposing legal disadvantages on same sex conjugal cohabs relative to their unmarried opposite-sex counterparts violates constitutional equality by discriminating on the basis of sexual orientation.
* Leg objectives were to increase economic equality in breakdown of intimate relationships, found to be furthered by inclusion of same sex couples.

#### Preamble and part 1, Civil Marriage Act, SC 2005, c 33;

WHEREAS the Parliament of Canada is committed to upholding the Constitution of Canada, and section 15 of the Canadian Charter of Rights and Freedoms guarantees that **every individual is equal** before and under the law and has the **right to equal protection and equal benefit of the law without discrimination;**

WHEREAS the courts in a majority of the provinces and in one territory have recognized **that the right to equality without discrimination requires that couples of the same sex and couples of the opposite sex have equal access to marriage for civil purposes;**

WHEREAS the Supreme Court of Canada has recognized that many Canadian couples of the same sex have married in reliance on those court decisions;

WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the Canadian Charter of Rights and Freedoms;

WHEREAS the Supreme Court of Canada has determined that the Parliament of Canada has legislative jurisdiction over marriage but does not have the jurisdiction to establish an institution other than marriage for couples of the same sex;

WHEREAS everyone has the freedom of conscience and religion under section 2 of the Canadian Charter of Rights and Freedoms;

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

WHEREAS, in light of those considerations, the Parliament of Canada’s commitment to uphold the right to equality without discrimination precludes the use of section 33 of the Canadian Charter of Rights and Freedoms to deny the right of couples of the same sex to equal access to marriage for civil purposes;

WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

AND WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the Canadian Charter of Rights and Freedoms, access to marriage for civil purposes should be extended by legislation to couples of the same sex;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

**S 3 FLA BC “spouse”**

**3**  (1) **A person is a spouse** 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 spouse, of an **intention** to separate permanently, and

(ii) an **action**, taken by a spouse, that demonstrates the spouse's **intention** to separate permanently.

**Ss 1(1) “spouse”, 1(2) FLA ONT**“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. (“conjoint”)

**S 1 “spouse”, CLRA***;* “spouse” means the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage; (“conjoint”)

**S 1(e) “spouse”, Matrimonial Property Act, RSA 2000, c M-8**. (e) “spouse” includes a former spouse and a party to a marriage notwithstanding that the marriage is void or voidable. Would this include same sex?

#### Consent required to marriage of person under 19 years of age

**28**  (1) Except as provided in subsections (2) to (4), a marriage of a minor, other than one who has been married before and whose spouse has died, must not be solemnized, and a licence must not be issued, unless consent in writing to the marriage is first given (a) by all of the minor's living parents who have guardianship of that minor, or  (b) by a guardian of that minor, or (c) if the minor has no living parents and no guardian, by the Public Guardian and Trustee or the Supreme Court.

**(6)** A marriage of a minor must not be solemnized, and a licence must not be issued, unless a certificate of birth or other satisfactory proof of age has been produced (a) to the issuer of marriage licences, or, (b) if the marriage is to be solemnized after the publication of banns, to the religious representative.

**Marriage of person under 16 years of age**

**29**  (1) Except as provided in subsections (2) and (3), **a marriage of any person under 16 years of age must not be solemnized, and a licence must not be issued.**

**Validity of marriages preserved**

**30**  Nothing in section 28 or 29 invalidates a marriage.

#### Solemnization of Marriage *Marriage Act RSBC 1996 c 282*

**S 3 Who can solemnize marriage**

**3(1) must be registered with registrar general as religious rep** - must be ordained or appointed by your church

**3(d)** religious body must be sufficiently well established in the province – continuity of existence

**3(3)** must be registered, not expired

**Authority to solemnize marriage**

**7(1)** religious officials

**7(2)** registration and authorization of religious rep requirements

**7(3) (a)** religious official registered under the act –

**7(3) (b)** marriage commissioner

**7(3) (c)** treaty first nation member designated under the laws of the treaty first nation to solemnize marriages

**8** religious rep must be licensed and registered to perform marriages, under both VSA and Registrar– applies to everyone

**9****(1)** must be in the presence of 2 or more witnesses besides the religious representative.

**9 (2)** The ceremony must be performed in a public manner, unless otherwise permitted by licence.

**9 (3)** Both parties to the marriage must be present in person at the ceremony.

**Licenses**

**15** parties must have license to get married, authorized by the registrar general of the VSA

**17** unused marriage license void after 3 months

**18** if the license was done irregulary or mistakenly, the parties would be protected

**Registration of marriage**

**25(2)** must be signed by each party, 2 witnesses, religious rep/commissioner/first nation designate

**Consent**

**28** consent required under age 19 by parent, guardian, or public guardian

**29** nobody under 16 can marry (on line between essential and formal validity) but “in some circumstances it could be ok” be critical of this

#### Civil marriage – s 8, 20 and 32 are what apply

**Commissioner Performing – Civil Marriage**

**8** Must be licensed under VSA and Reg General

**10** Marriage performed by person registered under section 2 (7) is as valid as one performed by a religious representative.

**20** slightly different rules for marriages by marriage commissioner (civil marriage) vs religious rep

* must still have licence
* marriage commissioner must still be registered
* must be public 20 (a) and have 2 or more witnesses
* parties and witnesses must declare something specific 20(B)

**32** The minister may appoint marriage commissioners necessary for carrying out this Act.

**20**  A marriage may be contracted before and solemnized by a marriage commissioner under a licence under this Act and on payment of the prescribed fee if

(a) the marriage is contracted in a public manner in the presence of the marriage commissioner and 2 or more witnesses,

(b) each of the parties to the marriage in the presence of the marriage commissioner and the witnesses declares, "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 substantive, creates essential validity of the marriage, blurs the line with federal sense of validity. Also procedural safeguard to ensure that requirements are met

(c) each of the parties to the marriage says to the other, "I call on those present to witness that I, A.B., take C.D. to be my lawful wedded wife (or husband) (or spouse)". Again both procedural and substantive

#### Vital Statistic Act

**15** Registration of marriage

**37** marriage certificates

## Comparison to Quebec and Ontario

**Requirement of publication of banns exists in Ontario but not in BC**

* warns the public about the marriage and allows public input to prevent marriage
* BC It is not necessary that banns or another public announcement of the marriage be published before the marriage ceremony takes place.

***Ontario and Quebec have much higher publicity requirements***

#### QUEBEC

**Who can solemnize - 365-377 rules respecting the solemnization of civil marriages and civil unions**

* anyone can be authorized to conduct/celebrate a marriage (judge, clerk, friend or family, notaries, mayors, any one)
* must be 18 or older, not have a recent criminal offence record, Canadian citizen or QC resident
* marriage can be civil or religious
* celebrant must agree to follow all formalities for performing the marriage

**QC Religious Marriage**

* Priests and ministers authorized by a religion to perform
* The justice minister must also authorize them to perform marriages

**Formalities Before the Marriage**

* must meet with the officiant before the marriage
* **The officiant must make sure that the future spouses meet all legal requirements**
* ensure that both future spouses have given free and informed consent to the marriage.
* The officiant must apply to the Directeur de l’état civil (registrar of civil status) for **publication of a notice of marriage**. This **notice must be published on the Directeur’s website at least 20 days before the marriage**.
* Marriage must take place within three months following publication of the notice. If not, a new notice must be published. The reason for the notice is to advise people of the upcoming marriage so they can inform the officiant if there is a reason the marriage should not take place. May not be necessary in serious cases (ie risk of danger)

**The Marriage Ceremony**

* **can take place anywhere, any day of the year between 9 a.m. and 10 p.m.**,
* **The ceremony can be religious or civil,** but it must follow all legal requirements

**Required formalities – During the Ceremony**

* the marriage must be performed by a person who is authorized to perform marriages.
* Requires two witnesses
* officiant must read certain articles from the Civil Code of Québec to the spouses that deal with their rights and obligations.
* After reading the articles, the officiant asks each spouse to consent to the marriage.
* Following the traditional "I do's," the officiant declares that the spouses are married.
* The officiant signs a**declaration of marriage**.
* The spouses and two witnesses must sign it as well.
* The declaration provides written proof of the marriage.
* The officiant must send the declaration to the Directeur de l’état civil within 30 days of the marriage.
* The Directeur then prepares the official act of marriage, which is the official document proving the marriage. If the spouses want a copy of the official document, they must apply to the [Directeur de l’état civil](http://www.etatcivil.gouv.qc.ca/en/marriage-civil-union.html" \t "_blank).

## Effects of Adult Relationships

#### White paper on Family Relations Act Reform, pp 79-85

**BC moved from judicial to statutory division of property under FLA**

* Previously under FRA it had been closer to the NS model that had been challenged in Walsh
* In common law since late 70s obligation of support applies to both de facto and de jure spouses
* However the family property division did not apply to de facto spouses
* In BC the move was made under FLA to include all spouses in property division requirements

#### Nova Scotia (AG) v Walsh, (2002) SCC 83: Nova Scotia 2002 \* cohabs are not spouses, SCC: not unconstitutional

* Challenged the fact that cohab was not considered a spouse for purpose of division of property
* Parties agreed before it went to the SCC, so the case was really a theoretical exercise
* NS challenged the ability to expand the definition of spouse to expand the division of family property
* **Decision: Defining spouse as married couples only is not unconstitutional: CL people are not married on purpose so don’t want or need the same rights and obligations as married people**
* **Dissent: Unmarried hetero couples should get same rights as married couples**

**Facts**: Walsh and Bona cohabited for 10 years, had 2 children. Property at issue is Bona’s net value of $66K. Upon the breakdown of their relationship, Walsh applied for spousal support, child support and a declaration that the definition of "spouse" in [s.2(g) of the *Matrimonial Property Act*](http://canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html#sec2) was unconstitutional for failing to provide her with the presumption, applicable to married spouses, of an equal division of matrimonial property, in violation of [s.15(1) of the *Charter*](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec15subsec1).

**Issue:** Is the definition of "spouse" in [s.2(g) of the *Matrimonial Property Act*](http://canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html#sec2) a violation of [s.15(1) of the *Charter*](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec15subsec1)? **NO**

**TRIAL**: Judge held that the exclusion of common law spouses from the definition of "spouse" did not constitute discrimination within the meaning of [s.15(1)](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec15subsec1).

**Court of Appeal** set aside the decision, concluding that the legislation infringed [s.15(1)](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec15subsec1) and that the infringement was not justifiable under [s.1 of the *Charter*](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec1).

**SCC** Appeal allowed, [s.2(g)](http://canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html#sec2) is not unconstitutional.

**Ratio** The application of the [*Matrimonial Property Act*](http://canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html) only to married couples is **not** unconstitutional. The right to choose to avoid the consequences of marriage or registered domestic partnerships must be respected. P 50, 57, 58

**Reasons**

* Matrimonial Property Act clearly provided differential treatment for married and cohab couples
* Miron v Trudel had determined that marital status was an analogous ground in the Charter
* Distinguished Miron v Trudel because it involved the relationship between a choab couple and a third party, whereas the Act focused on regulating the spouses relationship directly.
* However, the effect of the exclusion in the Act did not deman Walsh’s personal dignifty
* The equality guarantee is a comparative concept: must compare against appropriate group: can only compare between married and unmarried heteros
* Para 40: CL people make a choice to not marry and not take on the obligations ascribed to persons who get married: CL relationships are shorter, can be considered a “trial marriage”, can be a deliberate substitute for marriage; persons who do not marry have less conventional attitutes toward marriage and family and **reject the instiution** **THIS IS A KEY PART**
* Making a conscious choice not to marry
* No constitutional requirement for the state to extend the protections of the MPA to cohabs para 57
* Unmarried people have alternative choices and remedies (co-ownership, domestic contracts)

**Majority** - Bastarache, writing for the majority, held the distinction between unmarried and married couples in the [*Act*](http://canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html) does not affect the dignity of these persons and does not deny them access to a benefit or advantage available to married persons. **Bastarache applied the test set out in**[***Law v Canada***](http://casebrief.wikia.com/wiki/Law_v_Canada_(Minister_of_Employment_and_Immigration))**to test whether a statute violates s.15(1):**

* does the law impose differential treatment between the claimant and others, in purpose or effect; NO
* are one or more enumerated or analogous grounds of discrimination the basis for the differential treatment; NO
* does the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee? YES

Bastarache found that [s.2(g)](http://canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html#sec2) passed the first two questions of the test, but not the third. Many opposite sex individuals in conjugal relationships choose to avoid marriage to avoid the legal consequences that flow from it. To ignore the differences among cohabiting couples presumes a commonality of intention that simply does not exist. Finding this was not the case effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected by the state. **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***](http://canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html)**to married persons only is not discriminatory in this case as the distinction reflects and corresponds to the differences between those relationships.**

**Dissent \*\* HELD IT WAS UNCONSTITUTIONAL!**

L'Heureux-Dubé, in the dissent, held that the [*Act*](http://canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html) was discriminatory and could not be saved under [s.1](http://canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec1) as **unmarried heterosexual couples were deserving of the same protections that the** [***Act***](http://canlii.org/en/ns/laws/stat/rsns-1989-c-275/latest/rsns-1989-c-275.html)**was passed to provide**. Heterosexual unmarried cohabitants have historically faced disadvantages through a legal system that fails to acknowledge them as legitimate family forms. Many heterosexual unmarried cohabitants cohabit not out of choice but out of necessity. For many, choice is denied them by virtue of the wishes of the other partner. To deny them a remedy because the other partner chose to avoid certain consequences creates a situation of exploitation.

* Para 117 the goal of matrimonial property regimes and family law is to redistribute economic resources on the breakdown of a family
* Para 118 unmarried heteros have the same needs as married heteros when relationship ends: relationships are then functionally equivalent
* Unmarried becoming more common
* Para 140 It is no excuse to deny the benefit of equal sharing to all heterosexual unmarried cohbs simply because some members of the group do not seem to deserve nor want this equal division (should it actually be protection and obligation)
* Choice: Para 153: cohab instead of marriage is not always by choice, and was rejected in Miron

#### Eric v Lola - Quebec (AG) v A, 2013 SCC 5 \* Quebec spousal & property div only for MARRIED or CU, not CL

**RATIO: Provision in CCQ that only applied to division of property of married or CU spouses was unconstitutional under the Charter s 15(1) but saved by s 1 (close call)**

“Showcases a divided approach to two of the main policies underlying the family law regime: protection of choice and autonomy over how individuals choose to structure their interpersonal relationships on the one hand, and protection of vulnerable spouses on the other” Canlii connects

**Facts:** 19 yo in relationship with 32 yo Eric. Had a fling, breakup, back together for 7 yrs, have kids, not married. Lola wanted to marry, Eric did not believe in marriage. Separated, had contract that Lola got home and Eric paid child support. Lola challenged not having access to spousal support or property sharing entitlements that were available to married or CU spouses.

**Issue**: are the provisions that only extend spousal support and property sharing to married or CU spouses (specifically articles 401-430, 432, 433, 448-484, and 585) violations of the equality guarantee under section 15 of the Charter?

**Decision**: SCC 5-4 decision. **5 found it violated s 15(1).** 4 dissented. **Complete disagreement over s. 1** (4 didn’t consider s 1 as found it didn’t violate s 15, 1 found no violation, 1 found total violation, 3 found no violation except one provision article 585) **Cohab couples still do not have access to the spousal support and property division regime that married and civil union spouses have access to.**

**Reasons**: Pursuant to Eric and Lola’s domestic contract, Lola was still entitled to the home and to child support. While the ultimate result was not in Lola’s favor, the division within the Court may be the catalyst needed to prompt the Québec government to review the legislation and consider extending the articles at issue to cohabiting couples.

**Section 15 analysis:**

**Majority**: Justice Abella, writing for the majority’s analysis of section 15(1), also agreed that marital status is an analogous ground (indeed, once a ground is found as analogous, the claimant does need to prove the ground in subsequent cases). She disagreed, however, with Justice Lebel’s interpretation of the test. She stated that prejudice and stereotype are two possible indicia of discrimination, but are not discrete elements that a claimant must prove. She recognized that requiring claimants to prove prejudice or stereotype would not only elevate the threshold for finding a violation of section 15(1) but may also miss other ways that discrimination and disadvantage manifest themselves.

Justice Abella went on to state that the focus on “choice” should not have been relevant at the section 15(1) stage. Claimants are not required to prove that they could have avoided discrimination to establish that their equality rights have been violated. Choice, therefore, is irrelevant to a finding of discrimination and should instead come up at section 1 within the context of justifying the legislation.

**Dissent**: Justice Lebel’s dissent recognized marital status as an analogous ground (this had first been determined in *Miron v Trudel*, [[1995] 2 SCR 418](http://scc-csc.lexum.com/scc-csc/scc-csc/en/1264/1/document.do)), but concluded that a claimant must prove either prejudice or stereotype in order to ground a finding of discrimination. In rejecting that prejudice or stereotype were at play in this case, Justice Lebel prioritized the notion of choice. Although he recognized that cohabiting, married, and civil union relationships are functionally similar, he believed that it would be unfair to extend the obligations and rights which exist at separation for married and civil union spouses to cohabiting couples because the latter had specifically “chosen” not to marry.

**Tension between majority and dissent**

* arises because of the different policy rationales relied on by each judge:
* Justice Abella focuses on the protection of vulnerable spouses
* Justice 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.
* Justice Abella noted that the disproportionate number of women who experienced poverty at separation played an important role in the development of spousal support entitlements and family property division in the *Code*.

**Section 1 analysis:**

* All of the judges writing about section 1 agreed that the purpose of the legislation was pressing and substantial: the exclusion of cohabiting spouses from the statutory regime was meant to preserve their freedom of choice to remain outside the legal regime governing married and civil union spouses
* **Abella**: provisions fell at the minimal impairment stage:
* 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
* **Dissent McLachlin**: all provisions pass each stage of Oakes test
* **Majority (3)** objected to treating spousal support entitlements and property division entitlements in the same way.
* Whereas spousal support entitlements arise by virtue of the interdependence of the spouses as a result of the relationship itself, property entitlements arise because of a conscious choice

Canadian courts are not settled on the proper way to navigate the protection of vulnerable family members on the one hand, and respect for choice and autonomy on the other. Complicating this picture is that, the parties litigating are typically quite wealthy-may skew the balance in favor of choice and autonomy since the courts may presume that the vulnerable spouse does not need protecting. Not true for vast majority of cohab couples.

**Walsh and Lola both deal with: Choice, consent, protection, liberty, solidarity, expectations, start, end, explicity consent, positive step, stereotyping.**

#### Quebec Obligations in Marriage

**What is expected of you as a spouse -** You must respect your spouse (not abuse them), not commit adultery, and live together ongoing

**DA S 8(2)(c)** Breakdown of a marriage established if **(a)** living separate and apart x 1 year, (b)(i) adultery, **(b)(ii)** abuse physical and emotional

**Civil code 392-400 *As per 391 these are mandatory duties! Cannot be contracted out of***

**DIVISION I RIGHTS AND DUTIES OF SPOUSES**

1. The spouses have the same rights and obligations in marriage.

They owe each other respect, fidelity, succour and assistance.

They are bound to share a community of life. LIVE TOGETHER

1. In marriage, both spouses retain their respective names, and exercise their respective civil rights under those names.
2. The spouses together take in hand the moral and material direction of the family, exercise parental authority and assume the tasks resulting therefrom.
3. The spouses choose the family residence together. In the absence of an express choice, the family residence is presumed to be the residence where the members of the family live while carrying on their principal activities.
4. The spouses contribute towards the expenses of the marriage in proportion to their respective means. The spouses may make their respective contributions by their activities within the home.
5. A spouse who enters into a contract for the current needs of the family also binds the other spouse for the whole, if they are not separated from bed and board. However, the non-contracting spouse is not liable for the debt if he or she had previously informed the other contracting party of his or her unwillingness to be bound.
6. Either spouse may give the other a mandate in order to be represented in acts relating to the moral and material direction of the family. This mandate is presumed if one spouse is unable to express his or her will for any reason or if he or she is unable to do so in due time.
7. Either spouse may be authorized by the court to enter alone into any act for which the consent of the other would be required, provided such consent is unobtainable for any reason, or its refusal is not justified by the interest of the family. The authorization is special and for a specified time; it may be amended or revoked.
8. If the spouses disagree as to the exercise of their rights and the performance of their duties, they or either of them may apply to the court, which will decide in the interest of the family after fostering the conciliation of the parties.

**5 principles of effects of adult relationships in Quebec – mandatory, cannot contract out of them**

1. **Family residence 401-413**

[**401.**](javascript:displayOtherLang(%22se:401%22);) Neither spouse may, without the consent of the other, alienate, hypothecate or remove from the family residence the movable property serving for the use of the household. The movable property serving for the use of the household includes only the movable property destined to furnish the family residence or decorate it; decorations include pictures and other works of art, but not collections.

[**402.**](javascript:displayOtherLang(%22se:402%22);) A spouse having neither consented to nor ratified an act concerning any movable property serving for the use of the household may apply to have it annulled.

However, an act by onerous title may not be annulled if the other contracting party was in good faith.

[**403.**](javascript:displayOtherLang(%22se:403%22);) Neither spouse, if the lessee of the family residence, may, without the written consent of the other, sublet it, transfer the right or terminate the lease where the lessor has been notified, by either of them, that the dwelling is used as the family residence. A spouse having neither consented to nor ratified the act may apply to have it annulled.

[**404.**](javascript:displayOtherLang(%22se:404%22);) Neither spouse, if the owner of an immovable with fewer than five dwellings that is used in whole or in part as the family residence, may, without the written consent of the other, alienate the immovable, charge it with a real right or lease that part of it reserved for the use of the family. A spouse having neither consented to nor ratified the act may apply to have it annulled if a declaration of family residence was previously registered against the immovable.

[**405.**](javascript:displayOtherLang(%22se:405%22);) Neither spouse, if the owner of an immovable with five dwellings or more that is used in whole or in part as the family residence may, without the written consent of the other, alienate the immovable or lease that part of it reserved for the use of the family.

Where a declaration of family residence was previously registered against the immovable, a spouse not having consented to the act of alienation may require from the acquirer the grant of a lease of the premises already occupied as a dwelling, under the conditions governing the lease of a dwelling; on the same condition, a spouse having neither consented to nor ratified the act of lease may apply to have it annulled.

[**406.**](javascript:displayOtherLang(%22se:406%22);) The usufructuary, the emphyteuta and the user are subject to the rules of articles 404 and 405.

Neither spouse may, without the consent of the other, dispose of rights held by another title conferring use of the family residence.

[**407.**](javascript:displayOtherLang(%22se:407%22);) The declaration of family residence is made by both spouses or by either of them.

It may also result from a declaration to that effect contained in an act intended for publication.

[**408.**](javascript:displayOtherLang(%22se:408%22);) A spouse not having given consent to an act for which it was required may, without prejudice to any other right, claim damages from the other spouse or from any other person having, through his fault, caused the spouse injury.

[**409.**](javascript:displayOtherLang(%22se:409%22);) In the event of separation from bed and board, divorce or nullity of a marriage, the court may, upon the application of either spouse, award to the spouse of the lessee the lease of the family residence.

The award binds the lessor upon being notified to him and relieves the original lessee of the rights and obligations arising out of the lease from that time forward.

[**410.**](javascript:displayOtherLang(%22se:410%22);) In the event of separation from bed and board, or the dissolution or nullity of a marriage, the court may award, to either spouse or to the surviving spouse, the ownership or use of the movable property of the other spouse which serves for the use of the household.

It may also award the right of use of the family residence to the spouse to whom it awards custody of a child.

The user is exempted from furnishing security and from making an inventory of the property unless the court decides otherwise.

[**411.**](javascript:displayOtherLang(%22se:411%22);) The award of the right of use or ownership is effected, failing agreement between the parties, on the conditions determined by the court and, in particular, on condition of payment of any equalizing sum, all at once or by instalments.

When the equalizing sum is payable by instalments, the court fixes the terms and conditions of guarantee and payment.

[**412.**](javascript:displayOtherLang(%22se:412%22);) Judicial award of a right of ownership is subject to the provisions relating to sale.

1. **Family patrimony 413-426… 415\*\*\*** Value of house or residences of family

[**413.**](javascript:displayOtherLang(%22se:413%22);) A judgment awarding a right of use or ownership is equivalent to title and has the effects thereof.

[**414.**](javascript:displayOtherLang(%22se:414%22);) Marriage entails the establishment of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property.

[**415.**](javascript:displayOtherLang(%22se:415%22);) The family patrimony is composed of the following property owned by one or the other of the spouses: the residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan. The payment of contributions into a pension plan entails an accrual of benefits under the pension plan; so does the accumulation of service recognized for the purposes of a pension plan.

* residential property(s), Cars, Movable propert, Pension and rrsps

**417** net value is all assets above and all debts

**418** The value of these assets will be divided in equal value at the end of the relationship

# Parent-Child Relationships

## Introduction

#### [Susan Boyd, “Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility”](http://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1008&context=emeritus_pubs) (2007) 25:1 Windsor YB Access Just 63, pp 63-73 + conclusion;

**Thinking about ways to move forward in the field of legal parenthood must be attentive to gender and power differentials and to social relations around parenting.**

* Women and men are differentially situated in relation to parenthood, even now that motherhood and fatherhood are fragmented into various possible components.
* In order to take such differences into account, analysis, legal frameworks, and dispute resolution must carefully consider the social context and circumstances of each parenting dispute.

**In the context of parenting by single women and lesbians, who are also situated on the less powerful segment of the continuum, we might suggest that the social bonds between mothers and their children should be privileged in relation to the genetic ties of a sperm donor – who carries the heavy cultural power of a father.**

* Whilst in some circumstances the sperm donor would be intentionally included in a family circle by lesbian mothers, a system could be structured whereby the hurdle to the donor being recognized as a legal parent was higher than for a lesbian co-mother.
* Drawing on the tradition of Black women caring for other women’s children, 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.
* This second view will guide us to a more just vision of the family” – one that emphasizes responsibilities rather than rights. An approach that gives some weight to the intentions of a birth mother – particularly one who intends to parent without the influence of a man – might also enable what has been called the radical potential of insemination – that it destroys the centrality of the (hetero)sexed couple and re-centres women.
* This ‘thick’ concept of intentionality is worthy of further exploration – so long as it can be detached from its roots in a liberal individualism that strips intention of its social, political, and gendered contexts.

#### Angela Campbell, “Conceiving Parents through Law” (2007) 21 International Journal of Law, Policy and the Family 242, pp 242-248

* This article considers the way in which law attributes parental status in circumstances involving assisted reproduction it examines whether and how law recognizes the relationships that a child forms with the adults who surround her when that child was conceived through the use of donated gametes (sperm or ova) or through surrogacy.
* The third part highlights particular factors that have driven these assessments of parental status, namely, biological connections, the intentions of those who participate in a conception arrangement, and social relationships formed with the children produced from such arrangements.
* Within law’s parables, though, the location of parenthood can be arduous; a child’s parents often are not readily apparent or identifiable, given law’s multiple portrayals of parent – child relationships and the diverse factors law emphasizes in determining whether a formal parent – child connection exists.

**Long legal history of recognition of adoption as parent-child despite lack of biology**

* Recognition of parental status through adoption has deep legal roots; although formally recognized and regulated in Canada since the latter part of the 19th century, adoption has been practised for thousands of years, having been traced as far back as the Babylonian Code and then Roman law

**Determining filiation is still linked to concepts of natural filial relationships, even when ART**

* At the same time, it would be a mistake to assume that genetic realities have no bearing upon parental status. The rules of fi liation are set up with a view to mimicking ‘ natural ’ fi lial relationships even where, in reality, a biological link between adult and child might not exist

##### Table 1. Permutations of Conceptual Arrangements - Recipient of Reproductive Material or Services Contributed Reproductive Material or Services (from Campbell article)

1. Single woman may conceive with …

a) donated sperm alone to fertilize recipient’s own egg; she carries the embryo

b) donated sperm to fertilize recipient’s own egg; surrogate carries embryo (surrogate has no genetic connection)

c) donated sperm to fertilize donated egg; recipient carries the embryo

d) donated sperm to fertilize donated egg (from someone other than surrogate); surrogate carries embryo (surrogate has no genetic connection)

e) donated sperm to fertilize surrogate’s egg; surrogate carries embryo (surrogate has genetic connection)

2. Single man may conceive with …

a) surrogate’s eggs; surrogate carries embryo (surrogate has a genetic connection)

b) donated egg; embryo created with recipient’s sperm is carried by surrogate who is someone other than egg donor (surrogate has no genetic connection)

c) donated sperm to inseminate surrogate (surrogate has a genetic connection)

d) donated sperm to fertilize donated egg; surrogate carries embryo (surrogate has no genetic connection)

3. Heterosexual couple may conceive with …

a) their own sperm and eggs; female partner carries embryo

b) donated sperm (used to fertilized female partner’s egg); female partner carries embryo

c) donated egg (male partner’s sperm used to fertilize); female partner carries embryo

d) donated sperm to fertilize donated egg; female partner carries embryo

e) donated sperm to fertilize donated egg; surrogate (someone other than egg donor) carries embryo

(surrogate has no genetic connection)

f) donated sperm to inseminate surrogate (surrogate has a genetic connection)

g) male partner’s sperm used to inseminate surrogate (surrogate has a genetic connection)

4. Female partners may conceive with …

a) donated sperm to inseminate 1 partner; that partner carries embryo

b) donated sperm to fertilize the egg of one partner; other partner carries embryo

c) donated sperm to fertilize the egg of one partner; surrogate carries embryo (surrogate has no genetic connection)

d) donated sperm used to fertilize donated egg; embryo is carried by 1 partner

e) donated sperm used to fertilized donated egg; embryo is carried by surrogate (surrogate is someone other than egg donor, and has no genetic connection)

f) donated sperm used to inseminate surrogate (surrogate has a genetic connection)

5. Male partners may conceive with …

Options are the same as in block 2, above, pertaining to a single man.

#### Brenda Cossman, “Parenting Beyond the Nuclear Family: Doe v Alberta” (2007-2008) 45 Alta L Rev 501, Introduction, Part IV + conclusion are mandatory, the rest is option but I recommend reading it if you can)

**Doe v Alberta 2005 ABQB 885**

**Facts:** cohab, unmarried. Jane professional, wanted kid. John didn’t want kid. Jane had kid on her own through ART with unknown sperm donor. Born Aug 2005. Used express written agreement to assign parental responsibilities to Jane only, John not father, no parental rights or obligations. Sought court declaration that they could have this agreement.

**Issue**: Could John be found to be a parent despite not being biological or adoptive parent, and not having intention to parent?

**Decision**: ABQB dimissed application.

**Reasons**:

1. Per FLA s 48 he could be found to “stand in the place of a parent if he is the spouse of the mother and has demonstrated a settled intention to treat the child as his own child
   * Factors to determining settled intention listed in 48(2): attitude to parent, caregiving, disciplining, financial support, and intention
   * If found to stand in place of parent, would incur child support obligations
2. Would only determine “in the future” should the issue arise.
   * Applicants could not make agreement in advance to not find him a parent in future.
   * Intention was relevant but not determinative
   * No family law agreements are binding and could be changed by court
3. Not allowing couple to make agreement in advance re not being parent did not violate s 7 of charter

Appealed, Court of appeal also dismissed claim.

* John Doe could be found to be father in future
* The settled intention of john and jane to remain in close relationship thrust john into the role of parent to this child. The responsibility flowed from the decision to stay with Jane. Therefore he chose to become a parent.
* John not deprived of ability to order his rights and obligations towards the child as he saw fit.

Doe v Alberta captures many of the contemporary challenges to the way which we live in families

* We need to consider the liberty rights of single parents, the role of intention in legal parentage, and the role of contract in setting out those intentions.

Raises questions about the recognition of alternative families

* Challenges the dominance of the nuclear hetero family
* Assumption of father in john doe is based on this dominant view of family
* Same sex challenges have broadened the legal vision of family
* 3 parent cases challenge nuclear family

Raises the question of intention in the determination of parentage.

* A person who gets involved with a parent may become a parent themselves
* Like in ART / surrogacy, if the intentions are well set out, prior to conception, then they should be respected in court

Makes us question what makes a person a parent

* Is a father simply a person in a sexual relationship with a mother?
* What if it was a brother or gay uncle or friend? Would they be a father?
* What if John ignored the child? Or if he cared for the child?

## Parentage – General Rules

**BC**

#### Vital Statistics Act, RSBC 1996, c 479

**1** “assisted reproduction”, “parent”, “birth”

**2** duty to give notice of birth - Same as 111-112 CCQ “attestation of birth”, S2 VSA Alberta

**3** reporting birth, esp 3(1) and 3(1.1) can be completed by mother / father, or “parents” of child

**6** registrar must register birth if notice received within one year and is sufficient truth

**7** after one year, birth registration must have statement and affidavit

#### BC FLA – Parentage

**20** **definitions**

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

**"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

(a) his or her own human reproductive material, from which a child is conceived, or

(b) an embryo created through the use of his or her human reproductive material;

**"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 marriage-like relationship who intend, to be a parent of a child and, for that purpose, the person makes or the 2 persons make 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 assisted reproduction, and

(b) the person, or the 2 persons, will be the child's parent or parents on the child's birth, regardless of whether that person's or those persons' human reproductive material was used in the child's conception.

**23(1)(a)** person is child of his or her parents

**24(1)(a)** donor not automatically parent **(b)** may not be declared parent **(c)** unless determined to be parent under this Act

#### BC FLA – Parentage if no AR

**26****(1)** On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father.

**26(2)** Presumption of parentage if: **(a)** married to the child's birth mother on the day of the child's birth; (b) was married within 300 days before, (c) married after and acknowledges that he is the father; (d) living with child's birth mother within 300 days before (e) he and birth mother acknowledged that he is the child's father (f) he has acknowledged that he is the child's father

**26 (3)** If more than one person may be presumed to be a child's biological father, no presumption of paternity may be made.

**30 Multiparenty -** Up to 3 parties can agree to be parents by agmt before conception

#### Alberta Vital Stats Act

**1(a)** Birth is a complete expulsion from the mother, not duration of pregnancy, with signs of life

**1(o)** Minister responsible for VSA Alberta

**2** Notice of birth, signed by deliverer and submitted (same as BC)

**3** Registration of birth signed by birth mother, or other parent if incapable, within 10 days

#### Alberta Family Law Act, SA 2003, c F-4.5

**5.1(1)**  definitions

**7 Rules of parentage**

**7(1)** A person is the child of his or her parents.

**7(3)**  The relationship of parent and child, and the kindred relationships flowing from that relationship, shall be determined

**7(4)**  Donor who does not intend to parent is not a parent

**7(5)**  Spouse of surrogate is not parent of child born through AR

**7(6)**  All distinctions between the status of a child born inside marriage and a child born outside marriage are abolished.

**8 Presumption of parentage — biological father**

**8(1)**  Unless proven on BOP, a male person is presumed to be the biological father of a child IF

**(a)** he was married her at time of birth**,**

**(b)**  he was married 300 days before the birth

**(c)** he married after the child’s birth and has acknowledged that he is the father;

**(d)**    he cohabited for at least 12 months during which child was born and he has acknowledged that he is the father;

**(e)**   he cohabited with the birth mother for at least 12 months and the cohabitation ended less than 300 days before birth

**(f)**   he is registered as the parent of the child at the joint request of himself and the birth mother under the *VSA or other leg*

**(g)**  he has been found by a court of competent jurisdiction in Canada to be the father of the child for any purpose.

**8(2)**If presumption suggests more than one male person might be the father of a child, no presumption may be made.

**8(3)**Subsection (1) does not apply in the case of a child born as a result of assisted reproduction.

**Assisted reproduction**

**8.1****(2)**If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a male person only, the parents of the child are **(a) the birth mother and man (b) if surrogate, not a mother – would be the male and the person he was married to or who consented to be a co-parent**

**8.1(3)**If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a female person only, the parents of the child are  (a) the birth mother and person married to or consented to be parent (b) if surrogate, and not mother, then the intended mother and person married to or consented to be parent, (c) just intended mother

**8.1(4)** If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person and a female person, the parents of the child are **(a) the birth mother and the male person; (b)    if the birth mother is a surrogate and not a parent and the male person and female person are each declared to be a parent, the male person and the female person;**

**8.1(5)** If a child is born as a result of assisted reproduction without the use of human reproductive material or an embryo the parents of the child are the birth mother and a person who (a)    was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child’s conception, and (b)    consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child’s conception.

**Surrogacy**

**8.2(1)**   
**(a)**    a surrogate is not a parent of a child born to the surrogate as a result of assisted reproduction, and   
**(b)**    a person whose human reproductive material or embryo was provided for use in the assisted reproduction is a parent of that child.

**8.2(3)** If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person referred to in subsection (1)(b) and a female person referred to in subsection (1)(b), only the surrogate, the male person or the female person may make an application under subsection (1).

**8.2(8)** Any agreement under which a surrogate agrees to give birth to a child for the purpose of relinquishing that child to a person (a)    is not enforceable,  (b)    may not be used as evidence of consent of the surrogate under subsection (6)(b), and (c)    may be used as evidence of consent for the purposes of [section 8.1(2)](https://www.canlii.org/en/ab/laws/stat/sa-2003-c-f-4.5/latest/sa-2003-c-f-4.5.html?resultIndex=1#sec8.1subsec2_smooth)(b)(ii) or [(3)](https://www.canlii.org/en/ab/laws/stat/sa-2003-c-f-4.5/latest/sa-2003-c-f-4.5.html?resultIndex=1#sec8.1subsec3_smooth)(b)(ii).

**Blood tests, etc.**

**15(1)**  On the request of a party to an application under this Part or Part 3 or on its own motion, the court may make an order granting permission to obtain blood tests, DNA tests or any other tests that the court considers appropriate from any person named in the order and to submit the results in evidence.

#### Ontario Parentage CLRA

**1(2)** deemed to be spouse if living in conjugal relationship, until no longer doing so marriage is void

**4(1)** A person is the child of their parents

**5**Donor not parent

**6(1)** A birth mother is presumed to be a parent

**7(1)**CONCEPTION THROUGH SEX = PARENT

**7(2)  Presumption of parentage if:** person was birth parents spouse at time of birth, or 300 days before birth, or has been found or acknowledge to be parent **same as BC IF CONCEIVED THROUGH INTERCOURSE**

**7(3)**No presumption of parentage if more than 1 person same as BC

**7(4) and 7(5)**Sperm donor not parent

**9(1) Multiparenty -** Up to 4 parties can agree to be parents by agmt before conception

#### Quebec CCQ.

|  |  |  |
| --- | --- | --- |
| 1. **Filiation by blood** | 1.1 **Filiation of children born through assisted procreation**  **(3rd party donor)** | 2. **Adoption (use for surrogacy)** |
|  | | |
| **PROOF** | **538 parental project**– 1 woman (not 1 man) or a couple intending to become parents, requires 3rd party who contributes genetic material | **543** **adoption needs to be**  1) lawful and 2) in best interest of child |
| **523** **Act of birth** | **538.1**: Act and Possession needed for proof | **555 special consent adoption**   * You can designate the adopter |
| **524** **Uninterrupted possession of status** (care of child) – Determined in case law - starts from birth, 18-24 months of caring for the child | **538.2(1)** Donor does not equal parent BUT  **538.2(2**) **If procreation occurs through sexual intercourse**, even in the paradigm of a parental project, the donor has 1 year to make a claim of parentage – biology trump the rights of other | * Often the intended mother or the second dad will generally see his or her filiation established through special consent to adoption |
| **525 Presumption of paternity (de jure – marriage or civil union) not de facto CL** | **538.3** **presumption of parentage** (not *paternity*) applies to de jure spouses (male or female) |  |
| **526** Voluntary acknowledgement only binds a person making a declaration, **not needed for our purposes** | **539.1** **mother and 2nd mother** 🡪 2nd mother is assumed to be the “father” in any law that refers to “father”  2 parents only (can be 2 moms or hetero) |  |
| **530** If act of birth and possession of status match, no one can contest the filiation of the child, despite any new evidence or DNA etc.  **530(1)** no claim of parentage  **530(2)** no contesting | **540** Liability of someone who withdraws from parental project after birth (you are responsible financially, but not obligated to take care of child)  because no biological ties you cant make them liable any other way |  |
| **535.1** DNA testing - court can ask for DNA  **535.1(4**) negative presumption – court can draw the inference that a man who refuses the DNA test is likely the father | **541 Surrogacy agreements** are null, not enforceable in law  Filiation of the child is established through filiation by blood (father if he contributed genetic material) and filiation by adoption (using 555 special consent to adoption |  |
|  |  |  |

**Compare** **113 + 114 CCQ** “only mother and father may declare filiation of a child” no other person can declare filiation

[CCQ 107.](javascript:displayOtherLang(%22se:107%22);) Civil status The only acts of civil status are acts of birth, acts of marriage or civil union and acts of death.

**111-112. At birth, need the attestation of birth document –** identifies child, signed by accoucheur. Used to register child.

**113-121** 30 days to complete the Declaration of Birth. If married, you can declare the other parent. If you are not, each parent fills out forms. **Can include same sex parents. Attestation and Declaration MUST MATCH.**

[**522.**](javascript:displayOtherLang(%22se:522%22);) **FILIATION** All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth.

* In 1980 this title used to differentiate between filiation by blood and by adoption
* In 1994 it was moved to be an opener of the whole book on filiation as had ART for heterosexual couples added
* In 2002 it was changed so that there are 3 types of filiation, organized into chapter:
  + 1 Blood
    - established through 4 modes:
      * act of birth 523
      * uninterrupted possession of status 523(2) + 524
      * presumption of paternity 525 only applies to married fathers – rebuttable within one year
      * voluntary acknowledgement 526 (don’t have to know this in detail)
    - actions relating to filiation
      * if act of birth and possession are matching, you cannot contest filiation
  + 1.1 Assisted Procreation
  + 2 Adoption

## Parentage – Assisted Reproduction and Surrogacy

#### Pratten case – donor rights to privacy from children

* Successful journalist, conceived by anonymous donor, knew very little about her genetic father
* Got injunction for remainder of files (most had been destroyed)
  + Anonymity
  + Secrecy
  + Identifying and non-identifying
  + Reasons

**BCSC: found process for adult opted children to find out their biological parent information was discrimination under the Charter under 5(1) – allowed to find out information about donor**

**BCCA: not allowed to find out information. Must protect donor rights**. Children do not have a constitutional right to know their origin in Cdn law

**SCC:** **leave to appeal denied**

**Para 46 test for positive rights s7 argument** (never previously recognized in law)

* state deprives the right to life liberty security, contrary to principle of fundamental justice

**Para 52 principle of fundamental justice**

* [52] It is significant that the right “to know one’s past” was found not to be a principle of fundamental justice within s. 7 of the Charter in Marchand v. Ontario 2007 ONCA 787, 288 D.L.R. (4th) 762 aff’g (2006), 81 O.R. (3d) 172 (S.C.J.), leave ref’d [2008] 1 S.C.R. In that case, Ms. Marchand, an adoptee, wanted to know the identity of her biological father.
* The man named by Ms.Marchand’s biological mother as her father on the original birth registration denied paternity and refused to consent to the disclosure of his name. In an effort to gain access to that information, Ms. Marchand challenged the legislation denying her access on the basis that it violated her rights to liberty and security of the person under s. 7 of the Charter. That challenge was rejected by a judge of the Ontario Superior Court of Justice and Ms. Marchand appealed. In dismissing that appeal, the Court of Appeal (at para. 12) agreed with the following statement by the judge that the denial of access did not engage a principle of fundamental justice:

**A principle of fundamental justice must fulfil the following criteria:**

1. It must be a legal principle that provides meaningful content for the s.7 guarantee while avoiding adjudication of public policy matters;
2. There must be a significant societal consensus that the principle is “vital or fundamental to our societal notion of justice”; and
3. The principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.

**NOTES**:

* Today, a woman seeking donor insemination in B.C. can obtain detailed social and medical information on the donor, even if the donation is anonymous, government lawyers noted.
* Adopted children born in B.C. have been able to learn the identity of their biological parents since 1996, when the province changed the law to allow children to access such information.

#### [*MDR v Ontario (Deputy Registrar General)*, 2006 CanLII 19053](https://www.canlii.org/en/on/onsc/doc/2006/2006canlii19053/2006canlii19053.html?resultIndex=1) – 2 Mothers can register under Ontario VSA

* Challenge against VSA Ontario in 2006 to be able to register their children as two mothers
* Comparison of lesbian parents who planned a pregnancy using ART with heterosexual non-biological fathers who planned a pregnancy with ART
* Only differentiation between groups was sex – male/female vs female/female.
* The court concluded that the birth registry provisions of the Vital Statistics Act infringed the applicants' section 15 Charter right to be protected against discrimination based on sex.
* Those provisions were not saved by s. 1 of the Charter and were declared invalid.

The Applicants seeks to protect their children in the event of death, incapacity or separation.

They want presumptive proof of parentage, the benefit of appearing on the Statement of Live Birth.

* Appellants asked for “the mother” and “the father” to be interpreted as “the parent(s)” instead of assessed by sex.
* The use of “mother” and “father” created a gap for families that had not been contemplated by the legislation writers at the time it was written – created by legislation so neeed to be fixed by legislation.
* It was not intentional by legislators to purposefully leave out lesbian co-mothers.
* **115** “Applying the Oakes test, I concluded that the government failed to offer evidence to establish that the objective of prompt and accurate registration of birth particulars and of the exclusion of lesbian co-mothers to further this purpose are pressing and substantial. Furthermore**, the exclusion of lesbian co-mothers from the**[**VSA**](https://www.canlii.org/en/on/laws/stat/rso-1990-c-v4/latest/rso-1990-c-v4.html)**is not rationally connected to that purpose, minimally impairing, or proportionate to the serious harm faced by lesbian co-mothers due to exclusion”.**

**28** The Applicants argue that the term "father" in the VSA should be read as a plural and gender neutral term in order to include lesbian co-mothers. The interpretation of "father", they argue, is consistent with the purpose of the statute, which is recording social parentage. "Mother", "father" and "parent" are broad legal concepts that are not simply concerned with biology. There are a number of other Ontario statutes, including the CLRA, that recognize social parentage

**32** The purpose of the VSA is to record the child's birth and to create a record of parentage. A record of parentage is important to affirm the parent-child relationship. Often the biological parents are the same as the social parents. However, there is nothing in the text or context of the VSA to suggest that parentage is restricted to biological/genetic parentage. The VSA should be interpreted in "such fair, large and liberal a construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." (s. 10 Interpretation Act). The notion of parentage should be interpreted broadly, to include not only biological parents, but also social parents

**35** Although the purpose of the VSA includes recording social parentage when it furthers important social values, a textual analysis reveals that parents are restricted to one mother and one father: a maximum of two parents per child. As a result, statutory interpretation is not the proper tool for granting the co-mother Applicants status as "mothers". An examination of par patriae is therefore necessary.

**56** Including non-biological parents in situations where they clearly intend to parent the child would fall under a purpose of the VSA. Where the genetic father is unknown, for example an unknown sperm donor, there is no reason for him to think that he is doing anything wrong; it is common sense to view the non-biological father in such a situation as "the father".

**58** The terms "mother", "father", and "parent" are not defined in the VSA. These are broad terms that at first blush can refer to either biological parents or social parents

**72** Although a purpose of the VSA includes social parentage, only one woman and one man shall be listed. Biological particulars are one piece of information that are gathered, although not exclusively. This purpose is balanced with the need to promote other important social values, including the equality of all children in Ontario and privacy of families.

**80** The parens patriae jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or welfare.

**86** According to the government, there is a legislative gap when a situation is not contemplated by legislation, not when a deliberate policy choice is made in drafting legislation. The government argues that the legislature did contemplate the circumstances of non-biological parents in drafting the VSA and excluded them noneth

**102** conclude that the potential "gap" in the CLRA is that it does not provide for a declaration of

parentage of two parents of the same sex

**103** If I am wrong and the government intended to exclude lesbian co-mothers from declarations of parentage, which are about social rather than biological parentage, then the government had a discriminatory intent.

#### [*King v Low, [1985] 1 SCR 87*](https://www.canlii.org/en/ca/scc/doc/1985/1985canlii59/1985canlii59.html?autocompleteStr=king%20v%20low&autocompletePos=1) *-* gave baby up for adoption, lost rights to baby

* Aboriginal woman gave child up for adoption as family wouldn’t support her having a child out of marriage.
* Adoptive parents also aboriginal.
* Signs adoption consent, relinquishes to adoptive parents.
* A few days later she wants to change her mind. Her family states they will support her in parenting. Tries to get child back.
* Judge stated she was unfit as she had given up child at first. Ultimately child stayed with adoptive parents.

#### *Buist v Greaves*, 1997 OJ No 2646 – 2nd mother declaration of parentage not granted, even though intended parent

* Greaves is a lawyer, sleeps with her law students. **Judge calls her a perverted adult**.
* Buist and Greaves plan a child together through AI, relationship broke up
* Buist wanted declaration of parentage but was not granted.
* Court only recognized her as an important relationship in child’s life
* Sole custody to birth parent.
* **Same case had happened in 1994 *Low v Low* with a heterosexual couple however in that case the non-involved father was granted parentage status.**

#### Recognition of lesbian mothers:

* Ontario very recent only (2006 for spousal support but not parentage)
* Quebec 2002
* BC 2013
  + In a well-functioning family prior to these dates, 2 mothers could deal with legal hurdles by using the recognized parent for legal issues
  + In a non-functioning / break up family, the non-gestational parent had NO legal rights, no matter the intention at time of conception, the parenting relationships, etc. Their intention was not respected and their relationships with child were not recognized in the law.

#### Alberta v Doe ALBERTA CA

* Woman planned to be single mother, her male partner did not want a baby, they lived together. She got pregnant through AR, they had agreement not to co-parent, Court of Appeal in Alberta decided that it was not possible to be a single parent in the circumstance because there was a male figure in the household.

Parenting in law is not the same as parenting in day to day life

* Law is a normative role in constructing relationships, but cannot describe the actual relationships parents and child have together
* Establishing parenting in law is assessing best interests of the child
* You have to have access to the child in order to build a relationship with the child

## 

## Surrogacy and Comparative Provincial Law

### How surrogacy is regulated at the provincial level

* + - **Federal laws don’t deal with parentage**. But they regulate the criminal powers 91(27) and marriage and divorce 91(26)
    - **Provinces deal with parentage 92(13) property and civil rights**
      * No uniformity between provinces
      * Some similarities but also important differences!
      * Different approaches to specific rules tells us about the underlying principles of parent-child relationships in each province

#### Assisted Human Reproduction Act, SC 2004, c 2 ss 3, 7, 8, 10

**S 3** provides definitions for ovum, sperm, embryo and in vitro embryo (Donor)

**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 assisted reproduction procedure and derived from the genes of a donor or donors. (*mère porteuse*)

**S 6(1)** no payment to surrogate

**S 6(2)** no acting as intermediary or arrange surrogacy

**S 6(3)** no payment to intermediaries

**S 6(4)** minimum age for surrogate 21+

**S 7** prohibits commercialization

**S 7(1)** no person shall purchase offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor

**S 7(2)** no person, shall

(**a)** purchase offer to purchase or advertise for the purchase of an in vitro embryo or

**(b**) sell offer for sale or advertise for sale an in vitro embryo

**S 7(3)** other reproductive material

**S 7(4)** exchanges included

**S 8** use of reproductive material w/o consent \*\* SEE ALSO REGULATIONS for CONSENT \*\*

**S 8(1)** No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.

**S 9** no gametes from person <18

**S 12 NOT IN FORCE** payment

#### S 8.2 FLA Alta

**8.2(1)** Application may be made that surrogate is not a parent of child born of AR

**8.2(2)** surrogate, intendended parent, or spouse of intended parent may make application

**8.2(6)** court will make the declaration if satisfied that child was born as result of AR by donor gametes or ambryo provided by intended parent

**8.2(7)** person(s) declared parent by declaration is a parent for all purposes from time of birth

#### Ss 6(2), 10, 11 CLRA.

**6(1)** birth parent is parent by law

**6(2)** EXCEPT when parentage relinquished by surrogate or declaration of court

**10(2) Surrogacy agreement in effect if**

* + 1. surrogate and one or more persons enter into agreement before child is conceived
    2. Surrogate and intended parent get legal advice before entering agreement
    3. no more than 4 intended parents
    4. 4 child conceived through AR (not IC)

#### FLA BC Surrogacy

**20** definitions

**23(1)(a)** person is child of his or her parents

**24(1) rules re donors (a)** donor not automatically parent **(b)** may not be declared parent **(c)** unless determined to be parent

**27 (1)** parentage if AR rules applies IF: (a) AR, (b) no surrogacy, no sex

**27 (2) child born through AR - child’s birth mother is the child’s parent**

**27 (3) spouse of child’s birth mother also parent unless (a) did not consent or (b) withdrew consent**

**29(1)** surrogate is birth mother who is party to an agreement

**29(2)** agreement is

1. written, before child is conceived through AR, between surrogate and intended parent(s) and
2. includes: that birth mother is not parent, will surrender the child to intended parent(s), and that intended parent(s) will be the childs parents

**29(3)** on birth, intended parent(s) are the parents if:

1. no party withdraws before child conceived
2. at birth, birth mother surrenders child and IP takes into their care

**31 orders declaring parentage**

#### Arts 538-542 CCQ.

|  |
| --- |
| **538 parental project**– 1 woman (not 1 man) or a couple intending to become parents, requires 3rd party who contributes genetic material |
| **538.1**: Act and Possession needed for proof |
| **538.2(1)** Donor does not equal parent BUT  **538.2(2)** If procreation occurs through sexual intercourse, even in the paradigm of a parental project, the donor has 1 year to make a claim of parentage – biology trump the rights of other |
| **538.3** presumption of parentage (not *paternity*) applies to de jure spouses (male or female) |
| **539.1** mother and 2nd mother 🡪 2nd mother is assumed to be the “father” in any law that refers to “father”  2 parents only (can be 2 moms or hetero) |
| **540** Liability of someone who withdraws from parental project after birth (you are responsible financially, but not obligated to take care of child)  because no biological ties you cant make them liable any other way |
| **541 Surrogacy agreements** are null, not enforceable in law  Filiation of the child is established through filiation by blood (father if he contributed genetic material) and filiation by adoption (using 555 special consent to adoption |

**In Ontario Quebec and BC, being a donor does not give you rights of a parent 538.2 CCQ, s 24 BCFLA, s 5 CLRA**

#### [*Adoption 1445*, 2014 QCCA 1162](https://www.canlii.org/en/qc/qcca/doc/2014/2014qcca1162/2014qcca1162.html?autocompleteStr=adoption%201445&autocompletePos=1) \* Used s 555 CCQ for special consent adop/surrogate

* **Gestational surrogate**: heterosexual couple, donor egg, father’s sperm, friend carrying child
  + Filiation of father not contested
  + Filiation of second parent (mother, intended, no genetic tie) – what is her status?
  + Friend was paid something for being a surrogate and for agreeing to consent to the spouse adopting the child
  + Paid $2000 for the egg, $9000 for the surrogate expenses, not enough receipts
  + Question was it altruistic surrogacy or commercial surrogacy?
* **Parties wanted to use special consent adoption to have A listed as mother**
  + Birth certificate, B was listed as father, C was listed as mother
  + **I**f not using special consent, must use general consent adoption – you don’t have a choice over who gets to adopt the child
* **Trial** 
  + judge was concerned that the surrogate and egg donor had been paid
  + did not allow the special consent for adoption as the consent was vitiated by the illegal payment; therefore, they had to use traditional adoption process
* **Appeal**
  + They appealed wanting to use special consent process.
  + **Concern**: is it in the best interest of the child to not be adopted by the parents who are raising them?
  + **Issue around payment** – Appeal judge felt a) regulation around payment was not yet in force b) the expenses were reasonable c) lack of receipts reasonable given the circumstances of stress in life, wouldn’t have met evidentiary threshold anyways d) payment or no payment should not have an impact on **S 541** – that contracts are null – so remuneration is not a part of the issue at hand.
  + **Decision** – it isn’t about the contract, its about filiation of the child.
    - Granted S 555 CCQ special consent to adoption to another member of the family (ie non genetic intended mother)
    - Appeal allowed. Special consent adoption of A as mother was allowed.
    - C (surrogate) now had no status – which was the intention of all parties
  + Agreements are not enforceable – but question is does the contract have an effect on the filiation of the child?
    - S 541 CCQ Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null. You cannot contract around the status of the person or filiation.
  + What is the scope of 541 CCQ? If its against public order it is null anyways so why is it there?
    - Scope is unclear. Heated issue in Quebec civil law
    - Tensions in scholarly conceptions – child is not a subject to the contract so cannot be penalized by the actions or agreements of the parents
    - ... the nullity of surrogacy contracts must be upheld. Nullity has the effect of completely eliminating the binding nature of the contract. In so doing, it allows significant uncertainties as to the effectiveness of the agreement to exist, thus dissuading the parties. By giving birth, the surrogate becomes the child's mother. She may then refuse to perform the contract and keep the child without exposing herself to sanctions. Conversely, the intended parents, or at least the intended mother, may never be compelled to comply with their undertaking and to recognize the child or consent to its adoption. **Thus, nullity plays a preventive role, not merely by refusing to condone the practice but by discouraging it to protect what have been called the *a priori* interests of the child.**
  + Didn’t rely on “filiation of children born of AR” only used filiation of children born by blood
  + Its not because there is a contract that the whole point of the agreement is neutralized. The CCQ doesn’t actually state that people can’t agree on intention of parentage, just the contract itself is null.

#### [*Family Law Act (Re)*, 2016 BCSC 598](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc598/2016bcsc598.html?resultIndex=1)

Facts: Verbal agreement with surrogate, had used for 1st child also. Used surro egg, father sperm, gave to IPs

Issue: can she give up right to child when they didn’t have a written agreement in place per s 29?

Decision: Yes! The intention is more important than the exact wording of the legislation

## Adoption and Child Protection

**History and context of adoption, and stats**

* Aimed to be a mechanism of child protection
* Targets: unmarried mothers, apprehended Aboriginal children
* Created a fiction of legitimacy: Adoption was mostly kept secret, children didn’t know they were adopted, tried to meet a “normative family” standard
* Children weren’t given the same rights – were considered illegitimate, could face differential treatment

#### BC FLA Parentage if adoption

**25**  If a child is adopted, sections 26 to 30 of this Act do not apply and the child's parents are as set out in the [Adoption Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96005_01).

#### ADOPTION ACT [RSBC 1996] CHAPTER 5

**1**  (1) **"aboriginal child"** means a child

(a) who is registered under the [Indian Act](http://laws-lois.justice.gc.ca/eng/acts/i-5/) (Canada),

(b) who has a biological parent who is registered under the [Indian Act](http://laws-lois.justice.gc.ca/eng/acts/i-5/) (Canada),

(b.1) who is a Nisga'a child,

(b.2) who is a treaty first nation child,

(c) who is under 12 years of age and has a biological parent who

(i) is of aboriginal ancestry, and

(ii) considers himself or herself to be aboriginal, or

(d) who is 12 years of age or older, of aboriginal ancestry and considers himself or herself to be aboriginal;

**"aboriginal community"** means an aboriginal community designated by the minister;

**"administrator"** means the chief executive officer of an adoption agency or another officer of an adoption agency designated by the agency for the purposes of this Act;

**"adoption agency"** means a society licensed in accordance with the regulations;

**"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](http://www.bclaws.ca/civix/document/id/complete/statreg/11025_01);

**"caregiver"** means a person with whom a child is placed by a director or an administrator and who, by agreement with the director or the administrator, is authorized to carry out the rights and responsibilities, under the agreement, of the director or the administrator;

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

**"Convention"** means the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption;

**"court"** means the Supreme Court of British Columbia;

**"designated representative"**, when used in relation to the Nisga'a Lisims Government, an Indian band, an aboriginal community or a treaty first nation, means a representative designated in accordance with the regulations;

**"direct placement"** means the action of a parent or other guardian of a child placing the child for adoption with one or 2 adults, none of whom is a relative of the child;

**"director"** means a person designated as a director of adoption under section 76.1 (1) (a) and the Provincial director;

**"director of child protection"** means a director designated under s 91 of the [Child, Family and Community Service Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96046_01);

**"extraprovincial agency"** means an official or agency located outside British Columbia and having substantially similar powers as a director in respect of guardianship;

**"Indian band"** means a band as defined in the [Indian Act](http://laws-lois.justice.gc.ca/eng/acts/i-5/) (Canada) and includes a band council;

**"openness agreement"** means an agreement made under section 59;

**"parents' registry"** means the registry referred to in section 10;

**"post-placement report"** means a report to court prepared by a director or an adoption agency;

**"Provincial director"** means the person designated as the Provincial director under section 76.1 (1) (b);

**"registrar general"** has the same meaning as in the [Vital Statistics Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96479_01);

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

**"treaty first nation"**, in relation to a treaty first nation child, means the treaty first nation of which the child is a treaty first nation child.

**Purpose of the Adoption Act**

**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.

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

**Residency requirements for applicants**

**29(3)** must be a resident of BC to apply to adopt

**Principles applicable to all adoptions**

**35(1)** court may make adoption order if (a) child has resided with applicant 6 mos (b) in child’s best interest to be adopted

**Placement and non-placement adoption**

“[63] The Act appears to have **one set of provisions** that govern circumstances where a child is placed for adoption **by authorized persons or an agency** and another overlapping set of provisions that govern circumstances where the child h**as not been placed for** adoption. I shall refer to these as “placement adoptions” and “non-placement adoptions” respectively. [...]” MM v TB 2017 BCCA 296 at 63

**LOCAL INFANT**

* Voluntary placement
* Used agency
* Child born in BC
* Birth parent chooses and approves the placement of child with prospective adoptive family
* Young baby, decided usually in pregnacy
* Some level of openness in this adoption kind, some contact with birth family is possible depending on the order of the court etc

**INFANTS ACT**

Who can consent to adoption of children >12 - <19?

* Infants Act sets out duties and obligations of guardians in decision making on adoption of these children

**Continuing Custody Order**

* Made by a judge in best interest’s of child
* Ministry is permanent guardian of the child
* Happens in extreme cases
* Effect is the loss of all parental and guardianship rights by the parents

#### Who can place a child, with whom and what are the different types of placement

**Placement vs direct placement (private adoption) MM v TB, 2017 BCCA 296**

[67] The Act does not define “placement”. It does define “direct placement” as “the action of a parent or other guardian of a child placing a child for adoption with one or 2 adults, none of whom is a relative of the child.” Private adoption – parents place child with non-kin other family, not through director

[68] The term “placement for adoption” has been interpreted by the Ontario courts as the physical placement of the child with the prospective adoptive parent(s) for the clear and intentional purpose of adoption[...] Under our statute, the term “placement” is always used in the context of “for adoption”. In M.S.H., the Court stated that there can be no room for speculation as to the intention of the parties. I agree. Every step of the adoption process must be clear and unambiguous where placement for adoption is a key aspect of a plan for a permanent arrangement that is in the best interests of the child.”

**4(1)** child can be placed by (a) director (MCFD) (b) adoption agency (c) parent/guardian by direct placement (d) parent placed with a relative

#### Consents to adoption (dispensing and revoking) who and how

**13(1)** Consent must be provided by: **(a)** the child, if 12 years + **(b)** the child's parents **(c)** the child's guardians.

**13(2)** Consent of a biological father who is not presumed to be the child's biological father is not required unless he:

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

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

**13(3) Birth Parent consent not mandatory if 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 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.

**13(4) Birth Parent consent not mandatory** **If a child who has been adopted is to be adopted again**, the consent of a person who became a parent at the time of the previous adoption is required, instead of the consent of a person who ceased to have any parental rights and responsibilities at that time.

**Birth mother's consent**

**14** Birth mother cannot consent to adoption until child is 10 days old

**Form of consent**

**16 (1)** must be on proper form occurs in Supreme Court of BC

**Child's consent**

Under 7 no consent or child view needed

**30 and 32**  between 7-12 child’s views heard and considered, but their consent not required

and s 211 of FLA – requirements as to the contents of the report on the child’s view

**13** 12 and over requires child’s consent

**Court dispenses consent**

**17** In some situations the court may decide that consent if: (a) person not capable of consenting (b) not able to reach the person to give consent (c) person has abandoned, deserted, child, is not capable of caring for child, or has not made reasonable efforts to meet obligations to the child

LINK TO child protection, adequacy or fitness of parents, reasonable standard = fact based assessment

A court is denying parental rights in this case, there is a strict test where the parents aren’t asked about their consent to adoption - For more on best interest of the child: S 3 Adoption Act

**Revoking consent ss 18-22 Adoption Act**

**Who? Birth mother or court**

**When: depends (who)**

**How: in wiritng and received within specified time period**

**18 Revocation of consents before placement**

**18(1)** BEFORE child placed - a person who consented may revoke consent in writing, and received by director of agency

**18 (2)** if revoked, must alert anyone else who consented to the adoption

**18 (3)** if revoked, must return child to person who consented to adoption then revoked ASAP

**19 Revocation of consent within 30 days of birth**

**19 (1)** birth mother can revoke consent within 30 days if (a) in writing and (b) received by director or agency

**19 (2)** if revoked, must alert adoptive parents right away

**19 (3)** if revoked, must return child to birth mother ASAP

**20** A **child** (<19) can revoke their consent – does not need to be in writing – can be at any time. (However remember consent is only necessary for a child over 12, but between 7-12 the voice of the child needs to be considered). \*\* Fact based analysis, considered in light of all circumstances

**22** **Court can revoke consent after placement**

**22 (1)** after placement, court can only revoke consent in accordance with s 19 20 or 21

*dispensing means you don’t have to ask for parents consent*

*revoking means you are disallowing a parents consent*

**Adoption order -** Applies to placement and non-placement adoptions (almost all that happen in BC

**35 (1)** Court can made adoption order after post-placement report if

(a) child has been with family for 6 mos and (b) its in best interest of the child

**35 (3)** Court can alter or dispense with the residency requirement after considering recommendation of agency

**Effect of Adoption order**

**37 (1)(a)** Child is no longer that of the birth parents, but is now child of the adoptive parent

**37 (1)(b)** Adoptive parent is the parent of the child

**37 (1)(c)** Parents cease to have any rights or obligations including child support with respect to the child

**37 (2) EXCE**PTION **2nd parent adoption wherein the parent doesn’t lose the rights, just ADDS a new parent joint with first parent**

**38 (1)** Contact and access stop – BUT **38 (2)** Court may determine some contact is ok, in the child’s best interest

**37 (6)** Property interest continue **BUT** general understanding is no inheritance anymore

**37 (7)** Aboriginal rights continue, status not affected by adoption

#### MM v TB, 2017 BCCA 296 – leave to appeal to SCC was dismissed in Feb 2018 \* Ab child heritage / Adoption

**Facts**:

* The appellant is birth mother of a 10 yr old Aboriginal child who was legally adopted by the respondents.
* The maternal grandmother became guardian shortly after birth, left him in the care of the respondents for respite care when he was 14 months old and for full-time care when the child was 20 months old. The child has lived with the respondents continuously since then.
* In Aug 2011, respondents obtained custody and guardianship of child and thereafter applied to adopt child.

**Trial**:

* Judge granted the adoption order, finding that it was in the child’s best interest.

**CA Appeal**:

* **The birth mother appeals the adoption order on the basis that the trial judge erred in law by failing to properly weigh s. 3(2) of the Adoption Act**, which requires the judge to consider the importance of preserving the child’s Aboriginal heritage and cultural identity as a factor contributing to his best interests.

**Held**: Appeal dismissed.

**Reasons: The judge did not err in interpreting s. 3(2) of the Act. This is ONE factor in the Best Interest assessment.**

* 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) Best Interests of Child** 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”.
* In this case, the child had a strong emotional bond with the respondents’ family, including his two siblings, would likely suffer traumatic harm in the short term and lasting emotional harm in the long term if removed from their family, and wanted to stay with the respondents with whom he identified as his mother and father, “forever”.
* The judge properly weighed the evidence and did not err in her consideration of s. 3(2) in determining that it was in the best interests of the child to make the adoption order.

**Confirms the possibility of a non-placement adoption in BC**

Para 62 and on describes the AA scheme in BC

[15] With respect, I am unable to agree with the birth mother’s interpretation of s. 3(2) of the *Act.* First, 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. Neither do the words in s. 3(2), nor the context of the *Act,* allow for an expanded interpretation beyond the plain meaning of the text of the provision. Second, I am of the view that the judge’s consideration of s. 3(2) raises a question of mixed fact and law for which the standard of review is deferential. Last, even if the birth mother’s interpretation of s. 3(2) were to be accepted, the evidence establishes that the adoptive parents have done everything they could reasonably have done to ensure that the child learns about, participates in, and appreciates the significance of his Aboriginal heritage and culture. The evidence is clear that the child knows about his particular Band and First Nation, and speaks with pride about being Aboriginal

#### Racine v Woods (Mossman excerpts)

### Use statutory rules in each province – don’t assume de facto adoption exists in other provinces other than where this case came form

**Law focusses on child’s best interest, s. 3(1) of the AA, not the interest of those who gave birth**

* Indian child, two other child were with their father
* Mother had alcohol issues, couldn’t care for child
* Child apprehended at 6 wks of age
* Mother consented to becoming ward of child welfare for one year
* Mother remarried, had other 2 kids with her, child was returned
* Foster parents wanted child back, had concerns about how being raised
* Child came and went from mother to foster parents when mother unable to care
* Then mother demanded child back and fosters said no
* Mother tried to abduct child from school

**Trial**: Mother applied for custody (dismissed) and fosters applied to adopt (granted)

**CA**: adoption overturned, made ward of court, gave custody to fosters. Concerned re cutting off ab heritage

**SCC**: **appeal allowed, adoption reinstated**

* CA judges had put “entirely different interpretations on the evidence from that of the trial judge”, which was not their role!
* Nothing improper about fosters acting as if de facto adoption had occurred, child was abandoned w/ them
* Finding of abandonment however not necessary for trial judge’s decision
* S 103(2) dispenses with parental consent in the case of de facto adoption
* A child is not a chattel in which parents have a proprietary interest – they are human and are owed serious obligations
* Inter-racial adoption is an accepted phenomenon in our pluralistic society
* Most important is two loving parents!

**In Both Racine and MM v TB**

* Values are in high conflict
* Child’s best interests at play, decisions need to be made
* No second parent involved – Would it have been different in other cases?

### Indigenous Foundations Arts UBC “Sixties Scoop” – 1961-1980s

Term refers to the mass removal of Aboriginal children from their families into the child welfare system, in most cases without their families or bands

**Impacts of the Sixties Scoop**

* Children growing up in conditions of suppressed identity and abuse tend eventually to experience psychological and emotional problems. For many apprehended children, the roots of these problems did not emerge until later in life when they learned birth family or their heritage. Social work professor Raven Sinclair describes these experiences as creating “tremendous othe development of a strong and healthy sense of identity for the transracial adoptee. ” Feelings of not belonging in either Euro-Canadian society or in Aboriginal society can also create barriers to reaching socio-economic equity.

## Multiple Parentage

**BC - S 30 FLA Parentage if other arrangement**

**30(1) ONLY IF ASSISTED REPRODUCTION (NO SEX)**

Applies if: **30(1)** written agreement **(a)** made before child conceived **b**) made between IP and birth mother who agree to be a parent together, spouse of birth mother, donor who wants to parent

Generally a conjugal couple (intended parents) + 1

**30(2)** once child is born, the parents are the parties to the agreement Just use Declaration of Birth form to name all the parents (up to 5), declaration by court up to 5 using FLA s 31

**30(3)** if a part withdraws before child is conceived, agreement is revoked

**ONTARIO - S 9-11 CLRA**

**9(1) pre conception parentage agreement**

**9(2) Section applies if pre-conception parentage agreement in place:**

**9(2)(a)** only up to 4 parties to the agreement

**9(2)(b) Intended b**irth mother is not a surrogate and is party to the agreement

**9(2)(c)** can include sexual intercourse, the “donor” must be party to the agreement though! Meaning must be parent

**9(2)(d)** if through AR or donor insemination, the spouse of the birth parents is part of the agreement

#### AA v BB \* Expanded understanding of parentage, 2nd mother declared 3rd parent of child

**Still important today:**

* Lesbian couple + donor, all wanted to be involved in parenting
* Expanded understanding of parentage
* Confirmed the importance of declaration of parentage
* Happened just after MDR v Ontairo
* Second mother was declared as parent of child

**Facts:** A and C had been in a stable same-sex union since 1990. In 1999, they decided to start a family with the assistance of their friend B who would remain involved in his life. A, B and C all wished to have A's motherhood recognized to give her all the rights and obligations of a custodial parent. A and C did not apply for an adoption order because, if they did so, B would lose his status as the child's parent under the Child and Family Services Act, R.S.O. 1990, c. C.11. Instead, A brought an application for a declaration that she was the child's mother.

**Trial: Application dismissed**. Judge would have granted the order sought but found that he did not have jurisdiction to do so, either under the Children's Law Reform Act ("CLRA") or through exercise of the court's inherent parens patriae jurisdiction.

**Appeal:** **Application successful.**

**Reasons:**

1. Found application judge had not erred in interpretation of CLRA only permitting single father and single mother.
2. However, **The court's inherent *parens patriae* jurisdiction may be applied to a) rescue a child in danger or b) to bridge a legislative gap. A legislative gap existed in this case. The purpose of the CLRA was to declare that all children have equal status. The gap was not intended and should be fixed.**

**Discussion:**

* At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the Legislature of the day.
* **Present social conditions and attitudes have changed**. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA's legislative scheme. Because of these changes, the parents of a child can be two women or two men. **They are as much the child's parents as adopting parents or "natural" parents.**
* The CLRA, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide. It was contrary to D's best interests that he was deprived of the legal recognition of the parentage of one of his mothers. There was no other way to fill this deficiency except through the exercise of the parens patriae jurisdiction. **The legislative gap was not deliberate**. There was no doubt that the legislature did not foresee the possibility of declarations of parentage for two women. The gap in the legislation was revealed by changing social conditions and medical knowledge.
* **There was nothing in the legislative history of the CLRA to suggest that the legislature made a deliberate policy choice to exclude the children of lesbian mothers from the advantages of equality of status accorded to other children under the Act. A was entitled to a declaration that she was the child's mother.**

## Step-Parents

* Standing in place of a parent CREATES obligations but does not create formal status of parents
* *In loco parentis*

**Divorce Act s 2(2) “child of the marriage”**

For the purposes of the definition child of the marriage in subsection (1), a child of two 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.

**FLA ss 146, 147(4), 147(5)**

* **146** "**child**" < 19 years of age or older but unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of his or her parents or guardians;
* "**guardian**" does not include a guardian (a)who is not a parent, and (b)whose only parental responsibility is respecting the child's legal and financial interests;
* "**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**" spouse of the child's parent and lived with the child's parent and the child during their life.

**Step-parent Case Law Ratios:**

* **Once a person is found to “stand in the place of a parent” they cannot unilaterally terminate the relationship to avoid responsibility for support** Shaw v Arndt 2016 BCCA 78
  + Broad interpretation – reflects te purpose of the DA to represent best interests of the child and lasting parental relationships Chartier v Chartier [19991] 1 SCR 24
* **Test** if person stands in place of parent is dependent on the nature of the relationship btwn parent and child, including but not limited to: Chartier v Chartier:
  + 1. Whether the child participates in the family as would a bio child
    2. Whether the person provides financially for the child
    3. Whether the person disciplines the child as a parent
    4. Whether they represent to the child, family, or beyond that the person is a parent to the child
    5. The nature or existence of the childs relationship with the absent bio parent
* **An unsatisfactory relationship** or absence of relationship between stepparent and child does not terminate their obligation to pay child support Shaw v Arndt (or breakdown of relationship Chartier v Chartier)
* Existence of a parental relationship is determined **at the time the family was functioning as a unit**, not after separation Chartier v Chartier

#### Shaw v. Arndt [2016] B.C.J. No. 298  (BCCA) \* Step-parent liable to support child when bio parent can’t

* Stepchild going to university, stepparent needed to pay for it (even though he was attending at a slow pace)
* A stepparent may be liable to support the child when the biological parent is unable to or unable to do so

fully

* The quality of the parent-child relationship becomes relevant only in the most egregious circumstances otherwise it should have no bearing on the need to pay child support

#### Chartier v Chartier 1999 SCC \* step parent not i*n loco parentis* if second bio parent in child life \* cannot unilaterally withdraw from role as parent

* If the biological parent has an active role in the child’s life, this militates against a finding of *in loco parentis*. But what if they are a 3rd parent? 4th?

**Facts:** The respondent played an active role in caring for and was a father‑figure for his wife’s daughter from a previous relationship.  The parties discussed, but did not proceed with, the husband’s adoption of the child but amended her birth registration to indicate, falsely, that the husband was the child’s natural father and to change her name to his.  In a consent judgment in proceedings under*The* *Family Maintenance Act*, the husband acknowledged the child as a child of the marriage and was granted access to her.  The judgment, however, was silent as to her maintenance.  In subsequent divorce proceedings, a request was made for a declaration that the husband stood in the place of a parent to the child.  The husband contested the claim.  An interim order ordered him to pay monthly support for the child, suspended his access until a further order of the court and ordered a report concerning access.  That report recorded the husband’s desire to sever his relationship with the child.

**Trial**: Husband had repudiated his parental relationship with the child and was not obligated to pay support for her.

**CA**: dismissed the wife’s appeal for support for the child.

**SCC**: **At issue here is under what circumstances, if any, can an adult who is or has been in the place of a parent pursuant to**[**s. 2**](https://qweri.lexum.com/calegis/rsc-1985-c-3-2nd-supp-en#!fragment/sec2)**of the**[***Divorce Act***](https://qweri.lexum.com/calegis/rsc-1985-c-3-2nd-supp-en)**withdraw from that position.**

* **A person cannot unilaterally withdraw from a relationship in which he or she stands in the place of a parent.**
* The existence of the parental relationship under [s. 2(2)](https://qweri.lexum.com/calegis/rsc-1985-c-3-2nd-supp-en#!fragment/sec2subsec2) of the [*Divorce Act*](https://qweri.lexum.com/calegis/rsc-1985-c-3-2nd-supp-en) must, however, be determined as of the time the family functioned as a unit
* **The test for whether or not a person stands in the place of a parent should not be determined exclusively from the perspective of the child**
  + Attention must be given to the representations of the step‑parent, independently of the child’s response.
  + A determination of whether a person stands in the place of a parent must take into account all relevant factors, viewed objectively.
  + The court must determine the nature of the relationship and do so by looking at a number of factors, including intention (formal expressions and inference from actions)
    - The following factors should be considered in this assessment:
    - **Intention**: both those expressed formally and inferred from conduct.
    - A step parent cannot contract out of an *in loco parentis* relationship from the onset.
    - **Participation in the extended family**: does the child participate in the extended family in the same way as would a biological child?
    - **Financial support**: Does the stepparent provide financially for the child?
    - **Discipline**: Does the person discipline the child?
    - **Holding out**: Does the person represent to the child/the family/the world, either explicitly or implicitly, that he or she is responsible as a parent to the child?
    - **Role of biological parent**: What is the nature or existence of the child’s relationship with the non-custodial biological parent?

**Once it is shown that the child is to be considered, in fact, a child of the marriage, the obligations of the step‑parent towards him or her are the same as those relative to a child born of the marriage** with regard to the application of the [*Divorce Act*](https://qweri.lexum.com/calegis/rsc-1985-c-3-2nd-supp-en).

* + The step‑parent, at this point, not only incur obligations.
  + He or she also acquires certain rights, such as the right to apply eventually for custody or access.

**Not every adult‑child relationship will be determined to be one where the adult stands in the place of a parent.**

* Every case must be determined on its own facts and from the evidence and it must be established that the adult acted so as to stand in the place of a parent to the child.

**The concern that a child might collect support from both the biological parent and the step-parent was not a valid one.**

* The contribution to be paid by the biological parent should be assessed independently of the obligations of the step‑parent.  The obligations of parents for a child are all joint and several.
* The obligation to support a child arises as soon as that child is determined to be “a child of the marriage”.

# Family Breakdown

### The Law Society of BC, Report of the Family Law Task Force (2008)

*“Family is the core relationship that binds human beings together: it informs our understanding of self, and our relationships with others, and has a profound impact on how communities form and function. Family constitutes the private sphere of our lives, yet is interwoven in profound ways with our public lives. Because of this, family has the capacity to affect and influence virtually everything we do.*

*Family, perhaps more than any other relationship, touches the emotional heart of who we are. As such, the dissolution of the family unit can have profound emotional, economic, private and public ramifications. Family, more than any other social relationship, often involves the interests of people who are particularly vulnerable: namely, the elderly and children.”*

##### Terminology

Supreme Court Family Rules claimant and respondent (2010), plaintiff and defendant (pre-2010)

Provincial Court applicant and respondent

## Jurisdiction of Divorce and Family Matters

#### ss 192-193 *FLA* *BC*

**SUPREME COURT**

* Divorce, custody, access, child and spousal support, variation of orders, foregin and extraprovincial orders
* Division 1 – Jurisdiction of court generally
* **192(1)** subject to the divorce act the SC has jurisdiction in all matters under this act
* **192(2)** subject to the divorce act the SC continues have jurisdiction in all matters respecting marriage and divorce
* **192(3)** inherent parens patriae jurisdiction vested with SC

**PROVINCIAL COURT**

* **193(1)** all FLA matters
* **193(2)** but cannot do (2a) parentage (declaration or order of parentage), 2(b) property division, pension division, childrens property
* in some instances they could make a parentage declaration – when the parties are there in the prov court for another reason (ie child support)

#### Divorce under the *Divorce Act*

**NOTE:** **Residency requirements under the *DA***

**Jurisdiction in divorce proceedings**

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

**8(1)** Court may grant divorce on the ground that there has been a breakdown of the marriage

**8(2)** **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 spouse against whom the divorce proceeding is brought has, since 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 intolerable the continued cohabitation of the spouses.

#### Divorce under Civil Marriage Act

**Part 2 of the *Civil Marriage Act* deals with divorce of non-resident.**

**6** jurisdiction is Supreme Court

**7** divorce can be granted in the jurisdiction marriage occurred if **(a)** breakdown of marriage, living serparte x 1 year **(b)** neither spouse resides in Canada and **(C)** each of the spouses has resided in an area x 1 yr that doesn’t recognize the marriage as valid

## Marriage-like Relationship in *FLA*

**Spouses and relationships between spouses - FLA**

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

1. is **married** to another person, or
2. **has lived with another person in a marriage-like relationship**, and
   1. has done so for a continuous period of at least   2 years, or

  (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**

#### Weber v. Leclerc, 2015 BCCA 492 \* Marriage-like relationship DEFINED: intention to be in relationship critical

**Facts**: Couple lived together, separated, disagreed whether they had been in “marriage like relationship” per FLA. Ms Leclerc wanted them to NOT be found spouses

**Trial**: summary trial found they WEREin marriage like relationship (IE common law married)

**Appeal**: Agreed with trial, applied correct test

**RATIO**: **Marriage like relationship:**

* **does not require economic interdependence** (not an essential characteristic of marriage) Takacs, Weber v Leclerc
* Assessment is of nature and quality of existing relationship
* **Intention to be in a relationship similar to marriage is the critical piece,** not the intention to be bound by a statutory regime (Takacs)
* Also requires evidence of their interactions and behaviours to determine whether they acted married-like
* **There is no checklist to determine whether or not a relationship is marriage like, it is a fact based assessment**
* **Question of mixed fact and law that requires a broad approach** Austin
* *“*though economic dependence or independence exists in many marriages, it would be difficult to characterize such dependency as being an essential characteristic of marriage”

**Discussion**:

* ***Refers to Austin v Goerz and Takacs v Gallo****:* **determining whether it is marriage like relationship requires aholisticapproach. the presence or absence of any particular factor cannot be determinative. ‘there is no checklist of characteristics that will invariably be found in all marriages’.**
* “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”

#### Roach v Dutra Separate homes but still marriage-like relationship (attn: FRA)

**Facts**: Mr Dutra didn’t want to pay support, wanted Ms Roach found not a spouse. Had lived together but kids didn’t get along so lived in separate homes afterwards, that they co-owned on title.

**Trial**: found to be marriage-like, even though separate homes they had intention to be together in marriage like relationship

**Appeal**: **no evidence of separation, found same as trial judge**

##### The Molodowich Test to determine if marriage like relationship \*\*(historical – 1980 \*\* don’t apply it only as it is not really used today)

Shelter, Sexual and personal behaviour, Services, Social, Societal, Support ($), Children

## Separation

#### Traditional indicators of separation

Oswell v Oswell lays out traditional indicators of separation but not a checklist approach

(1) **There must be a physical separation**. Often this is indicated by the spouses occupying separate bedrooms (…). Just because a spouse remains in the same house for reasons of economic necessity does not mean that they are not living separate and apart

(2) **There must also be a withdrawal by one or both spouses from the matrimonial obligation** with the intent of destroying the matrimonial consortium

(3) **The absence of sexual relations is not conclusive** but is a factor to be considered

(4) Other matters to be considered are the **discussion of family problems and communication between the spouses;** presence or absence of joint social activities; the meal pattern

(5) Although the performance of **household tasks** is also a factor, help may be hired for these tasks and greater weight should be given to those matters which are peculiar to the husband and wife relationship outlined above

#### McGrail v McGrail, 2016 BCSC 104 \* Intention is key to separation, need not be mutual

[39] **Intention is key to the analysis. It need not be a mutually shared intention**

[40] In *Nearing v. Sauer*, [2015 BCSC 58 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc58/2015bcsc58.html), Madam Justice Fleming stated (para. 54) that **the case law also requires that the spouse who wishes to separate take action consistent with that intention**.

[41] After referring to other authorities Fleming J. stated:

I do not interpret the authorities as requiring the spouse who intends to separate to demonstrate absolute certainty that the marriage is at an end. Such a view would be inconsistent with the express language of [s. 3](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-3-2nd-supp/latest/rsc-1985-c-3-2nd-supp.html)(b)(ii) of the [*Divorce Act*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-3-2nd-supp/latest/rsc-1985-c-3-2nd-supp.html). **It is enough to communicate an intention to separate, accompanied by actions consistent with that intention, assuming, of course, there is a form of physical separation between the spouses.** (para. 59)

#### Separation under the FLA

Under the BC FLA, separation is considered to be effective when one of the spouses, with an intention to separate, communicates their intention to separate permanently (FLA 3(4)(b)(i)) and also take an action that demonstrates their intention to separate permanently (FLA 3(4)(b)(ii). The intention to separate does not have to be mutual (McGrail). Separation can be effective despite the spouses still living in the same residence (FLA 3(4)(a)). The most important part is that the intention to separate is there, and that it is communicated and acted on accordingly.

**Indicators of Separation:** There is no specific checklist to indicators of separation, it is a fact specific look at the various traditional indicators of separation including physical separation, withdrawl from the matrimonial obligations and household tasks, absence of sexual relations, and methods of communications, sharing meals, etc between the spouses. None of these are exhaustive or conclusive but are factors to consider (Oswell).

**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.

WOLFMAN AND CALVERT TEST

* Intention does not have to be mutual McGrail
* Indicators of separation, but not a checklist approach Oswald

#### Separation in the divorce act

***DA***

**8(3)(a)**  deemed separated for any period they live apart and one of them had intention to separate

**8(3) (b)** its ok to still live together and still be separated IF

* + 1. either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate
    2. resumed cohab not more than ninety days with reconciliation as its primary purpose.

**Separation is important in both the DA and the FLA, but means different things**

* Separation indicates the termination of the relationship under the FLA
* Under the DA, the key determinant is breakdown of the marriage: either by living separate and apart for one year, or by faults (adultery or cruelty). Separation then is the starting point for the period of time that you need to be living separate before you can get your divorce order.

**In both situations: intention is most important, as demonstrated through communication and action**

* Does not need to be a shared intention between the parties
* **Demonstrating intention to separate can be very abstract!**
* It’s not checklists, its nature of relationship and intention to terminate it
* Recommend to client to have some sort of proof or evidence of communication to facilitate the establishment of the date of separation

#### Time Limits

**Both the DA and the FLA recognize that couples may make attempts at reconciliation (DA s 83)(1)** the clock does not restart if you attempt reconciliation

##### Dates of separation are important because

* Influence when a divorce order can be granted
* They demonstrate the time limits have been met
* Calculations for property division

**FLA 198 (1)** Subject to this Act, a proceeding under this Act may be started at any time.

**FLA 198(2)** A spouse may start a proceeding**to divide property or family deb**t, **to divide a pension,** or **for spousal support, no later than 2 years after**,

**(a)**in the case of spouses who were **married**, **the date (i) of divorce judgment or (ii) marriage nullified**

**(b)**in the case of spouses who were **living in a marriage-like relationship**, **the date the spouses separated.**

**FLA 198 (5)** The running of the time limits set out in subsection (2) is s**uspended** while engaged in dispute resolution

#### Capacity to Separate

* **the intention to separate requires the lowest level of understanding** Wolfman-Stotland
* the capacity to form the intention to separate is equivalent to the capacity to enter into a marriage.
* The requisite capacity is not high, and is lower in the hierarchy than the capacity to manage one’s affairs.

## Family Dispute Resolution

"family dispute resolution" 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

(a) **assistance from a family justice counsellor** under Division 2 *[Family Justice Counsellors]* of Part 2,

(b) the **services of a parenting coordinator** under Division 3 *[Parenting Coordinators]* of Part 2,

(c) **mediation, arbitration, collaborative family law and other processes**, and

(d) prescribed **processes**; its an open category, but doesn’t mean it encompasses everything – must be mentioned in a regulation or under this Act

**The FLA places symbolic weight on out of court agreement**

* The theory is that it offers simpler, speedier and less costly ways to resolve post separation disputes, and that these mechanisms will foster the BIC and the relationships of the parents
* The assumption, especially when children are involved, is that relationships do not end, they transform. Our role as dispute resolution professionals is to assist in a positive transformation for the family.
* Can be empowering to the parties, to allow them more options to resolve conflict
* Risks: domestic violence, unequal power between partners

**s 6 Nothing in the FLA stops you from making an agreement with your spouse and sticking to that agreement**

**FLA Part 2: entirely devoted to dispute resolution**

**FLA s 4**: **Purposes of family dispute resolution**

* to ensure parties are informed of options available to them,
* to encourage parties to resolve through agreements and dispute resolution before making applications to court,
* to encourage parents to resolve without using the court, and to make agreements that are in line with the best interests of the children.

**Three divisions:**

* 1. Out of court agreement is the best option (**s 4-9**)
  2. Family justice counsellors (Appointed by a minister)
  3. Parenting Coordinators (Appointed by agreement or court order)
     + Used in high conflict situations involving children

#### Who offers family dispute resolution?

* Defined in S 1
* (a) a **family justice counsellor**; s 10 for details
* (b) a **parenting coordinator**; s 14 must meet requirements set out in the regulation
* (c) a **lawyer** advising a party in relation to a family law dispute;
* (d) a **mediator** conducting a mediation in relation to a family law dispute, if the mediator meets the requirements set out in the regulations;
* (e) an **arbitrator** conducting an arbitration in relation to a family law dispute, if the arbitrator meets the requirements set out in the regulations;
* (f) a **person within a class of prescribed persons**

**Mechanisms under FLA that promote meaningful / efficient ADR**

* **s 5** *FLA* : Duty to disclose:
  + ”Full and true information” **(s 5(1))**
  + Duty not to use information for other purposes **(s 5(2))**
* **s 6** *FLA:* possible to make agreements, agreements are binding, no consideration required, etc.
* **6(5)** A child who is a parent or spouse may enter into and be bound by an agreement, including an agreement respecting the division of property or debt. Minors <19 have capacity to make their own agreements in their own divorce or separation or their own parenting relationships
* **11 and 13** Confidentiality requirements
  + **Specifies in BC that in some circumstances confidentiality requirement can disappear:**
    1. **If parties consent**
    2. **If parties go to court, the agreement can be used in court**

#### Dispute Resolution professional duties:

**FLA**

**s 8(1)** assess whether **family violence** may be present

**s 8(2)(a)** discuss of the advisability of using various   types of family dispute resolution

**s 8(2)(b)** inform the parties of **available resources** available to assist

**s 8(3)** advise the parties agreements and orders on listed matters related to the children need to be made with the consideration of the best interests of the child

**The dispute resolution professional must certify that these duties under s** **8(2)** **have been fulfilled per s 197 *FLA* prior to any legal action.**

**DA s 9** (duty of legal advisor, reconciliation, mediation, certification)

**DA s 10** (duty of court, ensure reconciliation is not an option)

#### Types of Dispute Resolution and Professionals

##### Family Justice Counsellor

**11** **(1****)(a)** must not disclose information obtained in the course of providing assistance

**12** **(1)** must not be compelled to disclose, or to testify in any proceedin, information obtained by providing assistance

**13 (1)** Parties cannot use information obtained during mediation or negotiation against the other in court

**UNLESS**

**13 (2)** **(a)** the other party consents **(b)** if it’s a report that they both paid for or has expert advice (ie s 211) **(c)** in any circumstance under which the information is compellable by law, or **(d)**t o a written agreement between the parties **(i)** to mediate, or **(ii)** that resolves one or more issues relating to a family law dispute.

##### Mediation \*\* Must ensure that they advise clients to seek legal advice

Voluntary process

**Mediator must meet requirements of s 4 *Family Law Act Regulation*, B C Reg 347/2012; benefit: insurance!**

* Lawyers can be mediators if they meet the requirments
* Lawyers can also participate in the mediation
* Encourage to seek legal advice - to review an individuals mediated agreement and make sure client knows all their rights, and that the agreement is fair

**Mediator is neutral - does not make decisions, he, she or they help(s) to the communication between the parties;**

* Use different mechanisms to empower the parties to find their own solutions
* Key to mediation is for parties to learn to communicate, identify their needs and find solutions that work for them;
* Confidentiality requirements must be considered!
* At the end of a mediation process, you are not divorced. You still need a divorce order if you want one.

##### Arbitration

* Neutral arbitrator, selected by the parties only used in common law provinces (not Quebec)
* Arbitrators must meet requirements of **s 5 of the *Regulations***and procedural requirements of *Arbitration Act;*
* **The arbitrator will act as a** **judge and parties are going to be bound by his, her or their decision**;

**Arbitration Act s 23 Award must be in line with the principles of the FLA to be enforceable by the court**

**AA 2.1(3)** Potentially modifiable by a court, IF meets criteria in–

* + 1. improper advantage taken of another party’s vulnerability or distress,
    2. one party didn’t understand what was going on,
    3. one party didn’t understand the nature and consequences of the agreement, and   
       in all other circumstances under the common law that could cause a contract to be voidable

##### Med-Arb

* Two-stage process - Mediation and if it does not work arbitration;
* Involving a qualified third party, can be the same person doing both if they have the right training

##### Parenting Coordinators

**FLA ss 14 + A person meeting the requirements set out in the regulations may be a parenting coordinator.**

* Generally high-conflict situations, appointed by a court and/or by a written agreement between parties

**15(4)** Length – usually 2 years, can be renewed for another 2 years

**15(5)** May be extended

* Meant to be temporary and used until relationship between parents gets better
* Determinations (form and substance) – facilitate the communication and help parties respect what is in their parenting order or agreement

**15(2)** A parenting coordinator may assist **(a)** if there is a parenting coordination agreement or order in place, and **(b)**for the purpose of implementing an agreement or order respecting parenting arrangements, contact with a child or other matters.

**16** A party must, for the purposes of facilitating parenting coordination, provide the parenting coordinator with

(a)information requested by the parenting coordinator, and

(b)authorization to request and receive information, respecting a child or a party, from a person who is not a party.

**17**  A parenting coordinator may assist the parties **(a)** by building consensus  **(b)** making determinations respecting matters

**18** **(2)** In making a determination, must consider the best interests of the child only

**18 (5)** A determination is binding on the parties

##### Unbundling / LEGAL COACHING (She prefers this term)

##### Mediate BC, Mediate BC’s Family Unbundled Legal Services Project – Final Report, July 7, 2017, read p 5 starting at ‘What is unbundling’ to 9 stop at ‘what were the purposes’ FROM MARCH 6

* A situation where a lawyer provides limited scope services, rather full scope
* Limited scope legal - a lawyer performs discrete tasks and the client handles other matters that, in a full service retainer, would form part of the services the lawyer would provide.
* Research shows a very large, and widening, gap between Canadians who qualify for legal aid in their provincial plans and those who can afford to pay for full representation by a lawyer in a legal matter.
* While full representation for litigants is preferable, in light of these realities the unbundling model is an important and promising development.

**Report from Mediate BC BENEFIT:**

* Improved access to affordable legal services (and therefore to access to justice)
* Price predictability
* Improved outcomes
* Increased voice
* Enhanced empowerment
* Improved confidence in the process and outcome
* Improved access to settlement processes
* Access to tailored services
* Assistance in dealing with power imbalances

**Potential value to lawyers**

* Done well, it can be straightforward, lucrative and enjoyable.
* A solid contribution to access to justice
* Access to new untapped markets
* New, tailored, client-centred business models
* Managed exposure to risk
* Improved lifestyle and satisfaction

**Potential benefits to the Courts, the Judiciary and the justice system**

* Self-represented litigants who have had access to unbundled services will be better prepared and familiar with court rules and procedures
* forms/pleadings and documents will be clearer
* hearings will be shorter and more focused
* the number of hearings will be reduced
* outcomes will be more just
* justice resources will be freed up for other matters
* public perception of the justice system will be improved

**Family Violence**

**Can be considered when determining: best interests of child, care and time of children, and dispute resolutions**

* Dispute resolution not suitable in situations of family violence due to imbalance of power (must be fair, equal)

**Duties of legal professionals s 8**

* to assess whether a situation has family violence, and to ensure that violence won’t affect the agreement

**FLA definition of family violence is broad:**

* **physical** abuse of a family member, including forced confinement or **deprivation** of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
* **sexual** abuse of a family member,
* **attempts** to physically or sexually abuse a family member,
* **psychological** or **emotional** abuse of a family member, including (i)intimidation, harassment, coercion or threats, , (ii)unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy, (iii)stalking or following of the family member, and (iv)intentional damage to property, and
* in the case of a child, **direct** or **indirect** exposure to family violence;

# Spousal support

##### History

* women used to have less autonomy in relationships, less ability to self-support, imbalances of power
* difficult to access divorce, but now more access and no-fault divorce
* Tax impact – payor can deduct it, payee has to pay tax on it

**Two regimes (DA and FLA)**

**Married spouses** can ask for spousal support under FLA and DA

**Unmarried spouses** can only ask for support under FLA **(since MvH 1999)**

**In QUEBEC civil law, only applicable to civil union or married spouses (de jure spouses) NOT COHAB**

## Basics Re Support

#### Legislation RE Spousal support

**OBJECTIVES**

**FLA**

**161 (a)** to **recognize any economic advantages or disadvantages** to the spouses arising from the relationship between the spouses or the breakdown of that relationship;

**161 (b)** to **apportion between the spouses any financial consequences** arising from the care of their child, beyond the duty to provide support for the child;

**161 (c)** to **relieve any economic hardship** of the spouses arising from the breakdown of the relationship between the spouses;

**161 (d)** as far as practicable, to **promote the economic self-sufficiency of each** spouse within a reasonable period of time.

**DA**

**15.2(6)( a)** to **recognize any economic advantages or disadvantages** to the spouses arising from the marriage or its breakdown

**15.2(6)(b)** to **apportion between the spouses any financial consequences** arising from the care of their child, beyond the duty to provide support for the child;

**15.2(6)(c)** to **relieve any economic hardship** of the spouses arising from the breakdown of the relationship between the spouses;

**15.2(6)(d)** as far as practicable, to **promote the economic self-sufficiency of each** spouse within a reasonable period of time.

**FLA 160** Duty to provide support to entitled spouse

**FLA 163** Can make written agreement re spousal support. Can include start/end, where living, but not who can sleep with

**DA 15.2(5) and FLA 166** Misconduct of spouse not to be considered unless it a) prolongs or aggravates the need for support b) affects ability to provide support

#### Time Limits

**DA 3, 4, 15.2** during divorce proceeding or in a procedure for corollary relief alone after the divorce is granted

* No limitation period REQUIRES Residence in the province

**FLA 198** Claim within two years of a divorce (or declaration of nullity) or within 2 years of separation

#### Quantum of Support

**15.2(4) DA & 162 FLA**

**Principles**: Must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, **162** Factors: the **length of time** of cohab, **functions performed** by each while cohab, **existence of any agreement**

**Amount and Duration**: provides upper and lower numbers, then apply the cirumstances and facts to determine the order

* + Individualized to each case
  + Provides discretion

##### PER DA you can ask for support order: on interim order, on divorce order or on variance of an order

## Grounds for Entitlement to Support

#### Compensatory Grounds:

Moge v Moge feminization of poverty

Bracklow We need to value the impact that those

**“Intended to recognize that spouses are entitled to be compensated for contributions to a relationship and for losses incurred on its breakdown” one spouse can be compensated for what they did in the relationshpis**

**Goal of self-sufficiency not required or paramount** Moge JUST “as far as practicable”

**GOAL: Maintaining standard of living** (Bracklow)

* + Evaluated based on your actual standard of living as a spouse (should be as close as possible to when you were in functioning unit
  + Not synonymous with basic necessities
  + Bracklow emphasized the promotion of equality, autonomy, provide for a clean break, and to allow for self-maximization after divorce

**Independent model of marriage** – Moge and Bracklow

* Based on the notion that each party of marriage is an autonomous actor who retains his or her economic independence throughout marriage
* Even though they are formally committed to each other, they regard themselves as free agents in a marriage that can be terminated
* Encourages rehab and self-maximization of dependent spouses
* Recognizes the social reality of shorter marriages and successive relationships

#### Non-compensatory Grounds Bracklow

**Arises out of the relationship itself and is based on the social obligation of a spouse to look after a former partner who is in difficulty rather than letting that burden fall upon the public**

**Basic social obligation model – need and means Bracklow**

* Primary responsibility falls on the former spouse to provide for the ex, rather than on the govt
* Model founded on a historical notion that marriage is a permanent obligation
* Primary purpose of spousal support payments is to replace lost income that spouse used to enjoy in marriage
* Not unfair to ask partners to support each other due to their mutual interdependence

#### Contractual Grounds Miglin

**Based on contracts that the couple have - Prenups, separation agreements etc**

* Courts will respect agreements to an extent possible
  + However there are policy and social imperatives – need to strike a balance between security and certainty in the agreements
  + Prenup may no longer be fair as relationship unfolded

**Modern marriages are a complex mix of interdependence and independence**

* Both models provide significant policy concerns and social values, neither can achieve just law of support on own
* Both models provide important policy objectives
* Its critical to recognize and encourage the self-sufficiency of each spouse
* Yet equally vital to recognize that new relationships may occur creating new obligations which they cannot meet if they are stuck paying for old spouse

**Important to recognize the goals of independence are impeded by patterns of marital dependence,**

* Too often its impossible to be self-sufficient at the end of a marriage as an economic partnership that just ended

#### Contractual and compensatory

**Spouses may have obligation to meet or contribute to the needs of their former partners where they have capacity** to pay, even in the absence of a contractual or compensator foundation for the obligation

**Basic premise:** **Parties are equal – and each is entitled to what they contracted for and what they lost due to a) the marriage and b) its breakdown**

**“Even though marriage created dependencies, it is the duty of spouses to free themselves from their dependencies and assume self-sufficiency, thereby mitigating the need for continued compensation” at 29**

#### Moge v Moge, [1992] 3 SCR 813 \* consider all objectives when determining support, not means and needs test

**All objectives need to be considered, none is paramount**

* Self-sufficiency is only one objective, does not the be given priority in determining quantum and duration of support order
* Means and needs test is no longer the exclusive criterion of support

**There is no doubt that divorce and its economic effects are playing a role in the feminization of poverty in Canada. In most marriages the wife still remains the economically disadvantaged partner. It would thus be perverse in the extreme to assume that parliaments intention in enacting the act was to penalize women in this country financially.**

#### Bracklow v Bracklow, [1999] 1 SCR 420 at pages 420-423 and paras 23-33, 49, 58-60 \* spouses owe a mutual duty of support

**Facts**: Female spouse could not work and was sick. Breakdown of marriage significantly impacted her life

* Absent indications to the contrary, when two spouses are married, they owe each other a mutual duty of support. So even though the couple didn’t seem to have intra-marital financial interdependence, there remained a right to be supported outside of marriage.
* Marriage is a joint endeavour, a socio-economic partnership
* DA and provincial leg is aimed to deal with economic consequences of the marriage breakdown for both parties.

**Decision:** Court found that divorce rendered the appellant in a state of economic hardship, and therefore she is eligible for support based on the length of cohab, hardship marriage breakdown imposed on her, her palpable need, and the respondent’s ability to pay.

**Ratio**:

1. **First step is to review the DA objectives 15.2** that a support order should serve.
   1. No single objective is paramount, all must be borne in mind
   2. Include non compensatory factors
2. Judge must look at all factors in light of the stipulated objective and make order that equitably alleviates the adverse consequences of the marriage breakdown to achieve justice in the particular case.
3. **Presumption of intra-marital mutual interdependency, rebuttable by facts**

**How much should be awarded?**

1. Consider all the variables – some more important than others but all considered
2. Establish entitlement (compensatory, non-compensatory, contractual) The factors that go to entitlement have an impact on quantum
3. Then make adjustments through quantum (amount and duration)

#### *Miglin v Miglin*, [2003] 1 SCR 303, 303-311 \* Test for setting aside / modifying / enforcement of support agreements

**FLA 164 BC has legislated Miglin in order to clarify the test for setting aside agreements respecting spousal support**

**MIGLIN’S TWO STAGE ANALYSIS TO UPHOLD A SUPPORT AGREEMENT**

**1. Assessing procedural fairness of the agreement – was the formation of the agreement “unimpeachably negotiated?**

**164(3)** **Factors to consider:**

1. representation by counsel: the degree of professional assistance received by the party is relevant, but a court should not presume an imbalance of power.
2. circumstances: was one or both parties vulnerable and if so, did presence of counsel rectify this vulnerability? Free from pressure, free from oppression, nobody took advantage of the other spouse’s vulnerability?
3. duration of negotiations: was the agreement negotiated over a reasonable amount of time?

**2.Assessing the fairness of the agreement Substance of the agreement: does the agreement remain in substantial compliance with the objectives of the *Divorce Act 15.2(6) or the FLA 161 (whichever Act they are using)*?**

* + 1. An agreement can be modified to bring it in line with the principles in the *Act*.

**164(5)** length of time since the agreement was made, changes in the condition needs means or other circumstances of a spouse, intention of the spouses when they made it, degree to which they relied on the terms of the agreement, **degree to which the agreement meets the objectives in** **s 161**

The analysis should not be restricted to the spousal support component – look at the whole agreement; the agreement as a whole should substantially comply with the factors and objectives of the *Act* (including the principles of certainty, autonomy and finality).

**Is the agreement still in line the parties' original intentions**: **were the current circumstances anticipated when the agreement was drafted?**

* Was there a change in circumstances that were foreseeable at the time it was drafted?
* Foreseeability is interpreted broadly; circumstances do not have to have been explicitly considered/contemplated
* Foreseeable circumstances include a change of job, assets going down in value, etc.

#### *Leskun v Leskun*, [2006] 1 SCR 920 at pages 920-922 \* misconduct is not relevant to entitlement in DA 15.2(5) FLA 166

**Facts:** Married 1978 x 20 years, Wife worked, husband to school, wife had child. Wife injured, fired from job, Husband divorced her to marry another woman

**Trial:** ordered 2250 /mo until she returned to work, then it would be reviewed.

**CA** husband applied to discontinue as he was unemployed, denied as wife was not self-sufficient yet, based on husband’s misconduct in the marriage

**SCC: Order upheld, although DA eliminates misconduct as relevant to award for support** **DA 15.2(5). So while the CA dismissed husband’s application to lower payments on the wrong basis (he had shown misconduct in the marriage) – it still was reasonable to deny lowering the payments on other relevant factors. So order was upheld.**

**NOTE: FLA does not recognize misconduct either! FLA 166**

## Spousal Support Advisory Guidelines JULY 2008 pp 27-36, 51-52, 72-76.

* The law of spousal support had become more unstructured, more discretionary and more uncertain over time, particularly since 1999 in the wake of Bracklow.
* After Moge and prior to Bracklow, there had been some hope that a principled approach to spousal support was developing through the case law. It subsequently became clear that the normal process of judicial development had effectively come to a halt. In that situation, spouses, lawyers and judges began to find attractive the greater certainty and predictability that guidelines would bring, even guidelines that were not perfect.

**Benefits of calculated regime of spousal support (similar to child support)**

* + Easier for lawyers and judges to calculate
  + Can create consistency legitimacy and fairness
  + Can reduce conflict and encourage settlement
  + Provide a basic structure for judicial elaboration

**Income sharing:**

* Core concept on which SSAG are built
* Looks at imcome of parties (and disparirty between them) and uses math formula to determine the portion of spousal incomes to be shared
* Income sharing does not mean equal sharing
* Can be a practical and efficient way of implementing many support objectives such as compensation for the economic advantages and disadvantages of the marriage or the recognition of need and economic dependency

**Applicability of SSAG:**

* **Voluntary …. not legislated or legally binding … (unlike child support guidelines) BUT as per case law they are expected to be used in BC**:
  + Yemchuk v Yemchuk, 2005 BCCA 406, SSAG reflects the current law, build upon existing law, appealing, useful tool in assessing amount and duration
  + Redpath v Redpath 2006 BCCA 338 incorporated SSAG ranges into the standard of appellate review
  + Dunnigan v Park 2007 BCCA 329 “in determining the quantum of support the trial judge referred to the SSAG as he is obliged to do” at 16
* **Does not deal with entitlement** – remains subject to entitlement provisions of DA 15.2(4) and (6)
* An income disparity alone does not generate an amount of entitlement under the SSAG
* The broad conceptual framework for spousal support articledated by the SCC in Moge and Bracklow has been relied upon under both prov and federal legislation
  + Both federal and provincial leg can be overlapped and used
  + Prov laws differ from the DA in their application to unmarried couples but should not cause any difficulties with respect to the operation of the SSAG
  + Length of marriage applies to unmarried as length of cohab
* Does not override final agreements on spousal support
* Apply to interim as well as final orders

#### SSAG Pros and Cons - Payne and Payne, *Canadian Family Law,*pp 340-352

**Advantages:**

* guidelines provide the party and the court with a starting point for negotiations
* reduce conflict
* reduce cost and improve efficiency
* simplify process

**Disadvantages**:

* Too rigid?
* Too complicated?
* Might over limit ability to negotiate based on circumstances

#### *Dunnigan v Park,*2007 BCCA 329 at para 16 \* CL expectation that Judge will use the SSAG

[16] In determining the quantum of support the trial judge referred to the Spousal Support Advisory Guidelines, **as he is obliged to do**. … **In so doing, he properly used the Spousal Support Advisory Guidelines as just that, a guide to a range of awards, rather than as a set figure which must be applied or awarded.**

#### *Redpath v Redpath,*2006 BCCA 338 at paras 37-42 \* old CL – SSAG was to provide a “Range” changed in Dunnigan

[38] **I do not read Yemchuk as indicating that the Guidelines must as a matter of law be used by a judge in determining support.** The same is true of this court’s judgments in Tedham v. Tedham, 2005 BCCA 502 (see especially paras. 75-6), and Kopelow v. Warkentin, 2005 BCCA 551 (see especially paras. 75-6). **However, as a “useful tool”, the Guidelines may indicate whether a proposed award is “in the range” of what should be a pattern of predictable maintenance awards across the province and across Canada.**

[42] **Cases such as Hickey, however, were decided prior to the introduction of the Advisory Guidelines. Now that they are available to provide what is effectively a “range” within which the awards in most cases of this kind should fall, it may be that if a particular award is substantially lower or higher than the range and there are no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention.**

## Spousal Support Formulas

**Require accurate income determination**

* There may be incentives to dispute income
* Starting point is the definition of income under the federal child support guidelines and schedule III adjustments
* SSAG does not solve complex issues of income determination that arise in cases involving self-employment income
* Can impute income in situations where the actual income doesn’t reflect his or her earning capacity

**Without child support:**

**Amount of spousal support**

**Increases with length of marriage longer \* includes premarital cohab, ends w separation**

1.5 to 2 % of the difference between the gross incomes for each year of marriage,

To a max of 37.5 to 50% of the gross income difference for marriages of 25 years or more   
(upper cap of 50% is equalization)

**Duration of spousal support**

**Increases with length of marriage longer \* includes premarital cohab, ends w separation**

0.5 to 1 year of support for each year of marriage,

**Indefinite:** after 20 years OR if the marriage has lasted 5 years or longer, when the years of marriage and age of the recipient added together total 65 or more (the 65 rule)

**With child support (concurrent child support obligation)**

**Theoretical**:

* **Primary rationale for spousal support is compensatory** – **after Moge spouses must “compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union**” (**Brackenlow)** 
  + Missed opportunities and foregone careers because they assumed primary responsibility for care of children
  + **DA 15.2(6)(a)** Creates disadvantage or loss at end of marriage warranting compensatory support
* Marriages with dependent children raise strong compensatory claims based on the economic disadvantages flowing from assumption of primary responsibility for child care, not only during the marriage, but also after separation.
* **For marriages with dependent children, length of marriage is not the most important determinant of support outcomes as compared to post-separation child-care responsibilities.**

**Practical**:

* child support must be calculated first and given priority over spousal support.
* the differential tax treatment of child and spousal support must be taken into account, complicating the calculations.
* use computer software calculations of net disposable incomes

**Formula**:

* upper and lower % limits **do not change with length of marriage**
* **uses net income not gross**

1. **Determine the individual net disposable income (INDI) of each spouse**:
   * Guidelines Income minus Child Support minus Taxes and Deductions = Payor’s INDI
   * Guidelines Income minus Notional Child Support minus Taxes and Deductions plus Government Benefits and Credits = Recipient’s INDI

(2) **Add together the individual net disposable incomes. By iteration, determine the range of spousal support amounts that would be required to leave the lower income recipient spouse with between 40 and 46 per cent of the combined INDI.**

* **Should leave recipient spouse with 40- 46 percent of the spouses’ net incomes after child support has been taken out**

**Individual Net Disposable Income (INDI)**

* The approach to duration under this formula is more complex and flexible than under the without child support formula; orders are initially indefinite in form (duration not specified) but the formula also establishes durational ranges which are intended to structure the process of review and variation and which limit the cumulative duration of awards under this formula. These durational limits rely upon both length of marriage and the ages of the children.
* Formula depends on custodial arrangements (shared and split need variations of computation of INDI)
* Also different if spousal support is paid by the custodial parent
* Also different if the child is an adult

**Payor’s income: Floor $20,000 INDI Ceiling $350,000 INDI**

**Exceptions**:

• compelling financial circumstances in the interim period;

• debt payments;

• prior support obligations;

• illness or disability of a recipient spouse;

• a compensatory exception for shorter marriages under the with child support formula;

• reapportionment of property (British Columbia);

• basic needs/hardship under the without child support and custodial payor formulas;

• non-taxable payor income;

• non-primary parent to fulfil a parenting role under the custodial payor formula;

• special needs of a child; and

• section 15.3 for small amounts and inadequate compensation under the with child support formula.

**Estimate the spouses disadvantage or loss by determining what their career or employment path might have been had they not adopted their role in the marriage (not easy!)**

* Can use standard of living changes
* Conventional budget analysis

**Parental partnership rationale:** **DA s 15.2(6)(b)**

* The obligation for spousal support flows from parenthood rather than marriage itself
* Kids matter most: Not the length, interdependency
* Looks at past and future loss or economic disadvantage from present and future child care responsibility

# Division of Property

**Entitlement FLA**

**3(1)(a)** a person who is married to another person

**3(1)(b)(i)** a person who has lived with another person in a marriage-like relationship for a continuous period of >= 2 yrs

**3(2)** a former spouse

**Time limits –**

**Married spouses – 2 years from the date of**

**198(2)(a)(i)** the divorce order

**198(2)(a)(ii)** the marriage being declared null

**Unmarried spouses –**

**198(2)(9)(b) 2 years from the date of separation**

##### Family Law Act Explained, British Columbia, Part 5 & 6

**FLA** **uses an excluded property model** - involves less judicial discretion when identifying what assets need to be divided

**Division of Property applies to ALL married AND cohab x 2 yr couples**

* FRA did not include property/debt division for unmarried but in FLA they were included Newton v Crouch
* Bold move by BC to treat married and unmarried the same in 2013 FLA
* Ascription model!
* Limits autonomy, But it also provides protection for vulnerable people
* Makes assumption that people know ore about family law than they do

Section 81 Equal responsibility

* Subject to any agreement or order, spouses are both entitled to family property and responsible for family debt regardless of their respective use or contribution. Gets at interdependence of spouses. Influenced by concept of unjust enrichment.

Section 84 Family property

* **all of the spouses’ debt and property** at separation as **family property** unless it is excluded under section 85 of the Family Law Act. Not relevant if it was used for “family purposes” to be included

Section 85 Excluded property

**The spouse claiming that property is excluded property has the burden of proof to prove it is excluded.**

* pre-and post- relationship property;
* gifts and inheritances to one spouse;
* settlements or damage awards, except that part meant to compensate both spouses or to replace wages;
* non-property-related insurance proceeds, except that part meant to compensate both spouses or to replace wages; and
* some kinds of trust property

Section 86 Family debt

* **All debts incurred by either spouse during the relationship are to be equally divided.**
* There is an exception for debt incurred **after the date of separation** where it is to maintain family property.

Section 87 how and when the value of family property and family debt is determined

* establishes a valuation date that is either the date of an agreement or the date of a court hearing dividing the property. A different date may be selected by agreement or court order.

Section 89 Orders for interim distribution of property

* authorizes judges to make orders for interim distribution of property prior to final resolution of the issues to assist in making assets available to economically disadvantaged spouses who need them to achieve a fair division of family property.

Section 90 Temporary orders respecting family residence

* authorizes the Supreme Court, which has exclusive jurisdiction over property issues, to make a temporary order for a specified period of time for exclusive occupation of a family residence or exclusive use and possession of personal property stored at the family residence.

##### Division 4 – Dividing Family Property and Family Debt

Section 92 Spouses may make agreements respecting property division

* dividing family property or family debt or both;
* dividing property or debt unequally;
* including property or debt that would not by statute be included;
* excluding property or debt that would otherwise be included; and
* choosing a different valuation method for family property or family debt.

**Spouses have autonomy to depart from the Family Law Act with respect to property division.**

Section 93 Basis for setting aside agreements respecting property division

**First: was the agreement procedurally fair at the time it was made, based on the criteria in section 93(3)?**

* If not, the court is to set it aside and make an order dividing property, unless the order that it would make would substantially the same as the agreement.

**Second: even if procedurally fair, the court may set aside the agreement and replace it with an order dividing property if the substance of the agreement is “significantly unfair” having regard to the limited criteria set out in section 93(5).**

* The criteria to determine if an agreement is procedurally flawed are whether:
* a spouse failed to disclose significant property or debts
* a spouse took improper advantage of the other spouse’s vulnerability
* a spouse did not understand the nature or consequences of the agreement; and
* other circumstances that would, under the common law, cause a contract to be voidable.
* The criteria that the court must consider to determine if the substance of an agreement is “significantly unfair” is:
  + the length of time that has passed since the agreement was made;
  + the intention of the spouses; and
  + the degree to which the spouses have relied on the agreement.

Section 95 Unequal division by order

**It is intended to create a higher threshold and make the test for unequal division stricter.**

* allows a court to use an unequal division of property to compensate for situations where spousal support is insufficient to meet the spousal support objectives.
* changes the threshold for dividing family property unequally from whether it would be “unfair” not to do so to whether it would be “**significantly unfair**” not to do so.
* limits judges’ discretion to divide family property unequally between spouses.

Section 96 Division of excluded property

* Provides judges with flexibility to divide excluded property, but only in very limited and defined circumstances
* **Excluded property may be divided only in two situations:**
  + family property or family is debt located outside British Columbia and cannot practically be divided; or
  + **it would be significantly unfair not to divide excluded property considering the duration of the relationship and a spouse’s direct contribution to the preservation, maintenance improvement or management of the excluded property.**

## Trust property

**84 *FLA*** a spouse’s interest in trust property can be family property;

**84(3) *FLA***family property includes any part of trust property THAT **(a)** spouse is beneficiary **(b)** spouse has power to tx **(c) s**pouse can terminate trust ALSO IN W(SLM) v W(MRG)

**s 89** Orders for interim division of property

**s 90** Temporary orders respecting family residence

**s 91** Temporary orders respecting protection of property

**Asselin v Roy 2013 BCSC 1681 \* If proven, an oral agreement is binding**

* Parties must provide evidence as to their financial situation
* Not just Form A but a complete portrait of their assets throughout the time to decide on division of property

**Cabezas v Maxm 2016 BCCA 82 \* If a gift is made to both spouses, it is family property**

* Primary issue was payments made by the respondents parents on the mortgage
* Mortgage payments that were given to spouses by others
* **Is a gift to both spouses family property? Yes if it was intended to be for both**

**F(VJ) v W(SK) 2016 BCCA 186 \* S 104 is not a complete code**

* Principles from common law (above) and equity principles apply

#### EQUITY WILL PREVAIL

**104**   (1)If there is a conflict between this Part and the [Partition of Property Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96347_01), this Part prevails.

(2)The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

**Presumptions in Property**

* Rebuttable
* Used when insufficient evidence to the contrary

**Presumption of resulting trust**

* Equity presumes bargains not gifts
* Principle when giving something that a transfer without consideration it is presumed that a gift was not intended
* Transferee (recipient) has to demonstrate that a gift was intended
* In some contexts/circumstances, this rule does not apply (ie family law)

**Presumption of advancement**

* Materializes when a spouse gives or transfers property to their spouse
* Or when a parent gives or transfers property to a child
* In the family context courts have extended this to unmarried spouses as well (in BC, not all prov)
* In this presumption, in family contexts, it is presumed to be a gift (presumption of resulting trust does not apply)

## Division of Pensions

**84 (2) (e) subject to the limit of excluded property, pensions are included**

* if you had pension or RRSP prior to relationship, the prior value is excluded, but increase in value is included
* If it starts while in the relationship, the whole thing is family property
* Pensions are complicated assets, required to get expert evidence in practice

# Children Care and Time / Custody

Post-separation context only (not during marriage)

* + The fact that people can separate is still quite recent!

Paternal power

* + Father assumed to have control and custody of children in past
  + Mothers had few rights

Tender years doctrine

* + Presumption that young children should be with their mother

#### Best Interests of the Child Doctrine, s 37 FLA \* In both the DA and FLA, the best interests of the child guides decisions

**Best interests of child doctrine** **S 37 FLA**

* + Equal right to legal custody (formal equality of both parents)
  + Shared custody ideals
  + Complicated balance of needs of children with needs of parents – all interconnected elements

**Affected by assumptions we make about the relationships of adults and parents**

* + **“**Although the principle is used in most disputes, we must be aware of its limitations. The best interst principle has a paradoxical nature: while focusing substantive decisions on the best interest of the child, it encourages a decision-making process that is often harmful to children”

**37(2) list of factors to consider in best interest of child:**

* MISSING: Race/culture/heritage
* LIST is NOT exhaustive

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

**37 (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** between 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 to exercise responsibilities;

(g) the impact of any **family violence**

(h) person responsible for **family violence impaired in ability** to care for the child

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child,

(j) any civil or criminal proceeding relevant to the child's safety

**37 (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.

**37 (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.

**DA 16(8)** **Courts shall take into consideration the best interests of the child of the marriage as determined by reference to the condition, means, needs, and other circumstances of the child**

**DA 16(9)** **Past conduct not relevant** to determination unless it is actually relevant

**DA 16(10)** **Presumption of maximum contact:** **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.

#### Guardianship

**37** best interests of child

**37(2)** best interests of child factors to consider

**39** **Guardianship – presumption that parents are the child’s guardian and have parental responsibilities**

**39(3) exceptions for non-residing parent**

* + 1. if s 30 multiparenty applies
    2. if parent does not reside and all parents make an agreement
    3. if parent does not reside and has regularly cared for the child

**50** who can become a child guardian by agreement

**51** who can become a child guardian by order

**51(4)** the child has or doesn’t have a say?

**41** parental responsibilities listed

**42** parenting time

##### DA 1985 s 16-17

* **Custody, access**
* **Start from different points and perspectives**
* **Federal paramountcy**? But the FLA is more current, more sophisticated and in tune with BC people’s lives
* **16(10) maximum contact rule**
* **Use Gordon v Goetz test**

##### Hansen v Mantei-Hansen, 2013 BCSC 876 at para 117

*[117] The new Act is not easily and conveniently compatible with the Divorce Act because the concept of guardianship in the new Act subsumes 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.*

#### Contact

* **The child’s time with a non-guardian; it does not include “parental responsibilities”.**   
  A provision in an order or agreement for ‘contact’ with a child would seem to be comparable to the concept of ‘access’ under the former FRA.
* Can be supervised
* You can make minimal decisions at the moment you are with the child (what they should eat)

**58(1)** Who can make agreements respecting contact

**58(2)** When is it binding

**58(4)** Can it be set aside? Yes if not in BIC

**59** Can it be made by order?

**DA 2(1)** **Custody** – **care upbringing and any other incident of custody**

* Not well defined in DA
* Narrow sense – physical custody only
* Broader sense – bundle of rights and responsibilities to a child
  + In the case law the broad meaning seems to have prevailed and adopts a concept of custody almost akin to guardianship of the person that includes:
    1. 1. The right to determine a childs education, health care, religion and other general well being
    2. 2. Physical control over the child

**Access** – Temporary possession of a child for non-custodial parent to see the child - Can be supervised or unsupervised

* A parent with no custody/just access has very limited decision-making powers over the child
  + **16(5) a parent with access has a right to make inquiries and be given information about the child**

## Relocation

* When asking for orders that have relocation issues, you can ask to use either DA or FLA IF you are married
* However when it comes to guardianship and custody, the situation is different because guardianship is FLA, custody is DA concept.
* Primary concern under both is the best interest of the child

#### Strategy to choosing which regime to seek orders under:

* **For relocation choose one or the other not both**
* **If you are seeking to oppose relocation use DA because of** **16(10) maximum contact rule**
  + Also use **Gordon v Goetz test**
* **If you are seeking relocation use FLA (two tests as options)**
  + If you want to use FLA use Provincial court (as it can’t access DA)

**2 tests under FLA:**

**S 46** **changes to a child’s residence** (**no** written agreement or order)

* + **46(2)(a)** use best interests of the child factors per 37(2) and reasons for change in residence
  + **46(2)(b)** must NOT consider whether other guardian is planning to also move

**S 65** **relocation definition and application (**if there **is** a written agreement or court order)

* + a change in the location of the residence of a child that has **significant impact** on the relationship with a guardian or other persons having a significant role in the childs life
  + **69(3)** use best interests of child factors
  + **69(4)** IF **NOT** EQUAL PARENTING TIME - must satisfy the proposed relocation is in good faith and relocating guardian has proposed reasonable and workable ways to ensure relationship between other parent is continued then rebuttable presumption in the favour of the custodial parent,
  + **69(5) IF** parents have equal parenting time – same as 69(4) but not presumption in favour of one parent (see case law)
  + **69(6) determining if in good faith**
    1. Reasons for relocating, whether it will make life better for child and guardian, whether notice was given, restrictions in agreement or order
  + **69(7)** must not consider whether a guardian would still relocate if the child’s relocation was not permitted

#### *Fotsch v Begin,*2015 BCCA 403 at paras 1-16, 24-40, 57-65, 72-83;

**Facts**: The father appeals an order permitting the mother and the parties’ young child to relocate to Germany. He submits the trial judge erred in law by failing to apply the four-scenario analysis set out in S.S.L. v. J.W.W. and in considering whether the father would relocate to Germany if the mother’s application was granted. The father also submits the trial judge made errors of fact that were material to his decision.

**Held**: Appeal dismissed. Mother allowed to relocate to Germany with child.

**Ratio**: Parties had equal parenting time and had an interim order in placeused **s 69 FLA** required relocating guardian to establish that 1) the relocation is proposed in good faith, 2) there are reasonable arrangements have been proposed to preserve the relationship with the other guardian; 3) relocation is in the best interest of the child.

**Reasons**:

* **The FLA provides a comprehensive and mandatory statutory test for determining relocation applications** **69**
  + does not include the four-scenario analysis from *S.S.L. v. J.W.W*.
  + no statutory prohibition on considering whether a non-relocating guardian would move if the relocating guardian’s application was allowed.
* The trial judge placed no undue weight on the father’s evidence with respect to this factor and did not rely on it in order to make a presumptive disposition in favour of the mother and child’s relocation.
  + As directed by the FLA, he considered and weighed a multitude of factors in determining that the best interests of the child was for her to relocate with the mother to Germany.
* The trial judge also made no material errors of fact upon which he based his evidentiary conclusions.

#### *69* Orders respecting relocation

(1) In this section, **"relocating guardian"** means a guardian who plans to relocate a child.

(2) On application by a guardian, a court may make an order permitting or prohibiting the relocation of a child by the relocating guardian.

(3) Despite section 37 (1) [best interests of child], the court, in making an order under this section, must consider, in addition to the factors set out in section 37 (2), the factors set out in subsection (4) (a) of this section.

(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, and

(b)on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child 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,** the relocating guardian must satisfy the court

(a)of the factors described in subsection (4) (a), and

(b)that the relocation is in the best interests of the child.

(6) For the purposes of **determining 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 was given** under section 66 [notice of relocation];

(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 guardian would still relocate if the child's relocation were not permitte**d.

#### Gordon v Goertz, 1996 2 SCR 27 \* Use for DA relocation

**Facts:** Custodial parent wanted to move to Australia with her daughter. The father applied for custody or to obtain an order restraining the mother to remove the child:

**The focus is on the best interests of the child, as opposed to interests and rights of parents. Fact specific analysis.**

* Judge should consider, among other things: the custody arrangement and relationship between the child and the custodial parent, the access arrangement and the relationship between the child and the access parent, the desirability of maximizing contact between the child and both of the parents, the child’s views, 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, disruption to the child of a change in custody, and disruption to the child consequent on removal from family, schools, and the community he or she knows.

**Similarities and differences between DA and FLA re care and time and custody**

* **FLA 40(4)** no particular arrangements should be presumed v **16(10) DA** maximum contact rule
* Best interests of the child is the only consideration, but it is articulated differently in both statutes
* Compare ss **16(8)-16(1) DA** with **37-38 FLA**
* Compare also with s 3AA (Similar, different, why?)
* Can differ from one child to another
* Can be equal or unequal

# Child Support

## Entitlement / Eligibility

* Child support is the right of the child! Every child has the right.
* Child under age 19 of whom you are a parent
* **FLA 146** child is person <19 or older and unable due to illness disability or another reason to obtain the necessaries of life or withdraw from the charge of his or her parents or guardians (also includes educational pursuits)

#### Who has to pay:

**Parent/Guardian**

**147(1)(a) FLA** exceptions: IF child is a spouse;

**147(1)(b)** child voluntarily withdraws from parent’s charge (except in cases of family violence)

**Step parent entitlement:**

**147(4)** has to have contributed to the support of the child for at least one year

**147(5)** hierarchy – step parent support is secondary to that of parent/guardian

#### In loco parentis. Objective test under DA

**Test** if person stands in place of parent is dependent on the nature of the relationship btwn parent and child, including but not limited to: Chartier v Chartier:

* + Whether the child **participates in the family** as would a bio child
  + Whether the person **provides financially** for the child
  + Whether the person **disciplines** the child as a parent
  + Whether they **represent to the child, family, or beyond** that the person is a parent to the child
  + The nature or existence of the child’s relationship with the absent bio parent

**An unsatisfactory relationship** or absence of relationship between stepparent and child does not terminate their obligation to pay child support Shaw v Arndt (or breakdown of relationship Chartier v Chartier)

**Existence of a parental relationship is determined** **at the time the family was functioning as a unit**, not after separation Chartier v Chartier

##### Shaw v. Arndt [2016] B.C.J. No. 298  (BCCA) Importance of Intention –

* **A stepparent may be liable to support the child when the biological parent is unable to do so.**
* The quality of the parent-child relationship becomes relevant only in the most egregious circumstances otherwise it should have no bearing on the need to pay child support.
* **Goal**: Try to maintain standard of living of child

##### M.J.L. v. G.H., 2015 BCPC 208  \* special circumstances where child support paid for adult children (education and living with disability)

[6] The issues are whether S.M.H. continues to meet the definition of “child” in Part 7 of the Family Law Act, S.B.C. 2011, c. 25 (the “FLA”) and, if so, whether and to what extent M.J.L. remains liable to pay child support.

**Principles for whether a child >19 should still be eligible for child support**: (para 28-29)

1. Onus is on the person seeking support – must prove they meet the definition of child as in FLA s 146
2. Meets definition of child as per s 146 FLA “unable to withdraw from their parents charge or obtain the necessaries of life because of illness, disability or another reason”
3. The receipt of disability benefits does not absolve a family from providing financially for the child – case specific obligation and not based on ‘poverty level necessities)
4. Disabilty – determine whether the child is employable, and extent of disability
5. Being in the ‘charge’ of the parent – means being in the care, custody or responsible possession of that parent
6. Pursuing education – Farden Factors listed in MJL v GH

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), 48 R.F.L. (3d) 60 (BCSC) may be helpful:

1. whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
2. whether or not the child has applied for or is eligible for student loans or other financial assistance;
3. 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;
4. the ability of the child to contribute to his own support through part-time employment;
5. the age of the child;
6. the child's past academic performance, whether the child is demonstrating success in the chosen course of studies
7. what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
8. 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

##### *Earle v Earle,*pp 15-16 (basic principles continue to apply)

**Maintenance – Basic Principles**

* + - 1. **Maintenance Generally**
         1. Parents have a joint and ongoing legal obligation to support their children.
         2. It is the child, not the other parent, who has the right to maintenance.
         3. The payment of maintenance is based on not just what a parent does earn but what a parent can earn.
      2. **Variation**

1. There has to be a material change of circumstances, a change that is significant and long lasting.
2. A change to the Guideline amount is not automatic.

3. **Arrears**

**Basic Principles**

1. There is a heavy duty on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long-lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so.
2. If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away.

**Examples**

1. Arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future.
2. A reduction or a cancellation requires detailed and full financial disclosure, under oath (usually in the form of an affidavit) that at the time the payments were to be made:
   1. the change was significant and long lasting and
   2. the change was real and not one of choice and
   3. every effort was made to earn money (or more money) during the time in question,

and those efforts were not successful.

* 1. Responsibility for a second family cannot relieve the parent of his or her legal obligation to support the first family.
  2. Delay in enforcement is generally not a legal basis to cancel or reduce child support arrears.
  3. Judges will not cancel arrears because the other party gets a lot of money at once. Otherwise, people would be encouraged to not pay maintenance and rewarded for not paying maintenance.
  4. Judges will not cancel arrears because the children were looked after in spite of the non-payment.
  5. Nor will judges cancel arrears because the children no longer need the money. The children should be compensated for what they missed.
  6. An agreement between parents that the maintenance for the children does not have to be paid will not be considered.
  7. Lack of access between a parent and child is not a legal reason to reduce or cancel arrears.
  8. Judges will not reduce or cancel arrears because other money has been spent to buy things for the children.
  9. The fact that a person did not have legal advice when the order was made or during the time when the arrears added up, is not, by itself, a reason to reduce or cancel arrears.

## Federal Child Support Guidelines regulations under the divorce act \* only for married parents!! Only to be used in Supreme Court (s 192(2) FLA)!

#### Objectives

1. Establish a fair standard of support for children that ensures they continue to benefit from the financial means of both spouses after separation
2. To reduce conflict and tension between spouses by making the calculation of child support orders more objective
3. 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
4. To ensure consistent treatment of spouses and children who are in similar circumstances

#### Applicability

* All DA cases **15.1(3) DA**
* All FLA cases in BC! (not all provinces) **150(1) FLA**

#### Steps

The Federal Guidelines include various rules to help you calculate child support. In this guide, these rules have been divided into eight steps to make it easier for you to apply them. The eight steps are:

STEP 1: Determine which guidelines apply

STEP 2: Determine the number of children requiring support

STEP 3: Determine the parenting arrangement

STEP 4: Find the right table

STEP 5: Calculate annual income

STEP 6: Find the table amount

STEP 7: Determine if there are special or extraordinary expenses

STEP 8: Determine if there is undue hardship

##### Jurisdiction

Provincial – unmarried, or married and separated (not applied for a divorce)

Federal – married and applied for divorce, or divorced

#### Exceptions to Amounts Listed in Child Support Guidelines:

**S 5** Payor stepparent (not biological or adoptive parent)

**S 3(2)** child over 19

**S 4** income over $150,000 or below $12,000

**S 8** split custody – each spouse has sole custody of one or more child

**S 9** Shared custody - parenting the child(ren) within a 40-60% of the time rule

**S 10** undue hardship – if payor cannot pay the table amount – circumstances listed in the s 10

**FLA exceptions:**

**150(4)** agreement or order re rfiancial duties or division of property

**150(4)(b)** if it would be inequitable to apply to CSG in consideration of an agreement or order

#### What table do you use?

**S 3(3)(a)** If payor is in Canada, use the province the payor lives in

**S 3(3)(b)** If payor is outside Canada, use the province the other parent lives in

#### Calculating Income

**Goal to come as possible to actual amount available to payor to use towards child support**

**15(1)** use total income used for tax purposes

**17(1)** if income is fluctuating use a pattern of income over 3 year period to average / find pattern

**19(1)** imputing income to the payor if they are a) intentionally under-employed b) purposefully failing to earn income or diverting income for the purpose of not paying support

**You could also just agree on what income level is**

**STEPS**

1. Identify the right table (payor’s province)
2. Identify the right number of children
3. Identify if there are any exceptions (split or shared custody)
4. Go into long form
5. Calculate the amount by $1,000 (difference of income)
6. Calculate the exact amount to determine % to determine mount applicable
7. Lower amount
8. Table amount
9. Calculatee what you are adding based on annual income x % found in long table

YES EXCEPTION

1. Calculate the amount owed by both the PAYOR and PAYEE
2. Payable amount is the difference between the amounts

NO EXCEPTION

1. Amount is based on payor’s income, regardless of payee’s income